Court File No.: A-167-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

(Application under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7)

APPLICANT'S RECORD
VOLUME 1
(Notice of Application, Affidavit, and Transcripts)

Dated: December 22, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

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

John Dodsworth

Tel: (819) 997 9324
Fax: (819) 953 9269

Solicitor for the Respondent,
Canadian Transportation Agency

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NOTICE OF APPLICATION

TO THE RESPONDENT:

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

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

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

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

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

Date: March 28, 2014

Issued by: _____

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

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

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

APPLICATION

This is an application for judicial review in respect of the refusal of the Canadian Transportation Agency to hear and/or render a decision in the complaint of the Applicant dated February 24, 2014, as required by subsection 29(1) of the *Canada Transportation Act*, S.C. 1996, c. 10.

The Applicant makes application for:

1. an order of *mandamus*, requiring the Canadian Transportation Agency to render a decision in the Complaint;

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

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

The grounds for the application are as follows:

1. The Applicant, Dr. Gábor Lukács, is an air passenger rights advocate and a frequent traveller.

A. The statutory framework and statutory duty

2. The Canadian Transportation Agency ("Agency"), established by the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions:

   (a) as a quasi-judicial tribunal, the Agency resolves commercial and consumer transportation-related disputes; and

   (b) as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority.

3. Section 26 of the Act confers power upon the Agency to order a person to do an act or refrain from an act related to any Act of Parliament that is administered in whole or in part by the Agency. The Agency has exercised these powers, for example, to order carriers to remove misleading signage at airports or misleading information from their websites.

4. Pursuant to subsection 27(1) of the Act, a person may make an application to the Agency. The term "application" is defined in section 1 of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35 (the "*General Rules*") as follows:

> "application" means an application, made to the Agency, that commences a proceeding under the Act, any Regulations made under the Act or any other Act of Parliament under which the Agency has authority, and includes a complaint, [...]
>
> [Emphasis added.]

5. Section 1 of the the Agency's *General Rules* states:

> "complaint" means a complaint made to the Agency that alleges anything to have been done or omitted to have been done in contravention of the Act, any Regulations made under the Act or any other Act of Parliament under which the Agency has authority, [...]
>
> [Emphasis added.]

6. Subsection 29(1) of the Act imposes on the Agency the statutory duty to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation).

7. Subsection 86.1(1) of the Act requires the Agency to make regulations with respect to advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.

8. Part V.1 of the *the Air Transportation Regulations*, S.O.R./88-58 (the "*ATR*"), comprising of ss. 135.5, 135.6, 135.7, 135.8, 135.9, 135.91, and 135.92, was promulgated pursuant to subsection 86.1(1) of the Act.

9. Section 135.8 of the *ATR* requires advertisements to clearly distinguish air transportation charges from other fees and taxes.

10. Section 135.91 of the *ATR* explicitly prohibits misrepresenting air transportation charges as if they were third party charges or taxes.

B. The Applicant's Complaint

11. On or around February 24, 2014, the Applicant made a complaint to the Agency, alleging that Expedia, Inc. has been advertising prices of air services on its Canadian website, expedia.ca, contrary to sections 135.8 and 135.91 of the *ATR* (the "Complaint"); the Applicant asked that the Agency order Expedia, Inc. to amend its Canadian website to comply with Part V.1 of the *ATR*.

C. Refusal of the Agency to render a decision

12. On March 11, 2014, Ms. Cathy Murphy, the Secretary of the Canadian Transportation Agency, contacted the Applicant by email concerning the Complaint, and advised, among other things that:

> As this is an enforcement matter and not a matter that is subject to a formal complaint and adjudicative process, the Agency will not be commencing a formal pleadings process.

13. On March 15, 2014, the Applicant request in writing that:

(a) the Agency clarify whether Ms. Murphy's email was a decision of the Agency; and

(b) the Complaint be placed before a Panel of the Agency.

14. On March 21, 2014, Ms. Murphy advised the Applicant that:

> The message I sent was a staff message simply setting out the process that is followed for alleged contraventions to the Air Service Price Advertising Regulations. A response with additional information will be provided to you next week.

15. On March 27, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, wrote in a letter addressed to the Applicant, among other things, that:

> [...] the Agency will not be conducting an inquiry into the matters you have raised.

D. Jurisdiction of this Honourable Court

16. The refusal of the Agency to render a decision in the Complaint of the Applicant falls outside the scope of the statutory appeal pursuant to section 41 of the *Act*.

17. Thus, the present application is brought under sections 18.1 and 28 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, and the *Federal Courts Rules*, 1998.

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

This application will be supported by the following material:

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

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

March 28, 2014

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Applicant

Court File No.: A-167-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: April 22, 2014)

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

1. I am a Canadian citizen, a frequent traveller, and an air passenger rights advocate. My activities in the latter capacity include:

   (a) filing approximately two dozen successful regulatory complaints with the Canadian Transportation Agency (the “Agency”), resulting in airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;

   (b) promoting air passenger rights through the press and social media;

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

2. 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."

3. On or around February 8, 2014, when I purchased a Halifax-Budapest-Halifax ticket, I noticed that the Canadian website of Expedia, Inc. advertises prices of air services in a manner that is contrary to Part V.1 of the *Air Transportation Regulations* by:

   (a) failing to include fuel surcharges in "Air Transportation Charges";

   (b) improperly including and listing airline-imposed charges in "Taxes, Fees and Charges" under the name "YR - Service Charge."

4. My attempts to address these concerns with Expedia, Inc. informally and to have Expedia, Inc. change its Canadian website so that it would comply with Part V.1 of the *Air Transportation Regulations* were unsuccessful.

5. Thus, on or around February 24, 2014, I made a formal complaint with the Agency alleging that Expedia, Inc. has been advertising prices of air services on its Canadian website, expedia.ca, in a manner contrary to sections 135.8 and 135.91 of the *Air Transportation Regulations*. As a remedy, I asked the Agency to order Expedia, Inc. to amend its Canadian website to comply with Part V.1 of the *Air Transportation Regulations*. A copy of my complaint is attached and marked as Exhibit "A".

6. On March 11, 2014, I received an email from Ms. Cathy Murphy, the Secretary of the Agency, concerning my complaint. Ms. Murphy advised me, among other things, that:

> As this is an enforcement matter and not a matter that is subject to a formal complaint and adjudicative process, the Agency will not be commencing a formal pleadings process.

A copy of Ms. Murphy's email, dated March 11, 2014, is attached and marked as Exhibit "B".

7. On March 15, 2014, I wrote to Ms. Murphy and requested that:

(a) the Agency clarify whether Ms. Murphy's email was a decision of the Agency; and

(b) my complaint concerning Expedia, Inc. be placed before a Panel of the Agency.

A copy of my letter, dated March 15, 2014, is attached and marked as Exhibit "C".

8. On March 21, 2014, Ms. Murphy advised me by email that:

> The message I sent was a staff message simply setting out the process that is followed for alleged contraventions to the Air Service Price Advertising Regulations. A response with additional information will be provided to you next week.

A copy of Ms. Murphy's email, dated March 21, 2014, is attached and marked as Exhibit "D".

9. On March 27, 2014, Ms. Murphy sent me an email that read:

> Please find attached a letter from the Chair and Chief Executive Officer with respect to the Expedia matter.

A copy of Ms. Murphy's email, dated March 27, 2014, is attached and marked as Exhibit "E".

10. The attachment to Ms. Murphy's email was a letter by Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, addressed to me, and dated March 27, 2014. In the letter, Hare wrote, among other things, that:

> To be clear, no decision by an Agency Panel is required for the DEO to undertake an investigation of a potential contravention of a provision listed in the Designated Provisions Regulations. Therefore, the Agency will not be conducting an inquiry into the matter you have raised. Further, there is no role for the public to participate in an investigation, should the DEO decide that an investigation is warranted, except as requested by the DEO where the DEO determines that information relevant to the investigation is required. The role of the public is limited to apprising the DEO of concerns that they may have with respect to compliance. [...]
>
> [...] the General Rules do not require the Agency to conduct an inquiry into a matter filed by the public with respect to alleged non-compliance with Part V.1 of the ATR or of other provisions of the ATR or the CTA which do not specifically provide for a complaint mechanism.

A copy of Mr. Hare's letter, dated March 27, 2014, is attached and marked as Exhibit "F".

LEGISLATIVE HISTORY OF THE *Canada Transportation Act*

11. A copy of page 14188 of *Hansard* of the 1st Session of the 35th Parliament, recording the first reading of Bill C-101, is attached and marked as Exhibit “G”.

12. A copy of page 15078 of *Hansard* of the 1st Session of the 35th Parliament, recording the referral of Bill C-101 to the Standing Committee on Transport, is attached and marked as Exhibit “H”.

13. A copy of the Evidence of Meeting no. 63 of the Standing Committee on Transport of the 1st Session of the 35th Parliament, studying Bill C-101, is attached and marked as Exhibit “I”.

14. A copy of page 16838 of *Hansard* of the 1st Session of the 35th Parliament, recording the presentation of the report of the Standing Committee on Transport on Bill C-101, is attached and marked as Exhibit “J”.

15. A copy of page 490 of *Hansard* of the 2nd Session of the 35th Parliament, recording the reintroduction of Bill C-101 of the 1st Session as Bill C-14, is attached and marked as Exhibit “K”.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on April 22, 2014.

_____

_____
Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

_____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

February 24, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Expedia, Inc.
Complaint concerning advertising prices – violations of Part V.1 of the *ATR*

Please accept the following submissions as a formal complaint pursuant to Rule 40 of the *Canadian Transportation Agency General Rules* concerning violations of Part V.1 of the *Air Transportation Regulations* (the "*ATR*"), governing advertising prices, by Expedia, Inc.

Since attempts to address the issues described below informally have not been successful, the Complainant is asking the Agency to open pleadings in the matter without delay.

OVERVIEW

The Complainant alleges that Expedia, Inc. has been advertising prices on its Canadian Website, `expedia.ca`, contrary to ss. 135.8 of the *ATR* by:

(a) failing to include fuel surcharges in "Air Transportation Charges"; and

(b) improperly including and listing airline-imposed charges in "Taxes, Fees and Charges" under the name "YR - Service Charge."

The Complainant is asking the Agency to order Expedia, Inc. to amend its Canadian Website to comply with Part V.1 of the *ATR*.

FACTS

1. Expedia, Inc. is an Internet-based travel agency, operating websites that offer, among other things, flights from and within Canada.

2. Expedia, Inc. operates a website dedicated to Canadian travellers, namely, `expedia.ca` (the "Canadian Website").

3. Users of the Canadian Website seeking to book flights are shown, among other things, a trip details page that displays the "Trip Summary," which lists the various fees and charges making up the total price of the flight. For greater clarity, this information is displayed to prospective travellers prior to the actual booking.

4. A screenshot of the Canadian Website, displaying the trip details for an Ottawa-London (LHR)-Ottawa itinerary is attached and marked as Exhibit "A".

5. A screenshot of the Canadian Website, displaying the trip details for a Halifax-Budapest-Halifax itinerary is attached and marked as Exhibit "B".

6. A screenshot of the Canadian Website, displaying the trip details for a Halifax-Budapest-Halifax itinerary, displaying what purports to be a break-down for "Taxes, Fees, and Charges," is attached and marked as Exhibit "C".

7. A screenshot of the Canadian Website, displaying the trip details for a Halifax-Toronto-Halifax itinerary, displaying what purports to be a break-down for "Taxes, Fees, and Charges," is attached and marked as Exhibit "D".

8. On February 9, 2014, the Complainant wrote to senior executives of Expedia, Inc. to express concerns over lack of compliance with Part V.1 of the *ATR*.

9. On February 21, 2014, Mr. Andy Dyer, Senior Director, Legal of Expedia, Inc. advised the Complainant that:

> Expedia's current pre-purchase display has been reviewed and approved by the Canadian Transportation Agency.

   A copy of Mr. Dyer's email, dated February 21, 2014, is attached and marked as Exhibit "E".

10. Although the Complainant made further attempts to address the concerns informally, on February 24, 2014, Mr. Dyer advised the Complainant that:

> At this time, Expedia considers this matter closed.

   A copy of Mr. Dyer's email, dated February 24, 2014, is attached marked as Exhibit "F".

ISSUES

EXHIBITS

I. Prior communications between Expedia, Inc. and the Agency

Mr. Dyer claimed in his communications with the Complainant (Exhibit "E") that the Agency has reviewed and approved the Canadian Website of Expedia, Inc.

The Complainant is unaware of such communications between Expedia, Inc. and the Agency, and has been unable to locate any decision or order of the Agency approving the Canadian Website of Expedia, Inc.

If communications as indicated by Mr. Dyer did indeed take place, then it appears that some employees or Members of the Agency may have already made up their minds as to the subject matter of the present complaint, and consequently, it would be inappropriate for them to take part in the adjudication of the present complaint. Furthermore, the prior communications between Expedia, Inc. and the Agency may give Expedia, Inc. an unfair advantage in the present proceeding.

Thus, the Complainant is asking that the Agency:

(a) provide the Complainant with copies of prior communications between Expedia, Inc. and the Agency in relation to the Canadian Website, if there are any, or alternatively, order Expedia, Inc. to produce same;

(b) identify the staff and/or Members who had prior involvement with the issue of the Canadian Website of Expedia, Inc.; and

(c) ensure that no staff and/or Member who has had prior involvement with the issue of the Canadian Website of Expedia, Inc. is involved in any way in the adjudication of the present complaint.

II. The applicable law

Section 135.5 of the *ATR* defines "air transportation charge" and "third party charge" as follows:

> "air transportation charge" means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge.
>
> "third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it.

Section 135.7 of the *ATR* provides that Part V.1 of the *ATR* applies to all advertising activities for air services as long as it is within Canada or originates in Canada:

> 135.7 (1) Subject to subsection (2), this Part applies to advertising in all media of prices for air services within, or originating in, Canada.

Section 135.7(2) exempts package travel services from the price advertising regulations, and for greater clarity, the present complaint is focused on flight-only bookings advertised on the Canadian Website.

Section 135.8 of the *ATR* requires advertisers to clearly identify and distinguish between air transportation charges and third party charges:

> 135.8 (1) Any person who advertises the price of an air service must include in the advertisement the following information:
>
> (a) the total price that must be paid to the advertiser to obtain the air service, expressed in Canadian dollars and, if it is also expressed in another currency, the name of that currency;
>
> (b) the point of origin and point of destination of the service and whether the service is one way or round trip;
>
> (c) any limitation on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at that price;
>
> (d) the name and amount of each tax, fee or charge relating to the air service that is a third party charge;

(e) each optional incidental service offered for which a fee or charge is payable and its total price or range of total prices; and

(f) any published tax, fee or charge that is not collected by the advertiser but must be paid at the point of origin or departure by the person to whom the service is provided.

(2) A person who advertises the price of an air service must set out all third party charges under the heading "Taxes, Fees and Charges" unless that information is only provided orally.

(3) A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

[Emphasis added.]

Section 135.91 of the *ATR* explicitly forbids misrepresenting air transportation charges as if they were third party charges:

135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party charge or use the term "tax" in an advertisement to describe an air transportation charge.

III. Failure to include fuel surcharges in "Air Transportation Charges"

Expedia, Inc. does not include fuel surcharges under the heading "Air Transportation Charges," but rather lists it as a separate item called "Airline Fuel Surcharge" (see Exhibits "A" and "B"):

Trip Summary

Halifax to Budapest

Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014
Return: Arrives on July 16, 2014

1 Ticket: Return

Traveller 1: Adult	**C$985.12**
Air Transportation Charges	C$406.00
Taxes, Fees and Charges	C$363.62
Airline Fuel Surcharge	C$215.50

Total: C$985.12

All prices quoted in **Canadian dollars**.

In *Re: Scandinavian Airlines System*, 8-A-2014, the Agency considered fuel surcharges in the context of Part V.1 of the *ATR*, and held that:

> [55] The fare is an air transportation charge, as is the fuel surcharge, yet the two charges are not grouped together on SAS's Web site. Further, these two charges are not grouped together under the heading "Air Transportation Charges" as required by the ATR. The ATR are clear that the appropriate headings are to be used and that the relevant charges are to be found under the appropriate headings.

The Complainant adopts the aforementioned findings of the Agency as his own position, and submits that Expedia, Inc. has violated s. 135.8 of the *ATR* by failing to include fuel surcharges under the heading of "Air Transportation Charges" on its Canadian Website.

IV. Inclusion of airline charges in "Taxes, Fees and Charges"

Expedia, Inc. improperly includes certain airline-imposed charges, entitled "YR - Service Charge," under the heading "Taxes, Fees and Charges" (see Exhibits "C" and "D"):

The "YR - Service Charge" is imposed by the airline, and not by any third party, and as such it ought to have been listed under the heading "Air Transportation Charges."

Therefore, it is submitted that Expedia, Inc. contravened ss. 135.8 and 135.91 of the *ATR* by setting out an air transportation charge in an advertisement as if it were a third party charge.

V. Relief sought

The Complainant is asking the Agency to order Expedia, Inc. to amend its Canadian Website to comply with Part V.1 of the *ATR*.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Complainant

Cc: Mr. Barry Diller, Chairman and Senior Executive, Expedia, Inc.
Mr. Robert Dzielak, Executive VP, General Counsel and Secretary, Expedia, Inc.
Mr. Andy Dyer, Senior Director, Legal, Expedia, Inc.

Expedia.ca

Account | Manage Trips | Support | Français

Home | Flights | Vacation Packages | Hotels | Las Vegas | Deals | Disney | Car rental | Cruises | Things to Do | Insurance

Your Trip to **London, England, UK**

Mon 28/Apr/2014 - Tue 15/Jul/2014 | Total price: **C$887.29** Only **4 tickets** left at this price!

Price Change

Your ticket price changed from C$885.09 to C$887.29. The airline could not confirm the original price due to pricing or availability changes that occurred after we posted the latest prices on our site. Continue booking or look for a different flight.

Flights

Change Flights | Show Details

April 28, 2014 - Departure — Nonstop — Total travel time : 6h 45m

Ottawa
YOW 6:50pm
→
London
LHR 6:35am + 1 day
Arrives on April 29, 2014
6h 45m

Lufthansa 6837 Operated by Air Canada
Economy/Coach (K)

July 15, 2014 - Return — Nonstop — Total travel time : 7h 40m

London
LHR 1:05pm
→
Ottawa
YOW 3:45pm
7h 40m

Lufthansa 6836 Operated by Air Canada
Economy/Coach (K)

CONTINUE BOOKING ►

Save this Itinerary

Trip Summary

Ottawa to London
Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014

1 Ticket: Return

Traveller 1: Adult	**C$887.29**
Air Transportation Charges	C$195.00
Taxes, Fees and Charges	C$260.29
Airline Fuel Surcharge	C$432.00

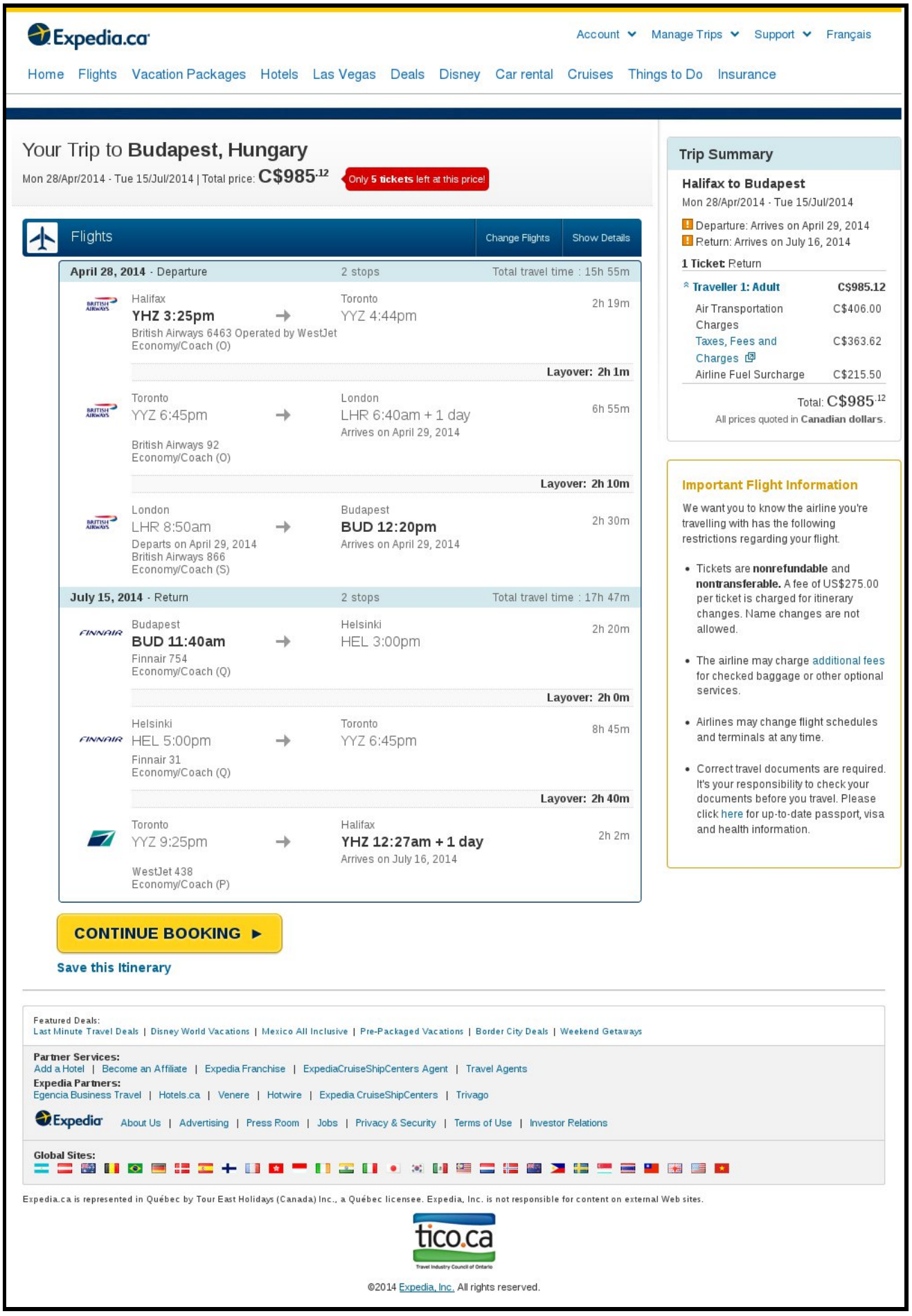
Total: C$887.29

All prices quoted in **Canadian dollars**.

Important Flight Information

We want you to know the airline you're travelling with has the following restrictions regarding your flight.

- Tickets are **nonrefundable** and **nontransferable.** Name changes are not allowed.
- The airline may charge additional fees for checked baggage or other optional services.
- This airline may charge additional fees depending on your payment method.
- Airlines may change flight schedules and terminals at any time.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.



Expedia.ca

Account | Manage Trips | Support | Français

Home | Flights | Vacation Packages | Hotels | Las Vegas | Deals | Disney | Car rental | Cruises | Things to Do | Insurance

Your Trip to **Budapest, Hungary**

Mon 28/Apr/2014 - Tue 15/Jul/2014 | Total price: **C$985.12**

Only **5 tickets** left at this price!

Flights

Change Flights | Show Details

April 28, 2014 - Departure — 2 stops — Total travel time : 15h 55m

Halifax **YHZ 3:25pm**	→	Toronto YYZ 4:44pm	2h 19m
British Airways 6463 Operated by WestJet Economy/Coach (O)			
Layover: 2h 1m			
Toronto YYZ 6:45pm	→	London LHR 6:40am + 1 day Arrives on April 29, 2014	6h 55m
British Airways 92 Economy/Coach (O)			
Layover: 2h 10m			
London LHR 8:50am Departs on April 29, 2014	→	Budapest **BUD 12:20pm** Arrives on April 29, 2014	2h 30m
British Airways 866 Economy/Coach (S)			

July 15, 2014 - Return — 2 stops — Total travel time : 17h 47m

Budapest **BUD 11:40am**	→	Helsinki HEL 3:00pm	2h 20m
Finnair 754 Economy/Coach (Q)			
Layover: 2h 0m			
Helsinki HEL 5:00pm	→	Toronto YYZ 6:45pm	8h 45m
Finnair 31 Economy/Coach (Q)			
Layover: 2h 40m			
Toronto YYZ 9:25pm	→	Halifax **YHZ 12:27am + 1 day** Arrives on July 16, 2014	2h 2m
WestJet 438 Economy/Coach (P)			

CONTINUE BOOKING ►

Save this Itinerary

Trip Summary

Halifax to Budapest

Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014
Return: Arrives on July 16, 2014

1 Ticket: Return

Traveller 1: Adult	**C$985.12**
Air Transportation Charges	C$406.00
Taxes, Fees and Charges	C$363.62
Airline Fuel Surcharge	C$215.50

Total: **C$985.12**

All prices quoted in **Canadian dollars**.

Important Flight Information

We want you to know the airline you're travelling with has the following restrictions regarding your flight.

- Tickets are **nonrefundable** and **nontransferable.** A fee of US$275.00 per ticket is charged for itinerary changes. Name changes are not allowed.
- The airline may charge additional fees for checked baggage or other optional services.
- Airlines may change flight schedules and terminals at any time.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.

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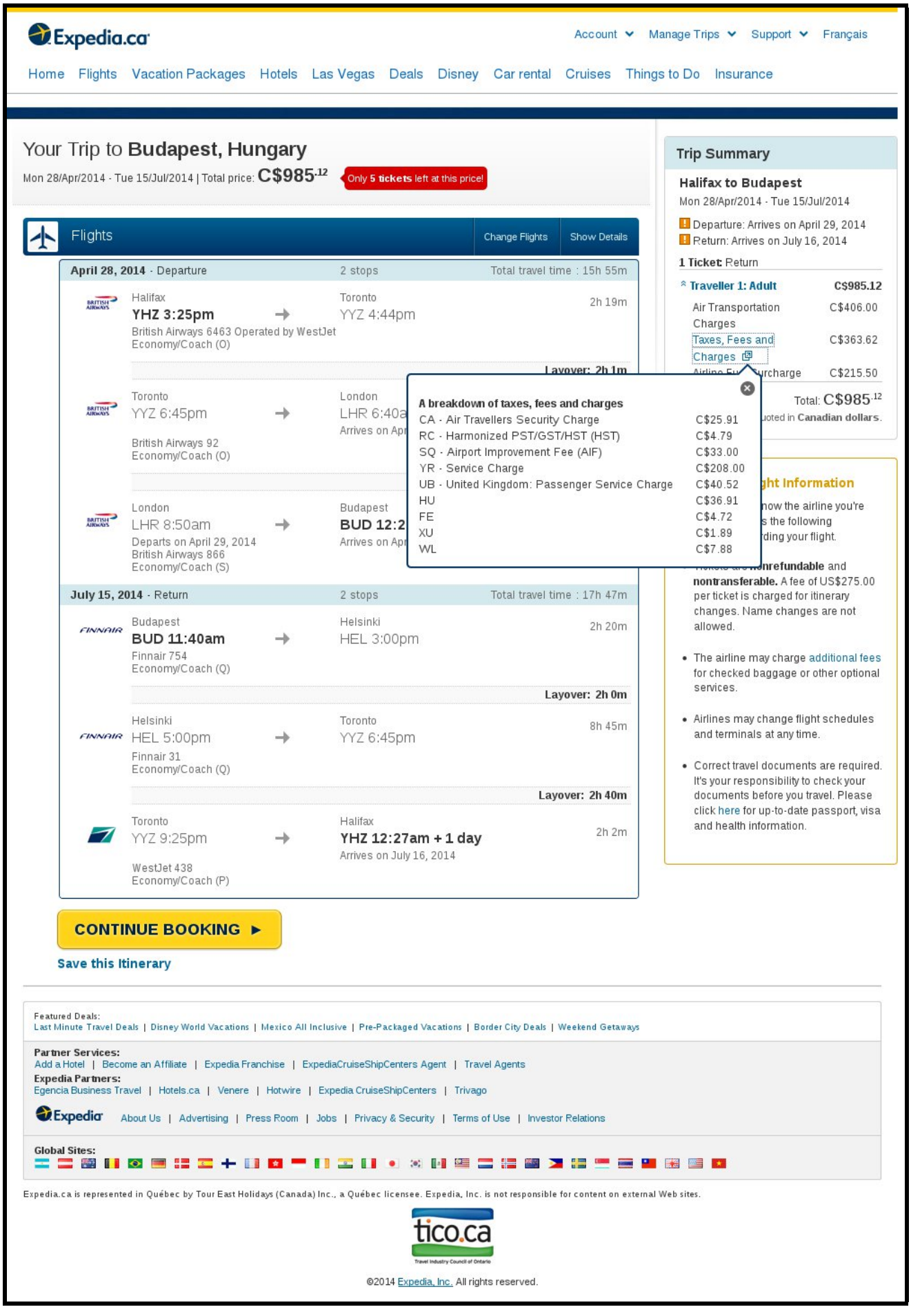
Travel Industry Council of Ontario



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Your Trip to **Budapest, Hungary**

Mon 28/Apr/2014 - Tue 15/Jul/2014 | Total price: **C$985.12**

Only **5 tickets** left at this price!

Flights

Change Flights | Show Details

April 28, 2014 - Departure — 2 stops — Total travel time : 15h 55m

Halifax **YHZ 3:25pm** → Toronto YYZ 4:44pm — 2h 19m
British Airways 6463 Operated by WestJet
Economy/Coach (O)

Layover: 2h 1m

Toronto YYZ 6:45pm → London LHR 6:40a
Arrives on Apr
British Airways 92
Economy/Coach (O)

London LHR 8:50am → Budapest **BUD 12:2**
Departs on April 29, 2014
Arrives on Apr
British Airways 866
Economy/Coach (S)

July 15, 2014 - Return — 2 stops — Total travel time : 17h 47m

Budapest **BUD 11:40am** → Helsinki HEL 3:00pm — 2h 20m
Finnair 754
Economy/Coach (Q)

Layover: 2h 0m

Helsinki HEL 5:00pm → Toronto YYZ 6:45pm — 8h 45m
Finnair 31
Economy/Coach (Q)

Layover: 2h 40m

Toronto YYZ 9:25pm → Halifax **YHZ 12:27am + 1 day** — 2h 2m
Arrives on July 16, 2014
WestJet 438
Economy/Coach (P)

A breakdown of taxes, fees and charges

CA - Air Travellers Security Charge	C$25.91
RC - Harmonized PST/GST/HST (HST)	C$4.79
SQ - Airport Improvement Fee (AIF)	C$33.00
YR - Service Charge	C$208.00
UB - United Kingdom: Passenger Service Charge	C$40.52
HU	C$36.91
FE	C$4.72
XU	C$1.89
WL	C$7.88

Trip Summary

Halifax to Budapest
Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014
Return: Arrives on July 16, 2014

1 Ticket: Return

Traveller 1: Adult	**C$985.12**
Air Transportation Charges	C$406.00
Taxes, Fees and Charges	C$363.62
Airline Fuel Surcharge	C$215.50
Total:	C$985.12

...uoted in **Canadian dollars**.

...ght Information

...now the airline you're ...s the following ...ding your flight.

...**nonrefundable** and **nontransferable.** A fee of US$275.00 per ticket is charged for itinerary changes. Name changes are not allowed.

- The airline may charge additional fees for checked baggage or other optional services.
- Airlines may change flight schedules and terminals at any time.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.

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Your Trip to **Toronto, ON**

Mon 28/Apr/2014 - Tue 15/Jul/2014 | Total price: **C$423.09**

Flights

Change Flights | Show Details

April 28, 2014 - Departure — 1 stop — Total travel time : 4h 15m

porter — Halifax **YHZ 1:15pm** → Montreal YUL 2:05pm — 1h 50m
Porter Airlines 418
Economy/Coach (A)

porter — Montreal YUL 3:20pm → Toronto **YTZ 4:30p**
Porter Airlines 420
Economy/Coach (A)

July 15, 2014 - Return — 1 stop — Total travel time : 3h 15m

porter — Toronto **YTZ 11:15am** → Ottawa YOW 12:11pm — 0h 56m
Porter Airlines 253
Economy/Coach (A)

Layover: 0h 29m

porter — Ottawa YOW 12:40pm → Halifax **YHZ 3:30pm** — 1h 50m
Porter Airlines 253
Economy/Coach (A)

A breakdown of taxes, fees and charges

CA - Air Travellers Security Charge	C$14.25
RC - Harmonized PST/GST/HST (HST)	C$54.84
SQ - Airport Improvement Fee (AIF)	C$45.00
YR - Service Charge	C$36.00

CONTINUE BOOKING ►

Save this Itinerary

Trip Summary

Halifax to Toronto
Mon 28/Apr/2014 - Tue 15/Jul/2014

1 Ticket Return

Traveller 1: Adult **C$423.09**

Air Transportation Charges	C$273.00
Taxes, Fees and Charges	C$150.09

Total: C$423.09
Quoted in **Canadian dollars**.

ght Information

We want you to know the airline you're travelling with has the following restrictions regarding your flight.

- Tickets are **nonrefundable** and **nontransferable.** Name changes are not allowed.
- The airline may charge additional fees for checked baggage or other optional services.
- Airlines may change flight schedules and terminals at any time.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.

From adyer@expedia.com Fri Feb 21 14:05:49 2014
Date: Fri, 21 Feb 2014 18:05:14 +0000
From: "Andy Dyer (ELCA)" <adyer@expedia.com>
To: Gabor Lukacs <lukacs@AirPassengerRights.ca>
Subject: RE: Expedia Display Concerns

Dr. Lukacs,

Expedia's current pre-purchase display has been reviewed and approved by the Canadian T ransportation Agency. Thank you for your attention to this issue.

Best regards,

Andy Dyer

-----Original Message-----
From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
Sent: Thursday, February 20, 2014 2:58 PM
To: Andy Dyer (ELCA)
Subject: Re: Expedia Display Concerns

Mr. Dyer,

Thank you for your message, which unfortunately, fails to address my concerns.

My concern is primarily about the advertising (i.e., pre-purchase) of the prices, as do cumented in the attached PDF files:

(1) In two of the attached three files, there is a "YR - Service Charge"
item shown among the "Taxes, Fees and Charges," even though all airline-charged fees ou ght to be listed under "Air Transportation Charges."

(2) In two of the attached three files, there is also an "Airline Fuel Surcharge" item listed, even though such charges ought to be listed as part of the "Air Transportation Charges."

While these issues exist also with respect to post-purchase information provided, the t hrust of my concern is focused actually on advertising and on the information displayed on Expedia's website *prior* to the purchase (as shown on the attached PDF files).

The obligation to comply with the Air Transportation Regulations applies to Expedia reg ardless of how its partners enter information into their databases. Certainly, now that you have been made aware of the issues, Expedia has an obligation to take remedial act ions.

I would like to draw your attention to the Notice to the Industry of the Canadian Trans portation Agency from last Friday:

> "The Agency considers each day that an advertisement remains in
> non-compliance to constitute a contravention of the regulations.
> Consequently, an advertiser is subject to monetary penalties each
> and every day of its non-compliance."

http://www.otc-cta.gc.ca/eng/notice-industry-enforcement-all-inclusive-air-price-advert ising-regulations-aspar

Therefore, I urge you to take remedial action without delay, and make changes to Expedi a's website.

Kindly please confirm the receipt of this message, and advise as to when Expedia's webs ite will be amended to conform to the Air Transportation Regulations in general, and ss . 135.8 and 135.91 in particular.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

On Thu, 20 Feb 2014, Andy Dyer (ELCA) wrote:

> Dr. Lukacs,
>
>
> Thank you for your patience as I have researched your concern. As a
> summary, you raise two issues: (1) the inclusion of carrier-imposed
> charges (e.g. YQ fuel surcharges) under the heading ?Taxes? in
> Expedia?s post-purchase itemized fare breakdowns, and (2) the
> descriptor ?Default Validating Carrier Tax? in reference to YR
> charges. I will address each below.
>
>
> Itemized fare breakdowns may be requested in two ways: (1) online
> through Expedia.ca and (2) telephonically via our call center. You
> requested an itemized fare breakdown both online and through the call
> center. Online requests are routed to the operations group or partner
> responsible for ticketing a given itinerary, and that team produces a
> report through its accounting system that separately states the taxes
> paid with respect to the given itinerary. The accounting system used
> by that team will determine the format of the report. In your case,
> the accounting system?s report format uses a column header of ?Taxes?
> to identify all charges other than the base fare, while separately
> stating HST, GST and QST (as applicable) as line items under the
> generic heading ?Taxes.? Although that system is owned and
> maintained by a third party, Expedia is making a recommendation to them that they upd
ate the column header to ?Taxes/Fees.?
>
>
> Telephonic requests are handled by call center agents, who access
> individual itineraries that are stored in large third-party databases
> known as global distribution systems (?GDSs?), which act as data
> clearinghouses for the global airline reservations community. Upon
> request, agents access an itinerary, produce a report through the GDS
> and e-mail that report to the customer. As you can see from the
> e-mails provided to you, the GDS reports generally contain a greater
> level of detail with respect to the taxes and fees applied to a given
> itinerary. Because those taxes and fees are identified by 2-letter
> codes, the GDS report also contains a glossary to help users
> understand the nature of each charge. That glossary is also included
> in Expedia?s e-mails. The format of that report and the glossary
> definitions are both determined by the GDS. In your case, the report
> includes all charges other than the base fare under a heading of
> ?Taxes? and a roll-up of all such charges under a heading of ?Total
> Taxes.? Expedia is making a recommendation to our GDS partner to update those headin
gs to ?Taxes/Fees? and ?Total Taxes/Fees? respectively.
>
>
> The glossary definition for ?YR? as provided by the GDS and
> subsequently passed to you was ?Default validating carrier tax.?
> Based on my research, YR charges appear to be charges imposed by a
> carrier, similar to a YQ fuel surcharge. In your case, the YR charge was a surcharge
imposed by Finnair.

> Expedia is making a recommendation to our GDS partner to update that
> glossary definition to ?Default validating carrier fee.?
>
>
>
> Although the regulations to which you refer apply to the advertisement
> and promotion of airfares to consumers in the pre-purchase context, we
> are keenly interested in providing customers with a clear
> understanding of their charges when they request a post-purchase
> breakdown. In addition to making the above-mentioned recommendations
> to third-party systems providers, I have asked our internal teams to
> update our e-mail communications to inform customers as to the
> inclusion of all non-base fare amounts, including carrier-imposed
> charges, under the headings described above. I hope that the
> foregoing explanation provides you with some clarity as to the format
> of the reports you received, the nature of the charges on your
> itinerary, and the steps we are taking to increase transparency of these charges goin
g forward.
>
>
>
> Once again, I appreciate your bringing this to my attention as I
> believe it will allow Expedia to provide better service to our
> customers going forward. If you have any questions, please contact me.
>
>
>
> Best regards,
>
>
>
> Andy Dyer
>
>
>
>
>

From adyer@expedia.com Mon Feb 24 13:06:45 2014
Date: Mon, 24 Feb 2014 17:06:33 +0000
From: "Andy Dyer (ELCA)" <adyer@expedia.com>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: RE: Expedia Display Concerns

Dr. Lukacs,

Thank you for your correspondence and interest in this matter. As indicated in my prev ious e-mail, Expedia does not release internal or external correspondence to the public and we believe our display is compliant with Canadian regulations. At this time, Expe dia considers this matter closed.

Best regards,

Andy Dyer

-----Original Message-----
From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
Sent: Friday, February 21, 2014 7:12 PM
To: Andy Dyer (ELCA)
Cc: Bob Dzielak (ELCA); barry.diller@iac.com
Subject: RE: Expedia Display Concerns

Mr. Dyer,

I am profoundly disappointed by Expedia's lack of cooperation in this matter. I have ap proached Expedia in attempt to resolve this matter amicably, but it appears that Expedi a prefers to deal with matters through formal adjudication.

I am hereby making a final attempt to resolve this matter: please change Expedia's webs ite to comply with the Air Transportation Regulations, or alternatively, provide me wit h a copy of the alleged approval that Expedia has allegedly received from the Agency.

Failing these, I am afraid, I will have no choice but to file a formal complaint agains t Expedia with the Canadian Transportation Agency.

Yours very truly,
Dr. Gabor Lukacs

On Sat, 22 Feb 2014, Andy Dyer (ELCA) wrote:

> Dr. Lukacs,
>
> Expedia does not make copies of internal or external correspondence
> available to the public.
>
> Best regards,
>
> Andy Dyer
>
> -----Original Message-----
> From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of
> Gabor Lukacs
> Sent: Friday, February 21, 2014 10:15 AM
> To: Andy Dyer (ELCA)
> Cc: Bob Dzielak (ELCA); barry.diller@iac.com
> Subject: RE: Expedia Display Concerns
>
> Mr. Dyer,
>
> Unfortunately, I could not find any trace of any approval of Expedia's website among the decisions of the Canadian Transportation Agency.

>
> Would you please be so kind to provide me with a copy of the approval of Expedia's cu
rrent pre-purchase display by the Canadian Transportation Agency?
>
> I look forward to hearing from you.
>
> Best wishes,
> Dr. Gabor Lukacs
>
>
> On Fri, 21 Feb 2014, Andy Dyer (ELCA) wrote:
>
>> Dr. Lukacs,
>>
>> Expedia's current pre-purchase display has been reviewed and approved
>> by the Canadian Transportation Agency. Thank you for your attention
>> to this issue.
>>
>> Best regards,
>>
>> Andy Dyer
>>
>> -----Original Message-----
>> From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of
>> Gabor Lukacs
>> Sent: Thursday, February 20, 2014 2:58 PM
>> To: Andy Dyer (ELCA)
>> Subject: Re: Expedia Display Concerns
>>
>> Mr. Dyer,
>>
>> Thank you for your message, which unfortunately, fails to address my concerns.
>>
>> My concern is primarily about the advertising (i.e., pre-purchase) of the prices, as
 documented in the attached PDF files:
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>> (1) In two of the attached three files, there is a "YR - Service Charge"
>> item shown among the "Taxes, Fees and Charges," even though all airline-charged fees
 ought to be listed under "Air Transportation Charges."
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>> The obligation to comply with the Air Transportation Regulations applies to Expedia
regardless of how its partners enter information into their databases. Certainly, now t
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actions.
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>> I would like to draw your attention to the Notice to the Industry of the Canadian Tr
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>>   "The Agency considers each day that an advertisement remains in
>>   non-compliance to constitute a contravention of the regulations.
>>   Consequently, an advertiser is subject to monetary penalties each
>>   and every day of its non-compliance."
>>
>> http://www.otc-cta.gc.ca/eng/notice-industry-enforcement-all-inclusiv
>> e -air-price-advertising-regulations-aspar
>>
>>

>> Therefore, I urge you to take remedial action without delay, and make changes to Exp
edia's website.
>>
>> Kindly please confirm the receipt of this message, and advise as to when Expedia's w
ebsite will be amended to conform to the Air Transportation Regulations in general, and
 ss. 135.8 and 135.91 in particular.
>>
>> I look forward to hearing from you.
>>
>>
>> Best wishes,
>> Dr. Gabor Lukacs
>>
>>
>>
>> On Thu, 20 Feb 2014, Andy Dyer (ELCA) wrote:
>>
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>>> Dr. Lukacs,
>>>
>>>
>>>
>>> Thank you for your patience as I have researched your concern. As a
>>> summary, you raise two issues: (1) the inclusion of carrier-imposed
>>> charges (e.g. YQ fuel surcharges) under the heading ?Taxes? in
>>> Expedia?s post-purchase itemized fare breakdowns, and (2) the
>>> descriptor ?Default Validating Carrier Tax? in reference to YR
>>> charges. I will address each below.
>>>
>>>
>>>
>>> Itemized fare breakdowns may be requested in two ways: (1) online
>>> through Expedia.ca and (2) telephonically via our call center. You
>>> requested an itemized fare breakdown both online and through the
>>> call center. Online requests are routed to the operations group or
>>> partner responsible for ticketing a given itinerary, and that team
>>> produces a report through its accounting system that separately
>>> states the taxes paid with respect to the given itinerary. The
>>> accounting system used by that team will determine the format of the
>>> report. In your case, the accounting system?s report format uses a column header o
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>>> to identify all charges other than the base fare, while separately
>>> stating HST, GST and QST (as applicable) as line items under the
>>> generic heading ?Taxes.? Although that system is owned and
>>> maintained by a third party, Expedia is making a recommendation to them that they u
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>>>
>>>
>>> Telephonic requests are handled by call center agents, who access
>>> individual itineraries that are stored in large third-party
>>> databases known as global distribution systems (?GDSs?), which act
>>> as data clearinghouses for the global airline reservations
>>> community. Upon request, agents access an itinerary, produce a
>>> report through the GDS and e-mail that report to the customer. As
>>> you can see from the e-mails provided to you, the GDS reports
>>> generally contain a greater level of detail with respect to the
>>> taxes and fees applied to a given itinerary. Because those taxes and
>>> fees are identified by 2-letter codes, the GDS report also contains
>>> a glossary to help users understand the nature of each charge. That
>>> glossary is also included in Expedia?s e-mails. The format of that
>>> report and the glossary definitions are both determined by the GDS.
>>> In your case, the report includes all charges other than the base
>>> fare under a heading of ?Taxes? and a roll-up of all such charges
>>> under a heading of ?Total Taxes.? Expedia is making a recommendation to our GDS pa

rtner to update those headings to ?Taxes/Fees? and ?Total Taxes/Fees? respectively.
>>>
>>>
>>>
>>> The glossary definition for ?YR? as provided by the GDS and
>>> subsequently passed to you was ?Default validating carrier tax.?
>>> Based on my research, YR charges appear to be charges imposed by a
>>> carrier, similar to a YQ fuel surcharge. In your case, the YR charge was a surchar
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>>> Expedia is making a recommendation to our GDS partner to update that
>>> glossary definition to ?Default validating carrier fee.?
>>>
>>>
>>>
>>> Although the regulations to which you refer apply to the
>>> advertisement and promotion of airfares to consumers in the
>>> pre-purchase context, we are keenly interested in providing
>>> customers with a clear understanding of their charges when they
>>> request a post-purchase breakdown. In addition to making the
>>> above-mentioned recommendations to third-party systems providers, I
>>> have asked our internal teams to update our e-mail communications to
>>> inform customers as to the inclusion of all non-base fare amounts,
>>> including carrier-imposed charges, under the headings described
>>> above. I hope that the foregoing explanation provides you with some
>>> clarity as to the format of the reports you received, the nature of
>>> the charges on your itinerary, and the steps we are taking to increase transparency
of these charges going forward.
>>>
>>>
>>>
>>> Once again, I appreciate your bringing this to my attention as I
>>> believe it will allow Expedia to provide better service to our
>>> customers going forward. If you have any questions, please contact me.
>>>
>>>
>>>
>>> Best regards,
>>>
>>>
>>>
>>> Andy Dyer
>>>
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>>
>

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

_____

Signature

From Cathy.Murphy@otc-cta.gc.ca Tue Mar 11 17:17:41 2014
Date: Tue, 11 Mar 2014 16:17:25 -0400
From: Cathy Murphy <Cathy.Murphy@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Letter dated February 24, 2014 re: Expedia, Inc.

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-1" character set.]
[Some characters may be displayed incorrectly.]

The Canadian Transportation Agency (the Agency) acknowledges receipt of your letter of February 24, 2014 wherein you allege that Expedia, Inc. has been advertising prices on its Canadian Web site, expedia.ca, contrary to section 135.8 of the Air Transportation Regulations (ATR) by:

(a) Failing to include fuel surcharges in ?Air Transportation Charges?; and

(b) Improperly including and listing airline-imposed charges in ?Taxes, Fees and Charges? under the name ?YR * Service Charge.?

In your letter you ask the Agency, among other matters, to open pleadings on the issue and to order Expedia, Inc. to amend its Canadian Web site to comply with Part V.1 of the ATR.

Part V.1 of the ATR is enforced by way of administrative monetary penalties (AMPs). AMPs is not a complaint process conducted by the Agency. Instead, a Designated Enforcement Officer (DEO) may investigate whether a person has violated a provision identified in the Canadian Transportation Agency Designated Provisions Regulations. Section 135.8 is listed in those regulations. Where the DEO believes that a person has committed a violation, he or she may issue an administrative monetary penalty of up to $25,000 for a corporation.

As this is an enforcement matter and not a matter that is subject to a formal complaint and adjudicative process, the Agency will not be commencing a formal pleadings process.

Your letter and all attachments have been referred to a Designated Enforcement Officer of the Agency for an investigation and the taking of appropriate enforcement actions as required.

Please confirm receipt of this message.

Sincerely,

Cathy Murphy
819-997-0099 | télécopieur/facsimile 819-953-5253 | ATS/TTY 800-669-5575
cathy.murphy@cta-otc.gc.ca
Secrétaire de l’Office des Transports du Canada/ Secretary of the Canadian Transportation Agency
15, rue Eddy, Hull QC K1A 0N9/
15 Eddy St., Hull QC K1A 0N9
Gouvernement du Canada | Government of Canada

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

_____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

March 15, 2014

VIA EMAIL and FAX

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Expedia, Inc.
Complaint concerning advertising prices – violations of Part V.1 of the *ATR*
Email of March 11, 2014 (the "Email")

Thank you for acknowledging the receipt of my complaint dated February 24, 2014 concerning violations of Part V.1 of the *Air Transportation Regulations* (the "*ATR*"), governing advertising prices, by Expedia, Inc. (the "Complaint").

I am deeply concerned by the following statement found in your email of March 11, 2014 (the "Email"):

> As this is an enforcement matter and not a matter that is subject to a formal complaint and adjudicative process, the Agency will not be commencing a formal pleadings process.

1. It is unclear whether the Email is a decision of the Agency. Indeed, the Email contains no reference to any Panel or Members of the Agency. Since only Members of the Agency may render decisions, such as dismissal of a complaint, this potential confusion is a source of serious concern with respect to the Email.

   Thus, I am requesting that you clarify the nature of the Email. If the Email is a decision of the Agency, then I am requesting that you specify the names of the Members that rendered it, and provide me with a certified copy of the decision pursuant to s. 22 of the *Canada Transportation Act*.

2. The Email makes no reference to any legislation that would preclude formal complaint and adjudicative process with respect to violations of the *Air Transportation Regulations*. Indeed, I have been a party as a complainant to several proceedings concerning violations of the *Air Transportation Regulations*.

3. Section 1 of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35 (the "*General Rules*") states that:

> "application" means an application, made to the Agency, that commences a proceeding under the Act, any Regulations made under the Act or any other Act of Parliament under which the Agency has authority, and includes a complaint, [...]
>
> "complaint" means a complaint made to the Agency that alleges anything to have been done or omitted to have been done in contravention of the Act, any Regulations made under the Act or any other Act of Parliament under which the Agency has authority, [...]
>
> [Emphasis added.]

As you have correctly noted in the Email, the Complaint alleges contravention of the *ATR*. Consequently, the Complaint meets the definition of "complaint" in the *General Rules*, and as such it is an "application" within the meaning of the *General Rules*.

4. Section 38 of the *General Rules* states that:

> Unless otherwise provided in these Rules, this Part applies to proceedings in respect of any application to the Agency except a notice of objection under Part 5.
>
> [Emphasis added.]

Therefore, in the absence of a decision of the Agency dismissing the Complaint, I am struggling to see any basis for refusing to follow the *General Rules* and commence pleadings.

5. Subsection 29(1) of the *Canada Transportation Act* imposes a duty upon the Agency to render a decision within 120 days:

> 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.

This duty is enforceable by way of an application for judicial review for an order of *mandamus*.

6. Given that Expedia, Inc. claims to have obtained the approval for its website from certain unspecified individuals at the Agency, there is a serious possibility for a conflict of interest, or at least the appearance of same. This can be alleviated only by a proper and public proceeding before a Panel of the Agency.

In these circumstances, I am requesting clarification of the nature of the Email, namely, whether it is a decision of the Agency.

If the Email is a decision of the Agency, then I am also seeking the names of the Members that rendered it, and a certified copy of the decision.

If the Email is not a decision of the Agency, then I request that the Complaint and the present letter be placed before a Panel of the Agency without delay.

Kindly please confirm the receipt of this letter.

Yours very truly,

Dr. Gábor Lukács
Complainant

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

_____

Signature

From Cathy.Murphy@otc-cta.gc.ca Fri Mar 21 11:44:07 2014
Date: Fri, 21 Mar 2014 10:43:48 -0400
From: Cathy Murphy <Cathy.Murphy@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Re: Letter dated February 24, 2014 re: Expedia, Inc.

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-1" character set.]
[Some characters may be displayed incorrectly.]

The message I sent was a staff message simply setting out the process that is followed for alleged contraventions to the Air Service Price Advertising Regulations. A response with additional information will be provided to you next week.

Please confirm receipt.

Sincerely,

Cathy Murphy
819-997-0099 | télécopieur/facsimile 819-953-5253 | ATS/TTY 800-669-5575
cathy.murphy@cta-otc.gc.ca
Secrétaire de l'Office des Transports du Canada/ Secretary of the Canadian Transportation Agency
15, rue Eddy, Hull QC K1A 0N9/
15 Eddy St., Hull QC K1A 0N9
Gouvernement du Canada | Government of Canada

>>> Gabor Lukacs <lukacs@AirPassengerRights.ca> 15/03/2014 8:55 PM >>>
Dear Madam Secretary:

Please refer to the attach letter in response to your email below.

Yours very truly,
Dr. Gabor Lukacs

On Tue, 11 Mar 2014, Cathy Murphy wrote:

> The Canadian Transportation Agency (the Agency) acknowledges receipt of
> your letter of February 24, 2014 wherein you allege that Expedia, Inc.
> has been advertising prices on its Canadian Web site, expedia.ca,
> contrary to section 135.8 of the Air Transportation Regulations (ATR)
> by:
>
> (a) Failing to include fuel surcharges in ?Air Transportation
> Charges?; and
>
> (b) Improperly including and listing airline-imposed charges in
> ?Taxes, Fees and Charges? under the name ?YR * Service
> Charge.?
>
> In your letter you ask the Agency, among other matters, to open
> pleadings on the issue and to order Expedia, Inc. to amend its

Canadian
> Web site to comply with Part V.1 of the ATR.
>
> Part V.1 of the ATR is enforced by way of administrative monetary
> penalties (AMPs). AMPs is not a complaint process conducted by the
> Agency. Instead, a Designated Enforcement Officer (DEO) may
investigate
> whether a person has violated a provision identified in the Canadian
> Transportation Agency Designated Provisions Regulations. Section
135.8
> is listed in those regulations. Where the DEO believes that a
person
> has committed a violation, he or she may issue an administrative
> monetary penalty of up to $25,000 for a corporation.
>
> As this is an enforcement matter and not a matter that is subject to
a
> formal complaint and adjudicative process, the Agency will not be
> commencing a formal pleadings process.
>
> Your letter and all attachments have been referred to a Designated
> Enforcement Officer of the Agency for an investigation and the taking
of
> appropriate enforcement actions as required.
>
> Please confirm receipt of this message.
>
> Sincerely,
>
>
> Cathy Murphy
> 819-997-0099 | télécopieur/facsimile 819-953-5253 | ATS/TTY
> 800-669-5575
> cathy.murphy@cta-otc.gc.ca
> Secrétaire de l’Office des Transports du Canada/ Secretary of the
> Canadian Transportation Agency
> 15, rue Eddy, Hull QC K1A 0N9/
> 15 Eddy St., Hull QC K1A 0N9
> Gouvernement du Canada | Government of Canada
>
>
>

This is **Exhibit "E"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

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Signature

From Cathy.Murphy@otc-cta.gc.ca Thu Mar 27 17:44:31 2014
Date: Thu, 27 Mar 2014 16:44:20 -0400
From: Cathy Murphy <Cathy.Murphy@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Letter from the Chair and Chief Executive Officer

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-1" character set.]
[Some characters may be displayed incorrectly.]

Please find attached a letter from the Chair and Chief Executive Officer with respect to the Expedia matter.

Please confirm receipt.

Sincerely,

Cathy Murphy
Secretary of the Canadian Transportation Agency

Cathy Murphy
819-997-0099 | télécopieur/facsimile 819-953-5253 | ATS/TTY 800-669-5575
cathy.murphy@cta-otc.gc.ca
Secrétaire de l'Office des Transports du Canada/ Secretary of the Canadian Transportation Agency
15, rue Eddy, Hull QC K1A 0N9/
15 Eddy St., Hull QC K1A 0N9
Gouvernement du Canada | Government of Canada

[Part 2, Application/PDF (Name: "lettertoDr.Lukacs.pdf") 1 MB.]
[Unable to print this part.]

This is **Exhibit "F"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

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Signature

Office
des transports
du Canada

Canadian
Transportation
Agency

Bureau du
Président

Office of the
Chairman

March 27, 2014

Mr. Gábor Lukács

Halifax, NS

lukacs@AirPassengerRights.ca

Dear Mr. Lukács:

This is in response to your letters dated February 24 and March 15, 2014 to the Secretary of the Agency, wherein you refer to alleged non-compliance by Expedia Inc. with Part V.1 of the *Air Transportation Regulations* (ATR).

The Federal Court of Appeal has recently confirmed that the Agency performs two distinct roles, first as an adjudicative body, and second, as an economic regulator. The matter that you have raised falls squarely within the second part of the mandate of the Agency.

Enforcement of the air pricing advertising provisions of the ATR is being achieved by application of the administrative monetary penalty provisions of the *Canada Transportation Act* (CTA). The *Canadian Transportation Agency Designated Provisions Regulations* (Designated Provisions Regulation) were amended specifically for that purpose. The DEO is empowered to exercise discretion and judgement in deciding how best to achieve compliance and where necessary enforce through the imposition of administrative monetary penalties. For your information, this approach has been highly successful in achieving compliance with the regulations amongst advertisers of air services.

To be clear, no decision by an Agency Panel is required for the DEO to undertake an investigation of a potential contravention of a provision listed in the Designated Provisions Regulations. Therefore, the Agency will not be conducting an inquiry into the matter you have raised. Further, there is no role for the public to participate in an investigation, should the DEO decide that an investigation is warranted, except as requested by the DEO where the DEO determines that information relevant to the investigation is required. The role of the public is limited to apprising the DEO of concerns they may have with respect to compliance. The Agency's Web site provides an e-mail address for this purpose.

I note that you refer to the *Canadian Transportation Agency General Rules* (General Rules) as the basis for having an Agency Panel assigned. However, the General Rules do not require the Agency to conduct an inquiry into a matter filed by the public with respect to alleged non-compliance with Part V.1 of the ATR or of other provisions of the ATR or the CTA which do not specifically provide for a complaint mechanism.

Furthermore, with respect to your concern that the DEO may have advised Expedia that it was in compliance, this does not create a conflict of interest. The DEO would simply be performing their duties by liaising with industry to ensure compliance with the provisions. This would not amount to a conflict of interest.

We are pleased to provide a portal to allow the public to advise the DEO of any concerns they may have with respect to compliance.

Consistent with our existing practices, if you have additional information about carriers or other advertisers not being in compliance, please feel free to provide such information at conformite-compliance@otc-cta.gc.ca and the Agency's DEO will take any measures the DEO deems appropriate.

Sincerely,

Geoffrey C. Hare
Chair and Chief Executive Officer

This is **Exhibit "G"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

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Signature

House of Commons Debates

VOLUME 133 NUMBER 222 1st SESSION 35th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Tuesday, June 20, 1995

Speaker: The Honourable Gilbert Parent

(Motion deemed adopted, bill read the first time and printed.)

* * *

[*English*]

CANADA TRANSPORTATION ACT

Hon. Douglas Young (Minister of Transport, Lib.) moved for leave to introduce Bill C–101, an act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act, and to amend or repeal other acts as a consequence.

He said: Mr. Speaker, I wish to inform the House that I move for referral of the bill to committee before second reading.

(Motions deemed adopted, bill read the first time and printed.)

* * *

SOCIAL INSURANCE NUMBERS ACT

Mr. John Finlay (Oxford, Lib.) moved for leave to introduce Bill C–335, an act respecting the use of social insurance numbers.

He said: Mr. Speaker, I stand today to introduce a private member's bill entitled an act respecting social insurance numbers.

In introducing this bill, I would like members of the House to note the federal government has never placed controls on the use of the social insurance numbers by other levels of government or by the private sector. The private sector may currently deny a service to an individual who refuses to divulge his or her social insurance number.

This bill would require other levels of government and the private sector to state exactly why this information is needed and will give an individual an opportunity to refuse to divulge his or her social insurance number unless required by federal statute to do so.

The bill would also impose penalties on groups, individuals, agencies or businesses which divulge another person's social insurance number without that person's consent.

(Motions deemed adopted, bill read the first time and printed.)

* * *

(1010)

TAXPAYERS BILL OF RIGHTS

Mr. Alex Shepherd (Durham, Lib.) moved for leave to introduce Bill C–336, an act to appoint to a taxation ombudsman and to amend the Income Tax Act to establish certain rights of taxpayers.

He said: Mr. Speaker, it gives me great pleasure to introduce this private member's bill which I have called the taxpayers bill of rights. The actions of Revenue Canada are often consistent and fair but from time to time the administrative practices get out of hand, so much so that one of my constituents actually suffered a heart attack over some of the actions taken by Revenue Canada. Things like rights of seizure without proper notice and arbitrary change of collection arrangements are only some of the aspects which the bill deals with.

Most important, it creates an ombudsman who will act as a buffer between taxpayers and Revenue Canada.

(Motions deemed adopted, bill read the first time and printed.)

* * *

FOOD AND DRUGS ACT

Mr. Paul Szabo (Mississauga South, Lib.) moved for leave to introduce Bill C–337, an act to amend the Food and Drugs Act (warning on alcoholic beverage containers).

He said: Mr. Speaker, in the interests of the health of all Canadians we often use warning labels on items such as cigarettes, antihistamines, cleaners, bags and other items which may affect the health of Canadians. This does not apply to alcoholic beverages and this bill seeks to have a warning label, particularly with relation to the problem of foetal alcohol syndrome and the ability of all of us to operate machines and cars while under the influence of alcohol.

(Motions deemed adopted, bill read the first time and printed.)

* * *

PETITIONS

OFFICIAL OPPOSITION

Mr. Lee Morrison (Swift Current—Maple Creek—Assiniboia, Ref.): Mr. Speaker, I have one petition to present from residents of my riding, pursuant to Standing Order 36. It has been duly certified by the clerk of petitions.

The petitioners state that since the Bloc Quebecois has publicly dedicated itself to a disloyal objective, since it is comprised solely of members elected from one province and since the Reform Party represents constituencies in five provinces and has constituency associations in every province of Canada, the current situation is a travesty on the institution of Parliament. The petitioners therefore call on Parliament to preserve Canadian unity, parliamentary tradition and protect the rights of all Canadians by prevailing on the Speaker of the House to recognize the Reform Party of Canada as the official opposition.

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

affirmed before me on April 22, 2014

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Signature

CANADA

House of Commons Debates

VOLUME 133 • NUMBER 235 • 1st SESSION • 35th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Monday, October 2, 1995

Speaker: The Honourable Gilbert Parent

I request the same thing from all members. We should rise above partisanship and indeed walk the talk as we began to do some time ago with private members' bills.

The Acting Speaker (Mr. Kilger): Is it the House ready for the question?

Some hon. members: Question.

The Acting Speaker (Mr. Kilger): Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

(Motion agreed to, bill read the second time and referred to a committee.)

[*English*]

SUSPENSION OF SITTING

Mr. Milliken: Mr. Speaker, on a point of order, I think you would find unanimous consent to suspend the sitting until twelve o'clock.

The Acting Speaker (Mr. Kilger): Is there unanimous consent to suspend the House until twelve o'clock?

Some hon. members: Agreed.

(The sitting of the House was suspended at 11.37 a.m.)

SITTING RESUMED

The House resumed at 12 p.m.

GOVERNMENT ORDERS

[*Translation*]

CANADA TRANSPORTATION ACT

On the Order:

June 20, 1995—The Minister of Transport—Second reading and reference to the Standing Committee on Transport of Bill C–101, An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence.

Hon. Douglas Young (Minister of Transport, Lib.): Mr. Speaker, I move:

That Bill C–101, An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence, be referred forthwith to the Standing Committee on Transport.

[*English*]

The Acting Speaker (Mr. Kilger): Before I recognize the hon. Minister of Transport to begin this debate I remind the House that under this standing order, members, including the minister, will have 10 minutes to make their interventions without questions or comments.

[*Translation*]

Mr. Young: Mr. Speaker, the government's vision for the future of transportation is clear and attainable. Our commitment is to take Canadian transportation into the 21st century on a more viable, integrated and competitive footing.

We are commercializing federal airports, the air navigation system, Canadian National Railways, Marine Atlantic and the department's Motor Vehicle Test Centre.

We have introduced a new international air transportation policy and concluded a landmark Canada/U.S. bilateral air services agreement opening up the skies with our biggest trading partner.

The government will unveil this fall details of the new national marine and ports policy. This policy will set the stage for a more efficient, competitive and fiscally prudent marine transportation and port system and eliminate subsidies except where constitutional obligations require us to continue to pay for services.

We have already eliminated most transportation subsidies and greatly reduced the financial burden of Canadian taxpayers.

On June 20, we introduced Bill C–101, to enact a new Canada Transportation Act. The reason for introducing this legislation last spring was to encourage meaningful dialogue between industry and the government. We have had extensive consultation with CN and CP, other railway companies, shippers, and representatives of other transportation modes.

We have considered reports by the Standing Committee on Transport and, most recently, the recommandations of Task Force on Commercialization led by Mr. Nault, the member for Kenora—Rainy River, now the Parliamentary Secretary for the Minister of Labour.

The rail elements of the legislative package complement our strategy to commercialize CN, but they are far broader than that initiative. They are about enhancing the long term viability of the entire Canadian rail industry. This bill will affect the operations of CN, CP and some 30 other railways that currently operate in Canada, and it will also benefit shippers.

This is **Exhibit "I"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

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Signature

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

EVIDENCE

Standing Committee
on

TRANSPORT

Chairman: Stan Keyes

Meeting No. 63

Thursday, October 5, 1995

ORDER OF THE DAY:

Bill C-101, An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts

WITNESSES:

Department of Transport:

Ed Cochrane, Special Policy Advisor, Policy and Coordination;

Moya Greene, Assistant Deputy Minister, Policy and Coordination;

Clyde McElman, Special Policy Advisor, Policy and Coordination;

Jean Patenaude, Special Advisor, Minister's Office.

Click here to view Committee Evidence

Home | Important Notices

EVIDENCE

[*Recorded by Electronic Apparatus*]

Thursday, October 5, 1995

.0933

[*English*]

The Chairman: Good morning, colleagues. We move to consideration of Bill C-101. This morning we have a briefing session on Bill C-101 with officials from the Department of Transport. Moya Greene is a face familiar to the committee. Maybe she can introduce those she's brought with her this morning.

Just before you do that, Moya, it is customary for the Chair to welcome any new members who have come to this committee. We welcome Mr. David Chatters, who's the newest member of the committee.

Welcome, David. We hope you enjoy your stay with us, as so many other members of this committee do.

Moya, maybe you could introduce your colleagues and we can get into some statements from you.

Ms Moya Greene (Assistant Deputy Minister, Policy and Coordination, Department of Transport): Thank you, Mr. Chairman.

With me this morning I have Jed Cochrane, Jean Patenaude, and Clyde McElman. Among the lot of us our hope is that we will be able to answer succinctly and clearly all the questions the committee might have for us this morning. If we cannot, Mr. Chairman, we endeavour to get responses to the committee as quickly as possible.

.0935

Perhaps you will allow me to make a few opening comments before we get down to the business at hand.

First, on behalf of the department I would very much like to thank the committee for accepting to review this important piece of legislation so very early in this legislative season. It is a very important bill for the transportation sector and for the reform that the government is proposing across all modes of

transport as we move toward the next century.

You will know about many aspects of that reform, because, as you have pointed out, we have been in front of this committee on many occasions in the past couple of years. This bill is important because it will be the primary economic regulation that will remain in place for the transportation sector and it consolidates a lot of pieces of fairly archaic and antiquated legislation.

The objectives of the reform were put quite precisely by the minister yesterday, so I won't go into any great detail on that. Indeed, they are set out in clause 5 of the bill. There is one aspect, though, that I think bears a little bit of reinforcement. It is that, as clause 5 states, economic regulation should be used only where it is necessary, which is where the competitive and the commercial forces of the market are inadequate or are incapable of moderating the relationships between the parties. That is set out in clause 5, and it has been there for some time.

At various occasions in history, in 1967 and 1987, we have looked afresh to ask ourselves if we have the right balance in place between what is necessary in terms of economic regulation and what can reasonably be left to commercial forces to mediate the transportation relationship between the parties.

That really is what we're about with this new bill.

I wanted to stress that, because, even though that has been an abiding objective of previous reforms, it is the guiding principle again today for this bill.

So, for every section of the framework that was in place, we asked ourselves, is this regulation still necessary? If the regulation is drafted and if we say that it is necessary, then is there a way in which to write it so that we will encourage the parties to take over more of the subject-matter that might be covered by that aspect of the regulation?

When we looked at the bill, we found that there were still many items in the NTA 1987 that probably were no longer needed. We found that we were purporting to regulate motor vehicles when, in all cases but one, the matters were handled under separate legislation and by the parties themselves. We found, for example, that we had not given sufficient weight to the maturity of the industry and the ability of other generic legislation to look after particular concerns. So, for example, we had provisions in the Railway Act that purported to regulate the corporate affairs of railways in a manner that was very different from all other corporations in Canada and at a time when there is general, modern corporations legislation on the books. We found in the 1987 act we were probably too timid with the application of general competition law and competition principles as they apply to the transportation act.

.0940

When we looked through the 1987 bill, we found a number of redundancies. We found a number of places where general business legislation could be made to

apply more directly. One of the things we therefore attempted to do was to reduce the weight of regulation if it was covered off adequately in some other area.

What the 1995 bill attempts to do is to strike, as I say, a new balance between what the parties can and should do themselves in the marketplace, what should be matters of government policy left for Parliament to decide, and what must remain a matter for the regulator to be involved in. As I have been involved in this process now for several years in consultations across the country, in very detailed discussions on how best to find that new balance in the bill, and in the reading of the briefs that are before the committee, there are five or six items that are likely to be items of prominent discussion for the committee.

One concerns the agency powers. In finding this new balance among commercial decision-making, economic regulation, and government policy-making, has access to the agency been given short shrift? As the first item I would like to address in my remarks, Mr. Chairman, I'd like to give you our thoughts on this.

I think if you read the first part of the bill, you will want to ask yourself, well, in response to this claim that access to the agency has been given short shrift or curtailed, does that seem correct or accurate to you, when you consider that the agency, under part I, has all the powers of a superior court? Under part I the agency can subpoena witnesses, can inquire into any complaint that is laid before it. The agency ``must'' decide the matter. The agency does not have a discretion to say ``well, that one I'm not going to look at''. The agency must decide the matter, and must decide the matter with dispatch.

The agency can make regulations on its own to govern its procedures. The orders of the agency are enforceable in a federal court, as if they were orders of the federal court, such that the normal procedures.... If you were to ignore that order, the normal procedures that apply to court orders can be brought to bear.

The agency will have its own powers to construct new penalties to enforce its decisions. The agency can inquire into a matter even if some of the facts that are in dispute are before another court. The agency is not constrained in its ability to hear the matter.

Most importantly, under clause 38, the agency has to hear any complaint, on any matter or act that is the subject of this or other pieces of legislation under its jurisdiction, and the agency shall make a decision. Under clause 29 it is obliged to hear it, obliged to decide.

Where I think you're likely to hear some concern about agency powers relates to subclause 29(2), where Parliament would give guidance to the agency; guidance on when restraints in decision-making should be exercised. That is all that subclause 29(2) does. It does not allow an agency to say it won't hear a complaint, it won't decide a complaint or it won't decide the complaint quickly. Subclause 27(2) simply tells the agency that when making a decision on a complaint, it should be restrained if there is no interest seriously at stake - if

there is no significant prejudice.

.0945

So when this honourable committee comes to look at subclause 27(2) - and it was already raised in the discussions yesterday - I would ask that you look at it in the context of the agency powers and ask yourself whether this curtails access to the agency or gives guidance to the agency to reinforce what is already an objective in the act.

That is to say, economic regulations should be used in places where competitive commercial forces are inadequate. So it is guidance on restraint, not to turn away a complaint, not to refuse to decide, but in the context of making a decision it should be one of the considerations.

The Chairman: Excuse me, Moya. I don't want to slow the process down at all, but because there are five or six items, if anyone has a concern or a question they'd like to ask at this particular point, maybe we could do that.

Ms Greene: Certainly we can engage in a bit of debate.

The Chairman: That way we can stick with a theme as we go.

So if anybody has a question at this point on Moya's opening remarks or on the agency powers, just give me the signal.

Mr. Fontana (London East): I have just one question. It relates to the size of the agency - it's going from nine to three, I believe, with some part-time members - and the fact that the agency itself will be composed of something around 200 people in its final form.

Do you feel, given the mandate it still will have with the coming of this bill, that it will have sufficient resources and representation on its board to fulfil that mandate?

Ms Greene: Yes, I do, Mr. Fontana.

You will all know that the agency, in addition to its quasi-judicial functions, used to have a fair amount of administrative duties. It had to administer big subsidies with lots of claimants. That was not really a quasi-judicial function but an administrative function.

You will know that the agency had to accept all kinds of filings, even though it didn't do anything with them. The law made the agency accept those filings. With the budget, these subsidies are discontinued, so a lot of the resources of the agency that had been devoted to these kinds of administrative actions are simply no longer required.

On the matter of three members and part-time members, in discussions with the agency it was felt that this is perhaps the most flexible way of going at the

agency's residual and core quasi-judicial functions. Looking at the number of actual complaints the agency has to decide in a given year and looking at the ability of the government to increase the number of people who would be available through the roster of temporary members should something unusual occur so that there would be a backlog of complaints, I'm very confident that the agency is resourced with a sufficient number of people and will have a sufficient number of decision-makers available to it to deal with it.

The other thing I would point out is that our agency is a large agency for reasons that are perhaps justifiable. Over the years Canadians have come to rely upon the agency, quite rightly, for a range of things that in some cases are still necessary. But relative to the size of the agency that exists in the United States for similar functions, it is still almost the same size.

.0950

In discussions I've had with the minister...the minister is very anxious that the agency never be put in a position where it cannot expeditiously deal with whatever is in front of it. Part of helping make sure the agency can deal with dispatch with things in front of it is the things found in the bill: that the agency shall make decisions within a certain timeframe and that the agency should be empowered to award costs against somebody who would use its process unnecessarily. But in addition, the minister wants to make sure the agency does have access to resources to enable it to get on with that timely decision-making. Relative to what has to be done, I am very confident those resources are there.

The Chairman: Mr. Gouk.

Mr. Gouk (Kootenay West - Revelstoke): I'm curious about the concept of the agency expeditiously dealing with things that come before it at the same time as clauses such as subclauses 27(2) and 34(1) place obstacles in the way of getting things to them in the first place. Right now if there's a dispute between the shipper and the railroad, the process allows it to go to the agency, period, and then it is dealt with in one way or the other. But the concept of significant prejudice means there has to be some process, as yet undefined in what I've seen, that says there has to be someone else who goes through a determination, first on what the significant prejudice really is, and second, on whether or not significant prejudice occurred. I don't know what that process is, I don't know how long it will take, before it can eventually make its way to this expeditious handling.

I also still think you're working in conflict between subclauses 27(2) and 34(1). Subclause 27(2) provides a potential roadblock in getting something to the agency. It says we may or may not look at it, depending on whether or not it's judged to be significant prejudice. Then you're providing another clause that says if you bring something before us that is frivolous and vexatious, we will penalize you for it - having said in an earlier clause if it isn't significant prejudice we won't even allow you to bring it before us in the first place.

I'd like to have some of those things cleared up.

Ms Greene: There is a misconception that I think it is very important the committee get on its table early. Subclause 27(2) does not entitle the agency not to deal with the complaint. The agency is required by law to take complaints and required to make decisions.

Subclause 27(2) is not an obstacle, in the sense that you don't have to prove a significant prejudice in order to get access to the agency. That's not how it works. You can go to the agency on any matter and the agency must decide.

If you look at the language of subclause 27(2), it simply says ``in its decision''. So the agency has accepted the complaint, because it's obliged by law to do so. The agency is making a decision because it's obliged by law to do so. In its decision the agency must consider whether or not this is a matter that raises a significant prejudice. There's no need for a process.

I would submit to you, Mr. Gouk, that if there were a process, you could fairly argue that it was an obstacle or a roadblock to the agency. But if you look at clause 38, they have to hear a complaint. If you look at clause 30, they have to hear that complaint even if a fact is in dispute in another forum. They can still go on.

Subclause 27(2), if you look at the wording of it...and it's well to read it in terms of subclause 27(1).

The agency has always been empowered to grant the relief, in whole or in part, it thinks appropriate under the circumstances. Subclause 27(2) says the application is made, the agency may grant the relief in whole or in part, just as it always has been able to - that's at the discretion of the agency - and then there's a bit of parliamentary guidance, meant to reinforce the objectives of the bill. It says ``in the decision''. Please satisfy yourself, agency, that there's a significant interest here that would not be satisfied if you didn't give the relief people are asking you to give.

So there's a misconception that this is a roadblock and this is a process. I am not going to say to this committee that simply because one is industrious you've done a good job. That's for you to decide: whether at the end of the day, in finding that balance, we've done a good job. But I will say the concern about a roadblock was certainly heard by those who were involved in drafting. And it was accepted: we certainly don't want to put a roadblock to the agency.

.0955

We considered other alternatives that the committee also might want to keep in its mind.

Right now the act says that the agency must accept all complaints, and it must accept complaints from all classes of shippers, whether they're captive or not.

There are captive shippers in this country, but there are far more in the country who are not captive. They are not captive to a single railroad or to a single mode

of transport.

So we felt maybe what we will do in this effort at regulatory reform is narrow the classes of complaint that can have access to the agency. People did not want us to do that.

The other alternative we considered was to narrow the class of shippers that can go to the agency. Only captive shippers, for example, would have access to a regulatory remedy. People did not want us to do that.

We said if all classes of complaint from all classes of shipper can go to the agency and if the agency will be legally obliged to accept them and to deal with them and make a decision on them, is it inappropriate to provide a little bit of guidance to reinforce the objectives of the act?

In your decision, yes, take the complaint. Yes, decide it with dispatch; don't put up a roadblock to anybody. Take the complaint, decide it with dispatch, but consider if a significant interest is at stake.

On frivolous and vexatious, I think they deal with slightly different things.

Remember, the agency has the complaint. It must take the complaint. The agency has to make a decision and do so within a period of time. The law requires the agency so to act.

On the basis of what I know, most cases are legitimate. But, Mr. Gouk, you know that there have been very protracted proceedings in front of the agency in certain cases, proceedings that did not help to tease out what the issues were, did not help the agency to come to its ultimate determination, only served to delay, only served to cost the parties money.

If you look at the civil procedure handbooks of this country, almost every court in the land is able to control that kind of misuse of its process by saying to people: you have a legal right to come to us and we are legally obliged to decide your case, but if you cause the process to be a frivolous and vexatious one, then we are going to ask you to pay costs. This is standard for almost every kind of procedure that is carried out across the land. It's not a roadblock, but it is an indicator that you get the agency, you get the decision, but if you're found to have delayed the agency in an untoward way and caused people to bear unnecessary legal costs in the process, then you will be asked to pay.

The Chairman: Thanks, Moya.

Mr. Guimond.

[*Translation*]

Mr. Guimond (Beauport - Montmorency - Orléans): Ms Greene, I missed the beginning of your presentation. Subsection 7(2) says that the number of members in the agency will decrease from nine to three, but that they will still

be appointed by the Governor in Council.

You have studied the legislations that exist elsewhere in the world. Wouldn't it have been time to innovate and adopt a procedure different from this antiquated partisan nomination process? In the Bill, you could have tried to innovate by setting up a process of appeal for the nominations; we hire the services of a head hunter who systematically evaluates the candidates and we hire the best person.

.1000

Why are we keeping such a system, which is worthy of 1867 and the early days of Confederation?

Ms Greene: Mr. Guimond, if I may, I will answer in English because I will then be sure of being able to carefully qualify my answers.

[*English*]

I really think that's a question you should put to the government. As you point out in your commentary and your remarks, it is standard; it is exactly how appointments are made to all bodies of this kind. It has been the practice for, lo, these many years.

I personally don't believe it is accurate to say that because the Governor in Council appoints, people are not qualified. I don't agree with that. My experience with Governor in Council appointments is that far and away, in the vast majority of cases, concern is taken to ensure that people are qualified.

You can take issue with Governor in Council appointments, but that's the standard way in which these appointments are made, for this agency and others.

The Chairman: Is there anything else, Michel?

[*Translation*]

Mr. Guimond: Section 48 refers to extraordinary disruptions. Can you give me examples of what is meant in paragraph 48(1)(a): ``other than a labour disruption''? Are we to understand that a labour disruption will not be considered as an extraordinary disruption? Can you give me an example of an extraordinary disruption? What is meant by that?

[*English*]

Ms Greene: Clause 48.... This came up yesterday as well, and if you would allow me, I would like to put it in a bit of context.

As the government makes a decision to withdraw from the day-to-day overseeing of commercial entities such as railways and airlines, and to allow more breathing room for the marketplace to mediate the relationship; as the government reforms the regulatory scheme and deregulates, if you will; and as

the government tries to move out from its direct bailiwick parts of the transportation sector that historically have been owned and operated directly by government, by people appointed directly by government, the government cannot lose sight of the fact that even though it is very remote as a possibility, it does not wish to abdicate entirely a sense of concern about the good workings of the transportation system, which is critically important to Canada's economy, and particularly to the trade of the country. This clause is designed to allow the minister in really remote, unusual, extraordinary circumstances, and working with the minister responsible for competition, to get that measure, in the short term, of breathing room in the face of an extraordinary disruption of the system, should that ever arise, to allow the government to consider what, if anything, needs to be done.

You asked me for examples. I'm loathe to suggest examples of when it might be used, because it's hard to foretell. But the structure of our industry, as you know, Mr. Guimond, is that on the air side we have two dominant air carriers and on the rail side we have two dominant railways. Let us say, God forbid, at some time in the future both of them were to come into such perilous financial circumstances that you would be faced not with an ordinary bankruptcy of a single company but with a disruption affecting a whole mode, or the sector in general.

.1005

In that case, what tools does a government have? Well, some may say, so be it, the government should shrug its shoulders. I think the importance of the sector is such that you as parliamentarians would not be able to shrug your shoulders if that extremely remote kind of eventuality were to occur. You would have to ask, is there anything we as a government need to do here? You may need to give yourself a very narrow window - a sixty-day window - of breathing room to bring together, for example, parties in the whole sector that may be facing this extraordinary disruption. If you could not bring them together, you could not even know whether or not this is a situation where government has any interest, has any reason to act.

So this provision, as the minister said yesterday, will likely never be used, because the parties in the industry are mature and reasonable people. But given the regulatory reform that has been going on in Canada now, progressively, for twenty years, and given the structure of our industry, in the remote circumstance that such a disruption were to arise, the government needs to give itself a very, very narrow, controlled latitude, with the supervision of the houses of Parliament, to act.

I wanted to spend a few minutes giving you my thoughts on agency powers, the meaning of significant prejudice, and costs against anyone who would misuse the process. I wanted to spend a few minutes talking about other items that are likely to be prominent items in front of the committee as you go through the debate.

Shipper protections. In trying to find a new balance between regulation, government policy, and commercial action, have we left shippers in our country who are very reliant on transportation, particularly rail transportation, in the lurch?

The first thing I would see is that under the NTA of 1987 shippers won quite extraordinary protections in Canada. I think they recognized their position in the historical tension there has been in the relationship with rail particularly. They won a manner of regulation that attempts to mimic competition. This is notable in competition line rates and it's notable in the interswitching provisions.

In addition to that, shippers won the extraordinary right to bring any dispute they have to final offer arbitration and to have it settled. Final offer arbitration, as you know, is an unusually designed form of arbitration, because it's designed to try to get the parties to put their best offer on the table and thereby come to their own decision. But in the event that they can't, they won the right to have a dispute submitted to final offer arbitration.

This is unusual not just for transportation.... This really does not exist for other services or goods that are sold in the economy. You might be able to negotiate that commercially, but to have the law say you have a right to it is unusual. It's also unusual in relation to what is available to transportation shippers in other countries.

Very early on in this process the minister made a decision and a commitment that although these rights impose significant obligations on Canadian rail that don't exist in other modes, that don't exist in other sectors, that don't exist in other countries, the minister did not want to curtail these hard-won rights, because the minister knows shippers feel even if they do not use them - they do not come to the agency and ask that a CLR, a competitive line rate, be imposed - the fact that these protections are there helps shippers in commercial negotiations with railways and that help has had a benefit for shippers, so that benefit ought not to be constrained.

.1010

What you are likely to hear is on the one hand there are real advantages to short lines being created in the country. It sometimes allows the continuation of service in areas where otherwise it could not continue, because it's just not economically viable. Many shippers will tell you that short lines have closer access to the local shipper and therefore deliver flexible, better service for shippers. So on the one hand you're going to hear we do want to encourage short line creation in the country.

But you're also going to hear concerns that the very important protections - competitive line rates, interswitching and final offer arbitration - have somehow been constrained. I would ask you to look at the provisions.

The bill makes it clear that competitive line rates, interswitching and final offer

arbitration are available. They are available, even in the presence of a short line, for whatever portion of the line still remains under federal jurisdiction, because that's the only thing a federal law can do. For whatever portion of a line is still under federal jurisdiction, competitive line rates and interswitching apply, and in any event, final offer arbitration is available, not just for rates but also for conditions of service. These protections are available whether or not you are in fact captive to the railroad.

So when the concern is raised, which is a legitimate concern, I would ask you to ask yourself this question: As far as it is possible for a federal law to do so, have these protections been continued? I hope you find, with us, that the answer is yes.

I have one more word about final offer arbitration. Final offer arbitration is truly an extraordinary remedy. It has been available since 1987. Thankfully it hasn't actually been relied upon in all but one or two cases we know of. But access to it, I believe, and others will tell you, is very important, again, so that negotiation goes on as smoothly as possible. The threat of it is sometimes enough to get a deal to cement for you where it would not otherwise.

In the bill, the government is proposing that final offer arbitration be enhanced and improved. Some complained that if, heaven forbid, we do have to rely upon the process, it takes too long. So the bill proposes that the timeframes be brought down from 120 days for a decision to 90 days for a decision.

Then the government decided that there may now be new circumstances analogous to the concerns shippers raised in 1987, which gave rise to final offer arbitration, that should also have access to final offer arbitration. For example, where municipalities are trying to negotiate with the large railroads for the commuter rails, or where VIA Rail is trying to negotiate for train services agreements with CN, they could be in a situation where the railroads would exercise a heavier hand than would otherwise be the case if access to final offer arbitration were not available. Therefore the new bill enhances final offer arbitration in that way.

But final offer arbitration is still designed to encourage, first and foremost, a deal. The way it's structured, the arbitrator doesn't have a lot of discretion. He can't say ``I'm going to tell you what I think is the most reasonable thing here and impose that''. He must take the last offer of one or other of the parties. In that sense it is the fear that the other guy's offer will be accepted that is the greatest encouragement to try to get a deal yourself.

.1015

Some would say that in the process we should not allow the railways to respond in ten days to the final offer of the shipper, but it is the shipper who is claiming the final offer arbitration. So if we're going to try to encourage that a last-ditch effort be made to get a deal, the proposal is that after the shipper has put his final offer on the table, the railways will be given ten days to say whether they will buy it or not.

The Chairman: It's question time. I'd like to kick it off on this one. In some of the briefs we're receiving from the shippers, the shippers are saying they're afraid that subclause 27(2) will apply to final offer arbitration.

Ms Greene: Subclause 27(2) applies only to agency decisions. It does not apply to final offer arbitration. Final offer arbitration is not a decision of the agency. It is a decision of the third party that the railway and the shipper agree to. It's not an agency decision, and therefore whether or not there's a significant prejudice to be protected through the regulator's decision is simply not applicable to final offer arbitration.

The Chairman: Thanks, Moya.

Mr. Gouk: At some point later on I'd like to go back for a supplemental on subclauses 27(2) and 34(1).

Dealing with what you're talking about right now, specifically final offer arbitration, in the general concept I think it's a good process. I think it has a lot of merit. But I have never heard of any other explanation for final offer arbitration except, simplistically put, each side decides their final position, thus the name. Each submits that final position. Then the arbitrator selects either one or the other.

The process currently being used and, as I understand, that will be continued in Bill C-101 is the shipper submits blindly their final position. The railroad then looks at it, studies it, decides what they can do and makes their final offer based on the knowledge of what the shipper has submitted. Is that the current process? Is that the process the Department of Transport intends to be continued under Bill C-101?

Ms Greene: Yes. I'd make a distinction, though, between the process and the actual decision, Mr. Gouk.

If you think about it, much negotiation has gone on before a shipper gets mad enough to say ``That's it. I'm going to the agency to ask them to appoint an arbitrator for me.'' That, shippers will tell you, is how it actually works.

Let's say a shipper does get mad enough and says they're going to get an arbitrator appointed. The objective of having final offer arbitration in the bill in the first place is to encourage the parties to come to their own deal as much as possible. There are three ways to do that.

One is the threat that the arbitrated decision you end up with will be a whole lot worse than what you and the other party had on the table in the negotiations that led up to it. That's the biggest incentive to get to your own decision.

Number two is the arbitrator can't make up his own mind about what he thinks is reasonable; he has to pick one or the other of the parties. If the parties are way apart, the fear on the part of one of them that he's going to pick this one, which seems totally outrageous to that party, is enough to start moving the

parties, in a negotiation sense, closer together.

The third way in which the provision is designed to get people to come to their own deals is it says that after a certain period of time you're into the process of arbitration and you can't pull it back. When does that start? When is it that you can no longer say you're going to negotiate this yourself?

.1020

Well, if the shipper is asked, you put your last ditch on, you give the railway a chance, ten days last ditch to reply to you, the shipper can then decide, I'm either going forward with arbitration, it's still not good enough, or I'm not.

That's the purpose of the ten days. It's another mechanism in the process, as opposed to the decision, to encourage the parties to come to their own negotiated result.

Mr. Gouk: As an example, if I were looking for a raise in the industry standard on behalf of whatever organization I represent, say that there's a standard out there that can be measured that says the average raise should be $10,000. The employer is offering nothing. I'm greedy; I'm asking for $20,000.

So I submit my final offer, which says I want a $20,000 raise for my group. The employer gets to look at it and says, well, we're both $10,000 out, so all I have to do is raise it and give them $1,000; mine is closer, and therefore I will prevail. The other doesn't get a chance to have that same access.

That is not final offer arbitration. That is some hybrid version of it, which gives a clear and distinct advantage to the side that gets to review what the other side has put in blindly. It does not have the opportunity to have that same advantage, unless it is prepared to go back to the other and say, here is the rail's final position; do you want to modify yours?

If you're really interested in modifying and making a hybrid process out of this to get them back together, then why not go back to the shipper? If you don't, then what you have is not final offer arbitration in the traditional sense and it's clearly biased to one side.

Ms Greene: I think you put to me an interesting point in the case of just wild offers, not serious negotiation offers.

Does the opportunity for the railway to have a final kick at the can before being pushed to final offer arbitration give it somehow a bit of an upper hand? I'll have to think about that.

If, after speaking to everybody here, you come to the conclusion that it doesn't encourage the parties to avoid the process - which is what we're trying to do, to use a process to avoid a process - then, in the spirit of what the minister has always said, we certainly would be very interested in having the committee's views on that.

Mr. Fontana: I'll leave final arbitration for a moment. The fact is that in the system, as Moya has indicated, since 1987 that has been in place. The fact that it has been used only twice in eight years indicates that, in whatever form, it does work. I think it's the threat of final arbitration, in no matter what form.... I can understand where Jim's coming from, and we might want to discuss that. But, in fact, obviously that mechanism is working. So I'm prepared to be open to it too.

I want to get to the nuts and bolts of the CLR, the running rights, or the interswitching. You didn't cover running rights, but you will the next time.

Ms Greene: I was going to get to it.

Mr. Fontana: Yes, you'll get to it.

This is what this bill is all about in terms of the economic deregulation. It has been said that in 1987 - I wasn't around then - that was the shipper's bill, that that was an opportunity for the government at the time essentially to put some balance back into what was perceived prior to 1987, which was all in favour of the railroads. What we've found out since 1987, because we live not in a modal-competitive environment.... We also live in a North American competitive environment, which means that we have to stack our railroads up to the American ones and other transportation modes. If we don't get it right in terms of that transportation mode, namely rail, and if the unforeseen happens, which means that both railroads can compete, then we won't have transportation in this country.

If we don't have transportation in this country, then everything else, including shippers, will go down the tubes, because unless we can move our stuff, nothing else happens.

I know that that's the balance we're trying to achieve here. I want to talk about whether or not, if you've given the proponents, shippers and railroads and everybody else, final arbitration as a way of negotiating....

.1025

I can understand why the CLR is there, and the interswitching, which essentially means that you want to have that as a safeguard for the shippers. But in the true marketplace, if they have that opportunity under final arbitration to take it, why do you need the CLR and the interswitching and all these economic regulations that in fact might make it impossible for the railroads to compete with their counterparts, be they trucking, railroads in the United States, or anybody else?

So while we're trying to achieve the viability of railroads, because that's key to the transportation sector, all of a sudden we put those things in place. I can understand why, but in trying to create that balance have we gone far enough vis-à-vis our ability to be able to compete with railroads in the United States that can operate at least 20% better off than we can? We have to worry about that.

My point is that if you have final arbitration, why do you need all these other things? Leave that to the parties to negotiate in good faith.

Ms Greene: That, too, is a very good point, because there's no question that for the agency to be imposing something called a competitive line rate and to be imposing rates at every interchange to interswitch traffic, causing a railway to lose what is most revenue advantageous, which is a long-haul move, and actually turn its traffic over to its competitor, is extraordinary.

The government believes that, certainly for the shippers who are captive to rail, it is a creative regulatory mimicking, if I can put it in that way, of a state of competition. It says you must quote the rate for the short haul and you must turn your traffic over to your competitor if that's what the shipper requests under the circumstances. The fear of that is enough to cause railways to negotiate harder than they otherwise would.

There's no question that, given the financial state of rail in this country and the importance of rail in this country, any government would have to be concerned about the ability of our railroads to be viable in the future. I think, though, that when you look at the whole package of the bill and you look at the other measures the government has taken to try to cement a new and better labour relationship in rail, to try to remove the weight of regulatory burden that prevented the railways from having a plant that best suited their needs, it probably balances the extraordinary rights in competitive access and interswitching.

Yes, you could probably leave everything to final offer arbitration. Conceptually it's possible. But in crafting any bill, as members of the committee know better than I do, lots of interests have to be accommodated. We have had these competitive access provisions and interswitching provisions since 1987, and shippers are very concerned that they should be there for some time into the future.

Mr. Fontana: I have a quick supplemental that relates very much to this.

Obviously we want to create short lines in this country, because, as you said, there are great benefits when those occur. But when a short line is created on part of a main line or on a piece of track, CLR, interswitching, and final arbitration - because the short line I guess won't be under federal jurisdiction, but in most cases it will be under provincial jurisdiction - won't prevail. This essentially means that what happens with a short line under provincial jurisdiction to negotiate with the shippers negotiating with the short-line rail on CLR, interswitching, or even anything, because it's not going to be under federal jurisdiction.... We're assuming that the provincial governments will have to pass parallel legislation to protect the shippers on the short line under provincial jurisdiction.

.1030

Ms Greene: I would not advise provincial governments to do that, but certainly

they could do it.

I think what's going to protect the shipper in the presence of a short line is this perspective: if the short line had not been there, there would probably be no service on that segment of the line.

Secondly, a short line regulated provincially is probably a lower-cost alternative than the main line was, and some of that lower cost is going to be reflected in the rates the shipper is going to get.

Thirdly, the shipper knows that as soon as he gets to that interchange point where the federal system begins again, he has access for the rest of the move to competitive line rates, and for all purposes to final offer arbitration.

So the protections the shipper has for the short line segment come from the nature of short lines, from the presence of short lines, and from the lower-cost alternative that short lines present.

The protection the shipper has if he's dealing with main lines comes from the fact that Parliament took the view in 1987 that these are big guys and they're probably not always as fair as they might be in the marketplace, so here's a regulatory mimic of competition so that you'll be able to negotiate harder and better with them. It's a different kind of protection, but the protection is still there by the very presence of the short line.

The Chairman: Thanks, Moya.

For those who are just joining us, Moya is touching on five or six prominent discussions that are going on about the bill. She's already done agency powers and now we're at shippers' protections. She's also going to go into short lines and interswitching, running rights and those kinds of things.

So if your questions have to do specifically with shipper protection, go ahead. If they're on some other matter, you might want to wait until that particular hot point is discussed.

Mrs. Cowling (Dauphin - Swan River): My question somewhat ties to the questionMr. Fontana just raised. It's with respect to running rights and short lines.

I just recently got back from Washington, and it's my understanding, from the representatives I met there, that Burlington Northern has pushed its rates up quite high. That concerns me when we talk about competition. What is your perception of that?

Ms Greene: If a shipper is captive to a railway, obviously that means the railway is in a monopoly position vis-à-vis that shipper. If that's the case, the railway is in a position to extract a higher rate than would be the case if the shipper could turn around and go to somebody else.

In the United States they do not have these regulatory protections, these competitive line rates or these access protections. In fact I don't know of any place where they exist the way they do in Canada.

In Canada they're there for exactly that kind of situation. Where a shipper is at risk of being exploited, in a rate sense, by the railway because the shipper has no choice except to use that particular railway, the competitive line rate says as soon as the shipper gets to that interchange, he can transfer his traffic over to a competitor, wherever one might arise on that route.

In the United States I think it's true that in cases where shippers are truly captive, rates are higher. That is the benefit of the competitive line provisions in Canada that just simply aren't there in the United States.

I should add that in Canada competitive line rates apply whether or not you're captive. You don't have to be captive to get them.

Mr. Gouk: I have two questions, one dealing with public interest and the other with running rights.

The Chairman: Jim, we haven't touched on running rights yet. She's going to come to that hot point.

Mr. Gouk: Okay, well, I'll just deal with the public interest then. I'm having trouble keeping up with where we're going.

You were either part of or certainly aware of the negotiations - sorry, the consultations; they were not negotiations and I don't wish to infer that there were any commitments made - that went on between the rail companies and certain shippers this spring. Is it not true that during the consultation sessions the railways had tentatively agreed to remove all public interest tests in the new legislation, including the public interest test relating to running rights? Was that not something -

.1035

Ms Greene: That's not my take on what happened. In a consultation session where there are lots of things on the table, just as there are here, all kinds of working ideas are put forward, different ways of solving the same problems are raised. None of them get boiled down to what you could say is a consensus view, meaning that you say, ``Okay, the alternatives are on the table; here's the way we should go''.

It is certainly not my take. In fact, I'm going to be more emphatic: railways never agreed in my presence that the public interest test could be removed in all cases. We're going to get to it, but they certainly never agreed to unlimited mandatory running rights.

Mr. Gouk: So it is a qualified denial.

The Chairman: Point three, Moya.

Ms Greene: Before we leave what are called the competitive access provisions - competitive line rates, interswitching, and final offer arbitration - I'd like to say a word about ``commercially fair and reasonable'', because that's another item you're going to hear a fair bit about.

Again, as our colleagues on this side of the table point out, the competitive access provisions are extraordinary regulatory remedies - very useful for some shippers who might otherwise be exploited, but extraordinary. If the regulator is going to be called upon, and if the regulator is going to be called upon to impose a rate, whether it be an interswitching rate or a competitive line rate, not just for a shipper who's captive, because these rights are for any shipper in Canada, and if we are concerned about rail viability in the future, what this provision attempts to do is to again give guidance to the agency that in taking over the commercial negotiations and in imposing that rate on the railway, it should please make itself sure that what it's imposing is commercially fair and reasonable.

Shippers will tell you that this curtails access to the remedy. It is my opinion that that is an inaccurate view of the guidance in ``commercially fair and reasonable''. ``Commercially fair and reasonable'' is a simple guideline to the agency that says, ``Okay, we agree that this is a time when regulation is needed'' - which itself is extraordinary - ``You can take it out of your own commercial hands and you, the agency, can set the rates here. But make sure that it's commercially fair and reasonable.''

If you will look at the clause, the question that I would ask you to ask yourself and to ask others, under the circumstances of a rate that's imposed, not just to protect those who are captive but at the behest of any shipper, is this: is it justifiable under the circumstances that the agency's decision should be guided by what it considers to be fair and reasonable?

Those are my comments with respect to the competitive access provisions.

Mr. Chairman, if you agree, I propose to go to running rights and common carrier obligations.

The Chairman: Thanks.

Ms Greene: You probably won't hear very much about common carrier obligations, because the common carrier obligation in the bill is exactly as it has been for many years. But I want to say a little bit about common carrier obligations to reinforce the view that shippers who feel exploited by railways still have extremely ample access to a regulator.

.1040

The common carrier obligation - in your bill it's called the level of service obligation - allows any shipper to complain about any aspect of the service, rate

or facility he is seeking to obtain from the railway.

This section has been held in the bill in its entirety, word for word, to the way it was. It gives the agency powers to hear the complaint and to, if need be, order even the construction of works to satisfy the agency. So at the end of the day, the obligation on Canadian railways to provide service is an obligation that goes well beyond what the railway as a commercial actor looking for business would seek to provide in the marketplace. In fact it goes well beyond what the old common law - the judge-determined law - would have imposed on the railway.

But it has been there a very long time, and as I say, the minister made a decision early on that he did not want to curtail access to the agency. Although he would want it to modernize and try to treat the railways as normal business, anxious to get business and anxious to keep business, he wanted to do so in a way that didn't leave someone in a very vulnerable position.

For that reason the common carrier obligation has been left in place word for word. It was the subject of considerable discussion as part of the consultations. As officials, we originally proposed that we simply remove it. We felt it was antiquated and treated railways as if somehow they were public utilities with guaranteed rates of return that could have imposed upon them by a regulator a notion of acceptable service well beyond what would have been provider-supplied in the marketplace.

That was not an acceptable position to shippers. They believed that in addition to competitive access provisions it was necessary to have this in place. Given the balance that seemed achievable at the time, the minister ultimately agreed with that position.

The reason I raised that is I started out by talking about the balance between what the regulator should do, what the parties should negotiate themselves and what the government should hold itself in reserve to do if, but only if, need be.

One of the things we were trying to balance was the extent of the overall regulatory burden on rail. In each and every case we were asking ourselves whether this was still necessary. Shippers, on the other hand, wanted to have a new opportunity to review what was in place from the perspective of whether they were adequately protected. They asked themselves if they could be protected more by the regulation. It is from that perspective that shippers raised the possibility of running rights. This gets to your question.

As you know, the act has always had a provision that allows the agency to intervene and order running rights over and for federal carriers, because that's the jurisdiction of the act. In the consultation we considered whether or not it would be appropriate to change that. Some shippers would have liked short lines to have running rights over main-line carriers - not just running rights that the short line and the railway would negotiate together, but running rights that could be imposed by the regulator.

Well, we did consider that. There were technical difficulties, because the federal

law is the federal law, and in many cases short lines are regulated by provincial governments. We certainly worked quite hard, but it wasn't clear that we could overcome that technical jurisdictional difficulty.

.1045

More importantly than that, when we spoke to short lines, the majority of them said, ``Wait a second. That misconstrues the nature of the relationship between a short-line railway and a main-line railway.''

In most cases, the relationship between a short-line railway and a main-line railway is a cooperative one, as opposed to an adversarial, competitive one. So short lines were not pressing that they should have running rights over main lines.

On the other hand, main lines were extremely concerned that government would purport to give a regulator the right to order that they open their plant to a short line that might have bought a segment of line to them on terms and conditions to which they agreed, that they then turn around and open their plant to what started out as a cooperative relationship to a competitor.

When we looked at the entirety of the bill - the obligations that remained on the railways, the extraordinary protections that were still there for shippers - on balance the decision was made that even if the technical difficulties could be overcome, a matter on which I'm just not sure, in the interest of that balance, the balance of obligation and right, given what we had heard and what you will probably hear from short lines, it did not seem appropriate for us to consider any further how to open main lines up to a short-line running right.

The Chairman: I want to go back to the common carrier obligation. I'm looking at 114.

Why doesn't 114 say somewhere that the obligations carried out here are done in a fair and equitable fashion, or a fair and reasonable one? I read this, and it's done without delay. It's done with diligence. It's furnished all proper appliances, accommodations. Is there already a template somewhere else, such as in the Canada Post act, where you have to take the mail but you don't necessarily have to deliver it by a Rolls-Royce? Is there something in there?

Ms Greene: Yes. It is 113, which is that the rate or the service that the agency decides has to be provided should be commercially fair and reasonable.

The Chairman: Great, thanks.

Mr. Fontana: I understand that the competitive carrier obligations and level of service obligations are intact, based on what was in the act before. I hope that at the end of this whole exercise, when we get a chance to - and perhaps an evaluation has been done.

Obviously, the true test for this new bill will be how much will it reduce the

transportation costs for, ultimately, the export goods that we want to sell to others. Let's face it, for the most part what moves across this country is exports.

Therefore, we have to make sure that the price of transportation has in fact come down with respect to this new bill, as opposed to the one we've been working with for the past number of years. Perhaps that evaluation can be done.

With this particular provision in the existing bill, as the chairman indicated, there needs to be a balance. I don't know whether or not you look for that balance to try to achieve the same thing as you might have in some of the other sections.

I'll just take the absurd. The agency has made certain rulings in the past, either because of a captive shipper or in fact where other alternative modes have been in place, to require a bridge or something else to be built for tons of money that in fact has not proven to be the best and most efficient way to do it.

.1050

That's why I think somewhere, somehow, one needs to strike a balance in this particular thing. While I want to protect the shipper, especially the captive shipper that has absolutely nowhere to go, surely we could draft something in a way that tries to protect those eventualities.

When I talk about shippers, obviously VIA or any passenger service, in my opinion, is different. I treat VIA and passenger rail services as railroad companies and not necessarily as shippers, and therefore one might want to look at passenger travel in an entirely different way.

Moya, I know the balancing act you've been trying to do involves the total package. Was leaving the provisions not changed at all part of the balancing act on the whole bill, or is there a way this committee could be helpful in looking at this specific clause to try to achieve a better balance?

Ms Greene: Mr. Fontana, I would never presume to say to you or anybody else on this committee who has to deal with all kinds of balancing acts every day that you can't find a better balance. Maybe you can. You're going to hear 100 different submissions. I don't know. What I can say is we went hard at it for quite a long time.

I take your point that the true test is going to be the efficiency of the system overall. Is it better? In the course of the next four years we're going to have ample opportunity to demonstrate to Parliament, to shippers and to carriers whether or not it is better, because, as you know, this bill also builds in four different reviews on grain transportation, on the system overall, on whether or not the act is working from the agency's perspective and annually from the government's perspective, and on what sorts of changes we have seen in transportation. So we will have an opportunity to know whether or not this bill has it right or wrong.

You raised a specific question on the guidance to the agency in clause 113 that:

> A rate or condition of service established by the Agency under this Division must be commercially fair and reasonable.
>
> Is this enough to ensure that decisions take account of the competitive pressures that everybody, including railways, is under? I think so.

Your second specific question was on the language of the level of service provision, which has been kept entirely intact. Yes, that was part of the balancing act the minister made in the last weeks of the consultation, when very many things were on the table. After really vocal concern on the part of shippers, the minister agreed to leave it in place.

Mr. Fontana: Can I ask one final question that relates to this? How many times has the NTA had to intervene with respect to common carrier access or level of service complaints from shippers and/or anybody else? I take it that even in this clause, that's something that can be brought to the agency if there is an agreement between one party and another. Is that right? Or it could even form part of a commercial agreement between a short line or a shipper and both the railroads, which agreement is subject to final arbitration if that's the case.

Ms Greene: Absolutely. Most of the things covered in the level of service provision are, as a matter of course, in thousands of shipping negotiations that take place every day. Most of those things are agreed between the parties. It is only when they're not agreed between the parties and the shipper feels really strongly about something that this becomes a kind of fail-safe provision.

It has not been relied upon very frequently - there have been eight or nine cases in the past few years - or at least it hasn't been involved in many decisions. There may have been complaints made to the agency that got resolved in the normal course of events by simply talking to the parties as opposed to actually activating the full-blown decision-making process, but there haven't been many decisions on this.

But shippers will tell you that is because the fact that it is there, again, gives them the leverage they need when they're negotiating.

.1055

The Chairman: Next stop-point.

Ms Greene: We've now gone through the balance between agency, government, and the commercial negotiations and looked at the specific protections, the competitive access provisions, running rights, and level of service. The last set of issues I wanted to raise, because I think they will be fairly prominent for you, is that if we don't have it right, then we've given ourselves a lot of opportunity to get it right. We've given ourselves opportunity to know whether we don't have it right.

What we've found is that for some modes of transport, trucking being a particularly good example, we have very little information on what is going on in Canada. Most trucking associations are extremely helpful; if you ask for something in particular, they will tell you.

In other areas we really didn't have all the tools that you as members of Parliament or government would need in order to make a fair assessment of whether the system is working efficiently, working better.

We've given ourselves room here to find out more about how the system is working than we had in the past, and to report to you on a regular basis, on an annual basis, ``Here's what we find''. We have done that in the context of the whole system. We've done that in the context of grain.

The agency in this bill is going to be asked to report on exactly the kinds of complaints it is getting and what there is in the bill that helps it to resolve them or impinges on its ability to do so.

Finding the right balance is very difficult. I'll be the first to tell you that and to admit that. But if you do your best, listening to all of the parties, and then you give yourself these opportunities to know what's going on and to take a sounding periodically as you go through the piece every year, then you're in a position at least to make whatever correction you think you need to make for the overall efficiency of the system.

Finally, Mr. Chairman, you're not going to hear very much about this, because it falls to you to listen to only the things that people don't like. People rarely come and tell you, ``This is what we like about it''. Let me depart a little bit here. There's a lot that you're not going to hear about that I think is very good about this bill, that you might want to keep in mind as you ask yourself if the balance is here.

There were hundreds of pages of statutory material, most of them going back to the turn of the century in certain cases - regulating rail, treating rail as if it was in a nursery. There were filings of corporate documents. They couldn't lease anything; they couldn't transfer anything; they couldn't get on with normal business without filings.

It was not necessarily that anybody was going to make any decisions.

You had to ask yourself what all that administrative trivia was about, as you went through, section by section, the Railway Act, the Government of Canada Railway Act, and the Canadian National Railways Act.

Many times people have looked at this legislation in the past, and they have groaned, just as we did, and said, ``My goodness, isn't there something we can do to simplify and get rid of that?'' But by the time we dealt with all of the immediate concerns, we sort of always left all of that. So it stayed on the statute books for, lo, these many years.

This time, finally, I think we've made a really important step in starting to treat the railways like new businesses. Where all of that Railway Act provision was not needed, it has been repealed with this bill or the suggestion is made that you repeal it with this bill. Where there's a generic law that every other business can use, like the Canada Business Corporations Act or the Competition Act, rather than have the agency duplicate what has been going on under that generic piece of business legislation, we can recede and let the generic business legislation apply. I think that's a good thing that again is also part of whether we got the balance right, but it's something that you're not as likely to hear about.

.1100

Thank you very much for the opportunity, Mr. Chairman.

The Chairman: Thank you, Ms Greene. We appreciate your coming to the committee.

I see we have some questions, so we'll get to them.

Mr. Gouk: First I'd just like to go back for a supplemental on that business of subclauses 27(2) and 34(1).

If something is frivolous or vexatious, then obviously that shipper cannot prove significant prejudice. I cannot envision an example of something that has significant prejudice but is frivolous and vexatious or vice-versa.

So if you're giving the agency the power to reject something on the basis that it doesn't prove significant prejudice, I wonder why you also have to have ``frivolous or vexatious'' in there. You're double-coupling yourself.

Ms Greene: Frivolous and vexatious is really a cost that's applied after the fact because you've made a decision that somebody has delayed proceedings or brought an action that, after looking at all the facts of it, really just ended up costing people a whole pile of money. Frivolous and vexatious is the last thing you decide.

Let's say there's a case where the agency is making its decision. It's accepted the complaint, it has all the parties rounded up in front of it, it's having the hearing and it's listening to all the arguments made, and finally, after due process and giving everybody a chance to say everything, it says ``Okay, now we're going to go away and make our decision''.

Before they just jump in and grant relief, one of the things they have to consider in the decision is whether there is a significant interest that would not otherwise be protected if this relief were not granted. I can see how they could say no to that.

If we didn't have the power of the agency to then go forward and actually award costs for someone having unduly delayed the proceedings, they couldn't do it. They don't have any power to award costs except in the frivolous and vexatious

clause.

Having decided that something doesn't have a significant interest attached to it doesn't necessarily mean a person has brought an action that was frivolous in the sense that it attaches cost to it. That's how I would put it. Does that make it clear?

Mr. Gouk: Yes, now I understand your position.

I've just two other short questions, one that hopefully will have a simple yes or no answer. Does Transport Canada intend to hold off the issuance or offer for sale of shares of CN Rail until Bill C-101 is passed?

Ms Greene: No.

Mr. Gouk: The only other question I have is could you offer clarification on the point you discussed with me yesterday, for the record?

Ms Greene: Oh, yes. Thank you very much.

Mr. Gouk raised an issue yesterday about clause 140 dealing with discontinuance of service and transfer of rail lines, and I was mistaken in my answer. He asked: If a railway amends the plan, can it go out right away after that, if it has a sale on the hook, and sell the line, as opposed to going through the whole process of waiting for other expressions of interest to come forward and then and only then discontinuing its operation of the line?

I said no, and I was wrong; Mr. Gouk is right. The railway can. If it has a sale on the line, the law doesn't prevent the railway from going ahead with the sale, even if it's the sale of a segment that it really didn't think it was going to try to sever off and sell right away. That is, you wouldn't want to use the law that is meant to encourage these transfers so that the absolute opposite took place.

The reason I was mistaken is we went back and forth on this. We want maximum notice to be given to people to give them a chance to express their interest, but on the other hand, if something comes up that nobody could have foreseen, it would not be helpful if railways were prevented or stopped from going forward. So we went back and forth on how to do that and I just forgot for the second how we came down.

.1105

Mr. Gouk is right. We will not prevent a railway from selling where there is an offer, albeit an unforeseen offer, that has come to their attention.

[*Translation*]

Mr. Mercier (Blainville - Deux-Montagnes): My question concerns one of the proposed amendments to subclause 27(2) of the Bill. We are told that they want to amend the wording of the English version so as to reflect the intention stated

in the French version. Could you explain to me what is the difference between the two?

Ms Greene: Yes I understand, Mr. Mercier, and you are quite right. It is a mistake in translation. Mr. Young and the government wishes to propose an amendment to the Committee so as to correct that mistake.

Mr. Mercier: What is the difference in the meaning between the two versions as they are at present?

Ms Greene: There is no difference in meaning. It is a translation error.

Mr. Mercier: Therefore, the French version is the right one.

Ms Greene: Yes, that is correct.

Mr. Mercier: I would also like you to explain why trackage rights will not be extended to short lines.

You said that there were two different pieces of legislation concerning at least short lines, and I don't think that you gave any other reasons. Could you explain somewhat the position of short lines in the terms of trackage rights? I would like you to elaborate a little on the issue of trackage rights, which the legislation does not provide in the case of short lines.

Ms Greene: Most short lines don't want any changes to trackage rights. Most of them tell us that the relationship between railways and short lines is one of cooperation. Once the railway company decides to sell a section, it expects the short line to be its partner. Thus, they serve each other's mutual interests. The short line can guarantee continuation of service in circumstances where it would be dangerous if the service were to be discontinued. It can guarantee to the railway that traffic will be transferred. Continuation of traffic is very important for the railway. Therefore, the relationship is based on cooperation rather than direct competition.

In the case of the shippers, the benefits result not from a relationship based on direct competition, but rather from the fact that the short line costs are lower than those of the railways, and that service to shippers continues in circumstances where otherwise it would not have been possible. In most cases, the short lines don't have any problem with current legislative provisions.

Mr. Mercier: Therefore, not all the short lines agree on this point.

Ms Greene: There was only one which was against. We consulted all the short lines in Canada and even in the United States. There was only one which was not happy with the provision in the Bill.

[*English*]

Mr. Hubbard (Miramichi): Mr. Chairman, just an opportunity here. We're

thinking railways, I guess. *Chemin de fer* is the story of the day. But the bill also has a good number of clauses that change other acts in the transportation field. Would our witnesses have any comments to make on these other changes? Are there important points that should be brought to the attention of this committee in terms of safety acts, the St. Lawrence Seaway Act, etc.? There must be 40 or 50 listed clause by clause.

.1110

Ms Greene: Are you talking about the consequential amendments?

Mr. Hubbard: Yes.

Ms Greene: Yes, there are a goodly number of consequential amendments. I'm not certain that it's an unusual number for a bill of this size.

Most of the consequential amendments arise because of the repeal of large parts of the Railway Act. The Railway Act had some very arcane provisions with respect to a railway's ability to expropriate, with respect to how native land claims were going to be treated in the context of railways' old, turn-of-the-century powers to expropriate. There were many other acts that made reference to the Railway Act. The Railway Act has been on the books since the turn of the century, so when hundreds of pieces of legislation would be brought before Parliament, there were lots of cases where, in these pieces of legislation that were coming before Parliament, you had to be mindful of the phrases in the Railway Act. As soon as you talk about repealing the Railway Act, you automatically touch upon a large number of pieces of legislation, but mostly in a technical sense.

Did you have something in particular in mind?

Mr. Hubbard: No. The question is that we might be side-swiped by some other act that's being amended. The example you mentioned was the aboriginal communities across this country, who've had great sections of land affected by the Railway Acts.

Have you any comments about changes that are being put forward in the various clauses that might affect this committee in its deliberations in the next couple of weeks?

Ms Greene: We have been very careful, particularly with the item you cite, to maintain exactly the status quo with respect to aboriginal peoples' claims to land that at the turn of the century might have come under railway use. We've been very careful not to do that and have had, I think, good discussion with our colleagues in the department responsible for those matters in order to make sure we didn't.

If I can just cast my eye over this, you're asking me if there is any surprise in here.

Mr. Hubbard: Any surprises that we might encounter.

Ms Greene: I surely hope not. I think it's all -

The Chairman: We'll have to go through them one at a time.

Ms Greene: You're going to have to go through them one at a time. But I think it's okay.

The Chairman: And, Charles, we know that you're going to read through each and every one of them before we sit down and pass them all.

Ms Greene: There's nothing that we need to raise here.

Mr. Fontana: The bill talks about ``compensatory rates'' and then it talks a lot about ``fair and reasonable rates''. Should I take it that ``compensatory'' and ``fair and reasonable'' mean the same thing? As I understand it, you don't define ``compensatory rates'' anywhere in the bill. Is there a reason for that, or can we define it? Would it be difficult to define it? Or is it in fact supposed to mean ``fair and reasonable''?

Ms Greene: ``Compensatory'' has been around for a long time as a term that the regulator has used to decide whether or not a rate met the requirements of the act. It usually means variable costs, which, as you know, with respect to railways is not nearly all of the costs of a movement because railways are a big, capital-intensive business. But ``compensatory rate'' has come to be interpreted by the railway as meaning at least the variable costs of a movement.

Given that it has been around for a long time, there's probably no need to define it.

``Commercially fair and reasonable'' is a broader guidance to the agency. It applies to rates, but it also applies to levels of service. The guidance there is that if on the facts of a case - it might be a rate case or it might be a level-of-service case - you, agency, make up your mind that what you're about to impose on, let's say, a railway is commercially fair and reasonable.... It might not in every circumstance be exactly the same as ``variable costs'' - ``variable costs'' in the context of a competitive line rate, for example, which is a a rate action. It might in fact differ from how ``commercially fair and reasonable'' would be interpreted in relation to a more general complaint.

.1115

The other thing the government is proposing.... This has come up with us. We are going to propose that on that issue we should be clearer in the bill than we have been. As you know, the minister put forward - obviously not legislative language, as you will have to do that.... In an effort to show that we are still thinking about how we can address some of at least the technical concerns that have been made, one of the things the minister proposed to do was to address exactly that, to make it clear that ``commercially fair and reasonable'' and

``compensatory'' can be different in the right circumstances.

Mr. Fontana: I want to understand the hierarchy - or at least make it so people can understand it - of how the abandonment or discontinuance provisions will actually work from a railroad to every one that in fact will be offered for sale the abandoned piece.

I should point out that the minister covered off the non-VIA passenger rail subsidies in a news release and it's covered off here, that in fact this bill does something, but in the public interest the minister has other mechanisms to ensure that those subsidies will occur. I know that the VIA subsidies are not directly related here, but in terms of passenger rail service in this country, they're directly impacted - not only VIA, but any other passenger rail company that wants to set up in this country. They're captive because they don't have their own infrastructure. They have to buy or lease their own infrastructure from the main lines, or perhaps even short lines now, as more and more are created.

I want to understand how it is possible to ensure that passenger rail service, in whatever form exists today or will exist tomorrow, is going to be protected so that it will have access to main lines, to short lines, or to whatever is going to be required in order to ensure that we shall continue to have passenger rail service. Or is any passenger rail company going to have to essentially negotiate its own deal with everyone if it wants to have that service in place?

Moya, you might want to clarify for the committee members how the abandonment will work, because CN or CP would offer it to a short line, would offer it to a province, would offer it to a municipality, could offer it to private companies. You might want to cover off that mechanism and that process, because it's very important.

Ms Greene: Yes, it is, and we did advert to that.

When the railway company offers for sale the portion of track that VIA might be on, the advertisement must indicate to people that VIA is operating on the service. Therefore the people who are responding to the advertisement have to indicate whether or not they are prepared to take over the service with VIA Rail operating on it.

VIA Rail also has an opportunity to be one of the commercial participants. In fact, in the past VIA Rail has bought small segments of track to operate in its own right. So VIA Rail has an opportunity to participate and become an owner of a segment of track, rather than a renter, which is basically what it is now.

Also, if VIA Rail does not take up that opportunity, or does not win in that opportunity, or does not have sufficient resources to win in that opportunity, the opportunity is there for VIA to negotiate with whoever does win. That's where extending final offer arbitration to VIA is very important.

Mr. Fontana: What if in fact the municipality, because nobody else has picked

up, has put in an offer for that line and they are the successful bidder and they have no intention of keeping that line at all operational for anyone or anything but essentially want it for property value, because it happens to make an awful lot of sense in its municipality to convert it just to land? It's absolutely necessary that VIA or any other passenger company need that track in order to ensure a continuance of service from point A to point B. What are they supposed to do if in fact they are not successful?

.1120

Ms Greene: They would call you, because the -

Mr. Fontana: They do.

Ms Greene: Seriously, because before it goes to the municipality, it has to be offered to the federal government or to a provincial government. So if the continuation of VIA Rail service is jeopardized and the federal government feels that is just not in the public interest, then the other levels of government have an opportunity to move at that point so as to protect that public interest.

If on the other hand the line is sold to a private carrier, so it is still operated as a railroad and there is no problem, VIA service is there and for the future final offer arbitration is available to VIA, just as it will be available to commuter short lines. If it gets to a municipality it is only because no private sector operator wanted the line as a line; the federal government decided there was nothing that would cause it, in relation to an interprovincial or international line, to get involved; the province decided there was no interest that would cause it to get involved. Presumably the public interest in rail passenger services is such an interest that might, under the right circumstances, motivate it. And VIA can be a participant in that commercial exercise.

Mr. Fontana: Perhaps you could clarify something. Are you telling me there is a pecking order of offers from, let's say, CN or CP to the federal government -

Ms Greene: Yes.

Mr. Fontana: - and if there are no takers in the federal government it goes -

Ms Greene: Yes, there's a pecking order of offers.

Mr. Fontana: I thought you had indicated that it was an advertisement...that the obligation of the rail company is, first, to put their plan in place, so everybody knows three years in advance what their abandonment plan looks like.

Ms Greene: Yes.

Mr. Fontana: But when it comes to the point of actually wanting to sell off that piece, all they have to do is put an advertisement in place and wait for the players to come to the table.

Ms Greene: That's right.

Mr. Fontana: All the players.

Ms Greene: No, there is a cascading order. It works like this. They put the notice in the newspaper about a segment; that particular segment you are talking about. In sixty days private sector people who want to operate the line reply.

Mr. Fontana: You just said private sector.

Ms Greene: Just let me finish, because then it gets to government. It goes to the private sector first. Then there's the part for continued rail use. Then there's a period of five months to try to negotiate that deal. If there's no deal - that is, nobody in the private sector wants to operate it as a railroad - then it gets offered to the federal government. The federal government has fifteen days to say whether it wants to do anything in relation to that. Then there are an additional fifteen days, if the federal government says no, where it goes to a provincial government. And then it goes to a municipal government. So there is a cascading order.

Mr. Fontana: Where is that located?

Ms Greene: It's in subclause 145(2).

Mr. Fontana: That's good enough.

The Chairman: Mrs. Terrana.

Mrs. Terrana (Vancouver East): First of all, I would like to thank the department, because every time I ask for a briefing or for help, immediately I am given it. Thank you very much for your efficiency and your promptness.

Secondly, I'm still concerned about this aboriginal issue. In British Columbia we have a particular set-up, as you know, and I've been approached by several groups. You say the status quo has been left. Where do we say that? It's surely not in the CN sale. Is it shown anywhere?

Ms Greene: It's right here, Ms Terrana. I'm just looking for the clause. It mimics exactly what has been in the Railway Act, lo, these many years.

Mrs. Terrana: So it is in C-101?

Ms Greene: It's in clause 97.

Mrs. Terrana: I don't have the bill here, but thank you for that. I've already discussed it with Mr. Patenaude, but I think it's important that -

Ms Greene: Clause 97 is exactly what the position has been vis-à-vis the transfer of crown land for literally decades. We've kept it word for word, exactly the way it was.

Mrs. Terrana: Thank you.

.1125

The Chairman: Moya, I thank you and your officials very much. I guess it goes without saying that you will be available to this committee, that if we have a whole segment on grain or something else come forward and we're concerned about something, then we can bring you back for an hour or so, if need be.

Ms Greene: Yes. Thank you very much.

The Chairman: That's a great understanding that we have.

Colleagues, thank you for your participation. Our first set of witnesses will be a week from Monday.

This meeting stands adjourned.

Home | Important Notices

This is **Exhibit "J"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

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Signature

CANADA

House of Commons Debates

VOLUME 133 • NUMBER 265 • 1st SESSION • 35th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Monday, November 27, 1995

Speaker: The Honourable Gilbert Parent

[*English*]

Hon. Douglas Young (Minister of Transport, Lib.): Mr. Speaker, the application that the hon. member refers to is one that is being considered by the appropriate authorities in the United States.

The National Transportation Agency has the responsibility as it relates to any activities by the two airlines in Canada. It would be our intention that whichever direction those two airlines desire to take in terms of merging their operations, they will have to respect both the letter and the spirit of the law in Canada.

* * *

FISHERIES

Mr. John Duncan (North Island—Powell River, Ref.): Mr. Speaker, the Nisga'a land claims negotiations in northwest British Columbia apparently include a Nass River aboriginal commercial fishery allocation.

This flies in the face of the five aboriginal fisheries cases currently being argued before the Supreme Court. The provincial aboriginal affairs minister in B.C. has stated that whatever the results of these cases, commercial fishing must not be entrenched in B.C. treaties.

What continues to motivate the Minister of Fisheries and Oceans to promote inclusion of a racially based commercial fishery in B.C. treaties?

Hon. Brian Tobin (Minister of Fisheries and Oceans, Lib.): Mr. Speaker, it is quite clear that the only thing that is racially based is the nature of the questions being asked in the House of Commons.

Some hon. members: Oh, oh.

The Speaker: Both in the questions and in the answers sometimes we abut on what is parliamentarily acceptable. I would encourage all hon. members when asking questions and responding to be quite judicious in their questions and in their answers.

This concludes question period.

ROUTINE PROCEEDINGS

[*Translation*]

GOVERNMENT RESPONSE TO PETITIONS

Mr. Peter Milliken (Parliamentary Secretary to Leader of the Government in the House of Commons, Lib.): Mr. Speaker, pursuant to Standing Order 36(8), I have the honour to table, in both official languages, the government's response to 14 petitions.

* * *

[*English*]

COMMITTEES OF THE HOUSE

TRANSPORT

Mr. Stan Keyes (Hamilton West, Lib.): Mr. Speaker, I have the honour to present, in both official languages, the fifth report of the Standing Committee on Transport on Bill C–101, the Canada Transportation Act.

The primary aim of the bill is to encourage the revitalization of the rail industry by reducing the regulatory burden facing that sector.

The bill was referred to the committee after first reading, pursuant to Standing Order 73(1). This new procedure allowed members to participate more fully in the legislative process and make important and constructive amendments to the bill.

The committee acknowledges with gratitude the co–operation and support of all those who contributed to our study of Bill C–101. We extend our thanks to all the witnesses who appeared, as well as those who made written submissions and shared their knowledge and insight with us.

• (1505)

In the process of reviewing this bill, the committee heard 55 hours of testimony from 154 witnesses, representing 85 stakeholder groups and organizations.

I would like to give special thanks to the clerk of the committee, the researchers, interpreters and the support staff of the committees and parliamentary associations directorate. I would also like to thank my fellow committee members for patiently proceeding through hours of testimony in order to ensure the effective evaluation of Bill C–101.

PROCEDURE AND HOUSE AFFAIRS

Mr. Peter Milliken (Parliamentary Secretary to Leader of the Government in the House of Commons, Lib.): Mr. Speaker, I have the honour to present the 103rd report of the Standing Committee on Procedure and House Affairs regarding the membership and associate membership of standing committees.

If the House gives its consent, I intend to move concurrence in the 103rd report later this day.

* * *

CANADIAN WITHDRAWAL FROM NAFTA ACT

Mr. Nelson Riis (Kamloops, NDP) moved for leave to introduce Bill C–359, an act to require the withdrawal of Canada from the North American Free Trade Agreement.

This is **Exhibit "K"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 22, 2014

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Signature

CANADA

House of Commons Debates

VOLUME 133 • NUMBER 009 • 2nd SESSION • 35th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Friday, March 8, 1996

Speaker: The Honourable Gilbert Parent

contribute so much to every community and who bind the country together through the kind of work which they do in the family, in the community, in the business world, in the political world, as homemakers, as truck drivers, whatever profession or work the women are doing. I want to congratulate every woman who has made a substantial contribution historically to the country.

In terms of the federal government's commitment to women, about which the minister spoke, I have no doubt that in a rhetorical sense the government is committed to the advancement of women. However, the proof of what one says is really in what one does.

In relation to the budget, which the secretary of state presented in such favourable terms, I would like to know how the ending of a national child care program and reducing grants to women's organizations by 5 per cent, which already work on very limited funds without core funding, contributes to the equality of women. How does a reduction in provincial and territorial federal transfers, which means a reduction in social programs, contribute to the advancement of women? How does the federal government's refusal to pay the outstanding amount of pay equity that is due to women working for the federal public service—some 80,000 women are owed $1.5 billion, as has been directed by the human rights commission—contribute to the advancement of women. Finally, how in this budget, with a lack of focus on jobs, can this government be seen to be furthering the equality of women?

Similarly, I would like to know how the changes to the unemployment insurance system and the lack of benefits for women in many areas of this country, such as seasonal workers and part time workers, can in any way further the equality of women.

With respect to the budget the government certainly deserves to receive a D minus on furthering equality for women. The Secretary of State for the Status of Women must deal openly and honestly with women when she is talking about her general commitment.

We still, because of the economic policies of this and prior governments, are dealing with an increasing gap between the rich and the poor. One in five children in this country live in poverty. We have a long way to go.

On this International Women's Day I would challenge the secretary of state responsible for women to seriously address the issues which I have raised with respect to child care and facilitating independence for women and families. I would seriously challenge her to deal with the issue of violence against women, pornography and the inequities which still remain with the huge wage gaps between women and men in most non-unionized sectors.

Finally, I hope that on International Women's Day the government and all members of the House will join me in celebrating the women of this country and their work and will commit to working for equality, in all fields, for women in Canada and abroad.

• (1240)

WITNESS PROTECTION PROGRAM ACT

Hon. Alfonso Gagliano (for Leader of the Government in the House of Commons and Solicitor General of Canada, Lib.) moved for leave to introduce a Bill C-13, an act to provide for the establishment and operation of a program to enable certain persons to receive protection in relation to certain inquiries, investigations or prosecutions.

He said: Mr. Speaker, I wish to state that this bill is in the same form as Bill C-78 of the first session of the 35th Parliament at the time of prorogation. I therefore request that it be reinstated as provided in the special order adopted on March 4, 1996.

(Motions deemed adopted, bill read the first time and printed.)

The Acting Speaker (Mr. Kilger): The Chair is satisfied that this bill is in the same form as Bill C-78 was at the time of prorogation of the first session of the 35th Parliament.

* * *

CANADA TRANSPORTATION ACT

Hon. Alfonso Gagliano (for Minister of Transport) moved for leave to introduce Bill C-14, an act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act 1987 and the Railway Act, and to amend or repeal other acts as a consequence thereof.

He said: Mr. Speaker, I wish to state that this bill is in the same form as Bill C-101 of the first session of the 35th Parliament at the time of prorogation. I therefore request that it be reinstated as provided in the special order adopted on March 4, 1996.

(Motions deemed adopted, bill read the first time and printed.)

[*Translation*]

The Acting Speaker (Mr. Kilger): The Chair is satisfied that this bill is in the same form as Bill C-101 was at the time of prorogation of the first session of the 35th legislature.

Therefore, in accordance with the motion passed Monday, March 4, 1996, the bill is deemed to have been studied by the Standing Committee on Transport and reported with amendments.

GILLESPIE REPORTING SERVICES, A Division of 709387 Ontario Inc., 200-130 Slater St. Ottawa Ontario K1P 6E2

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Examination No. 14-0812 Court File No. A-167-14

FEDERAL COURT OF APPEAL

B E T W E E N:

DR. GABOR LUKACS

APPLICANT

- and -

CANADIAN TRANSPORTATION AGENCY

RESPONDENT

****

CROSS-EXAMINATION OF SIMONA SASOVA ON HER AFFIDAVIT sworn May 20th, 2014, pursuant to an appointment made on consent of the parties, to be reported by Gillespie Reporting Services, on the 4th day of September, 2014, commencing at the hour of 10:30 in the forenoon.

****

APPEARANCES:

Dr. Gabor Lukacs, for the Applicant

Mr. John Dodsworth, for the Respondent

This Cross-Examination was digitally recorded by Gillespie Reporting Services at Ottawa, Ontario, having been duly appointed for the purpose.

(i)

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EXHIBITS

DATE TRANSCRIPT ORDERED: September 4, 2014

DATE TRANSCRIPT COMPLETED: September 25, 2014

SIMONA SASOVA, AFFIRMED:

CROSS-EXAMINATION BY DR. GABOR LUKACS:

1. Q. Ms. Sasova, I understand that on May 20th, 2014, you swore an Affidavit.

A. That is correct.

DR. LUKACS: Let's mark that Affidavit as Exhibit No. 1.

EXHIBIT NO. 1: Affidavit of Simona Sasova, sworn May 20, 2014.

DR. LUKACS:

2. Q. I understand that you received a Direction to Attend dated June 6th, 2014.

A. Yes.

DR. LUKACS: Let's mark that as Exhibit No. 2.

EXHIBIT NO. 2: Direction to Attend dated June 6, 2014.

DR. LUKACS:

3. Q. And I understand that you received a Direction to Attend dated August 21st, 2014.

A. Yes.

DR. LUKACS: Let's mark that as Exhibit 3.

EXHIBIT NO. 3: Direction to Attend dated August 21, 2014.

DR. LUKACS:

4. Q. For how long have you been working with the

Canadian Transportation Agency and in what roles?

A. I started in December 2010 so it has been three and a half years or a little bit more, and since December when I started, 2010, I work as a manager of enforcement.

5. Q. So I understand that you are designated as an enforcement officer.

A. That is correct, and I have been designated since December 2010.

6. Q. Who provided you with that designation?

A. It is the Chair. It is the Agency that provides the designation.

7. Q. The Chair of the Agency?

A. You asked me this question -- yes.

8. Q. Who else has such a designation at the Agency?

A. There are five more--well under--in my section there are five more officers. They have that designation and I believe there is some other staff that has been designated as well in the Agency.

9. Q. In your unit who are those other enforcement officers?

A. They are my staff: enforcement officers, senior investigators that work on the programs that I supervise, that I oversee.

10. Q. So, for example, Cordoza, Daniel, would be one

of them?

A. I cannot tell you because he does not work in my section. I really don't know.

11. Q. Okay, so who are the people that work in your section?

A. You want the names of those people?

12. Q. Yes.

A. Okay, it is Jeannette Anderson, Marla LeBlanc, Jean-Michel Gagnon, Gerrianne Ross and Daniel McKenna. There was also an officer that has left the Agency since but he was involved in this and his name was Ishani Cooray but he is now gone.

13. Q. Who is your immediate supervisor?

A. It is Carole Girard.

14. Q. What is the chain of command? To whom does Carole Girard report?

A. She reports to Ghislain Blanchard.

15. Q. And further up the chain of command?

A. That would be then the Chair.

16. Q. Are you a current or past member of the Canadian Transportation Agency?

A. What do you mean member?

17. Q. Member as appointed by the Governor-in-Council.

A. Oh, no. Oh, god, no, of course I am not a

member. No.

18. Q. Thank you. In carrying out your duties as an enforcement officer and manager of the enforcement division are you bound by the decisions made by members of the Agency?

A. As the enforcement officer I enforce the Canadian Transportation Act and regulations, and I haven't had the decision--yes, I consider decisions, definitely. I work--it is hard to answer because I haven't had a case where I would have to rely strictly on a decision. However decisions are--I am bound by decisions, yes.

19. Q. Thank you. In paragraph 1 of your Affidavit you say that you have "personal knowledge of the matter...deposed" in your Affidavit. Is this correct?

A. Say again.

20. Q. In paragraph 1 of your Affidavit you state that you have--

A. Oh, yes.

21. Q. I am quoting, "personal knowledge of the matters...deposed" in your Affidavit.

A. Yes, of course. Yes.

22. Q. In paragraph 5 of your Affidavit you refer to the Canadian Transportation Act and state that it, and I am quoting, "...introduced, among other things, more..." efficient "... enforcement powers for the Canadian

Transportation Agency across all modes of transportation, including the ability to—"

A. Levy fines.

23. Q. "—levy fines...". So just to be clear it said, "more effective enforcement powers".

A. Uh-huh.

24. Q. Do you have personal knowledge of this?

A. Of what; of more effective enforcement powers or what? I am sorry I don't understand your question.

25. Q. Of what you are stating here. You are stating here that the Canada Transportation Act "...introduced, among other things, more effective enforcement powers...". Do you have personal knowledge of this fact?

A. That the Canadian Transportation Agency--sorry, that the Canada Transportation Act--I really don't know where you are going with this question. I am sorry I cannot answer that.

If I have a personal knowledge? Well I have a personal knowledge. I understand that the AMPs were introduced and yes, they are more effective and that is a known fact. I don't know what you are trying to say.

26. Q. Okay. What do you mean by "more effective enforcement powers"?

A. Well the AMP program, AMP system, allows for monetary penalties to be issued instead of let's say, you

know, just giving a ticket--I would just compare it to anything else--which is more effective to reach compliance.

27. Q. More effective than what?

A. More effective than just issuing--as I said just let's say issuing a ticket or giving a verbal reprimand or anything. When there is a monetary penalty involved the two -- it is more effective to enforce and to reach compliance.

28. Q. It is more effective in your opinion?

A. No, in my experience.

29. Q. In your experience what--we are talking about an Act that came out in 1996. So do you have any experience about the times before AMPs were in force?

A. I have experience from other--yes, from other positions that I have held where there were no AMPs.

30. Q. Other positions with the Agency?

A. No.

31. Q. Can you tell me what was the situation before the Canada Transportation Act was enacted?

A. What was the situation before the Canada Transportation Act was enacted?

32. Q. Yes.

MR. DODSWORTH: Perhaps you could clarify that.

THE WITNESS: Yes, I am not sure what--

DR. LUKACS: Sure, sure.

33. Q. My question is: What enforcement tools and powers were available before the Canada Transportation Act was enacted?

A. Well there were--the enforcement to my knowledge--to my knowledge the history of the enforcement section since I worked was based--was actually developed when the AMP program started.

MR. DODSWORTH: Can I say anything?

DR. LUKACS: No, no, counsel. This is a cross-examination. I am sorry--

MR. DODSWORTH: Okay.

THE WITNESS: Okay, fine. I just--are you trying--whether I have personal knowledge of-- when I have personal knowledge which was referred in paragraph 1--I just want to clarify this--is to what your complaint was. I am sorry, what your complaint was, yes.

DR. LUKACS:

34. Q. I am sorry, I asked question--

A. Yes.

35. Q. --in this setting I am asking you questions and I ask you to answer those questions. This is not a mediation when we discuss the contents of the affidavit.

A. That is fine. Go ahead, yes.

36. Q. So my question was whether you have knowledge

of what enforcement tools and powers were available before the Canada Transportation Act was enacted.

A. I have very--I have little knowledge. There was--it was--there were no tools, really. The enforcement section started when the Act--when the AMPs program had started.

37. Q. So AMP--

A. So I don't think so anything has been--so what I want to say with this: I don't think so there was much enforcement being done before that as far as I know, and that is only my knowledge of the section's history.

38. Q. And just for clarity of the court reading this transcript AMP means…?

A. Administrative Monetary Penalty.

39. Q. Administrative Monetary Penalty, so to your knowledge before this provision was made there was not much enforcement going on. Is that correct?

A. I don't even think that the enforcement section existed. I really cannot go further than that or in what capacity it existed.

40. Q. As an enforcement officer do you have the power to make orders, for example to order an advertiser to change its website?

A. Okay, it is not an order by the Agency. What I have a power it is to enforce the Act and regulations.

41. Q. So you cannot make an order directing an advertiser to change its website, can you?

A. Once again I can ask them to do it and enforce it but it is not an order of the Agency. It is not in the same sense.

42. Q. Thank you. Would you please look at Exhibit F to your Affidavit?

A. All right.

43. Q. Would you please explain what is this exhibit? What is Exhibit F to your Affidavit?

A. What I am looking at is--I believe what you had. It is your email between you and Expedia.

44. Q. Exhibit F? That is not what I am seeing here.

A. What do I have here?

MR. DODSWORTH: To clarify, February 24th, 2014, Exhibit F?

DR. LUKACS: That is not what I am seeing in the copy I have here served upon me, counsel. If you look at paragraph 8 of Ms. Sasova's Affidavit, it is being identified there.

THE WITNESS: Which paragraph?

DR. LUKACS: Paragraph 8.

THE WITNESS: Okay. Oh, it is a note, an interpretation note.

DR. LUKACS: Uh-huh.

THE WITNESS: Okay, it is an interpretation note. Okay, I have the interpretation--it is the interpretation note, yes?

DR. LUKACS:

45. Q. So what is this document? Can you explain what it is?

A. Oh, yes, sure. An interpretation note has been issued past the implementation of the new regulations with regards to air service price advertising and it has--as in the title "interpretation". Okay, it interprets the legislation to facilitate those affected--so in this case it would advertisers how to reach compliance and what changes need to be done and in what manner so that they understand and can become compliant faster and refer to it for anybody who wants to advertise in the future and so forth.

46. Q. Who wrote this interpretation note?

A. This was written by tariff division.

47. Q. The tariff division?

A. That is right, in consultation with us.

48. Q. Is this interpretation note binding upon the Agency or upon you?

A. If it is, sorry, binding?

49. Q. Is it binding?

A. It is a guidance document. We refer to it

when we enforce or when we instruct, rather when we instruct how to become compliant.

50. Q. But is it a binding document?

A. You mean what is inside would be--I am bound by this, what is inside?

51. Q. Yes, yes. Are you--

A. No.

52. Q. -or the Agency bound by it?

A. I don't know when you say "Agency". I am talking about myself as an enforcement officer and I refer to it. It is binding word by word, is that what you are asking? Every word, whether it is binding?

53. Q. Yes.

A. No, these are concepts and, you know, we work with--it is strictly a guidance, an interpretation. We interpret it and this is not a law and this not an order.

54. Q. Can you please look now to page 8 of the interpretation note?

A. Sure, yes.

55. Q. Do you agree that a total price of an air service is made up of two categories of costs: one called air transportation charges, on the one hand, and taxes, fees and charges on the other hand?

A. Correct.

56. Q. Can you explain in plain words what air

transportation charges stand for?

A. Air transportation charges are any other charges than those that are third party charges.

57. Q. Then what are third party charges?

A. It is everything that is remit to a third party: taxes, fees, airport fees, anything that is remit that it does not stay with the carrier, that is remit to a third party.

58. Q. Uh-huh.

A. To advertiser, not another carrier, advertiser.

59. Q. Can an advertiser refer to air transportation charges using a different heading?

A. To air transportation charges a different heading? What we--what is--the regulation calls that if the air transportation--air transportation charges are mentioned, they must appear under air transportation charges heading.

60. Q. So if they appear at all then they cannot put a different name for it, correct?

A. That is correct.

61. Q. Can you explain the meaning of base fare and fuel surcharges?

A. Well base fare would be--and I am not an expert in what base fare is, but base fare would be a

carrier fare or a carrier charge and fuel surcharge. It is what is, you know, it is charges for fuel. That is all what I can--as I said I am not an expert in those, what exactly, you know, comprises what.

62. Q. Do you agree that fuel surcharges belongs to the category of air transportation charges?

A. Of course, yes.

63. Q. Do you agree that base fare and fuel surcharges must be grouped together under the heading air transportation charges on a website?

A. Yes and no. If it is broken down, then yes. If is not broken down they then don't. They don't have to be grouped. They don't need to appear so I don't know whether they are grouped or not. They don't have to be mentioned.

64. Q. But if they are mentioned at all then they have to be grouped together and they have to--

A. No, they have to be broken down. They don't have to be grouped. They have to be broken down and under the heading, but the heading does not need to have a total.

65. Q. But if the heading does have a total then that total must include fuel surcharges. Do you agree with me?

A. Okay, let's say that the airline would put air transportation charges in the total and would not break it

down, I don't know if the fuel surcharge is there. I really cannot tell you that if there is a fuel surcharge--if there is a--if they break it down and they define one of the charges to be a fuel surcharge it has to be under the heading air transportation charges.

66. Q. But if they put a total for air transportation charges that total must include in it fuel surcharges if fuel surcharges appears, correct?

A. No, no, because what if there is no fuel surcharge. There are some tickets that they are not--there is no fuel surcharges so I can ask them to include it there.

67. Q. Ms. Sasova, my question is if fuel surcharges appear--

A. Okay, if they listed it. That is what you mean.

68. Q. If they list fuel surcharges--

A. Yes.

69. Q. --and they also list a total for air transportation charges, that total for air transportation charges must include also the amount listed under fuel surcharges, correct?

A. If they wrote a total and then underneath a fuel surcharge this would have to be--it should be. I don't have a legislation for it but it should be. That

makes sense that it would be, but as I said the legislation does not call for having a total and then those charges that are underneath must equal the total. It does not. We don't have anything. I don't have any cover for that.

70. Q. I believe one of the items printed out there is a decision in Scandinavian Airlines.

A. Yes.

71. Q. This is number 8-A-2014.

A. Yes, yes.

DR. LUKACS: Let's mark it as Exhibit 4.

THE WITNESS: Yes.

EXHIBIT NO. 4: *Re: Scandinavian Airlines System,* Decision No. 8-A-2014 of the Canadian Transportation Agency.

DR. LUKACS:

72. Q. Let's look at paragraph 55.

A. All right.

73. Q. Are you familiar with this decision?

A. Yes, I am.

74. Q. Was the enforcement division involved in this case?

A. No. Well, not in the decision, not in the decision.

75. Q. But in the case itself.

A. Yes, the case. Yes, of course. Well we were involved until the warning letter was issued to Scandinavian and then there was no more involvement.

76. Q. Did the enforcement division not make submissions to the Agency on this? I recall some reference to it. Am I mistaken; on the first page?

A. Enforcement. There was involvement yeah. There was an answering of what they had submitted, correct, but at the end of the decision no there was none.

77. Q. So the decision was made by the Agency, by the members of the Agency.

A. Correct, yes.

78. Q. Have you read paragraphs 54 and 55 of the decision?

A. Yes. Yes, I have read the decision but I have to look at it. Just a moment.

MR. DODSWORTH: Do you have it?

THE WITNESS: I have it here.

MR. DODSWORTH: You have it, eh.

THE WITNESS: Yes, just a second here.

MR. DODSWORTH: Oh, I am sorry, I have it here.

THE WITNESS: Yes.

DR. LUKACS:

79. Q. Can you please explain the meaning of the following? I am quoting:

"The fare is an air transportation charge, as is the fuel surcharge, yet the two charges are not grouped together on SAS's Web site. Further, these two charges are not grouped together under the heading "Air Transportation Charges" as required by the ATR. The ATR are clear that the appropriate headings are to be used and that the relevant charges are to be found under the appropriate headings".

A. Yes.

80. Q. Can you explain what the issue was here?

A. Okay. Well Scandinavian Airlines had everything grouped together so what they needed, they needed to separate. They couldn't have, you know, the air transportation charges and taxes, fees and charges in the one breakdown. These had to be separate. So what they meant if you are--if you want to display air transportation charges they have to be separate from taxes, fees and charges and the fuel surcharges cannot be under taxes, fees and charges--sorry--cannot be, yes, under taxes, fees and charges. It has to be in air transportation charges so you need to group those together and you need to group taxes, fees and charges together.

This was kind of a case where they put everything together.

81. Q. Do you agree that the Agency ruled that fuel surcharges cannot appear under its own separate heading?

A. Well reading this it says that they have to use appropriate heading but they are not saying that a fuel surcharge--you see there that a fuel surcharge cannot be on its own as a heading. I just read that the appropriate headings must be used and they have to be grouped separately.

82. Q. And what is the appropriate heading under which fuel surcharge must appear?

A. It will be air transportation charges.

83. Q. Let's now go back to Exhibit F of your Affidavit. I would like you to look at page 12, the second paragraph. It says:

"In addition, the Agency may order a person to make the changes necessary to conform to Part V.1 of the ATR to bring about compliance".

A. Okay.

84. Q. Who can issue such orders?

A. The Agency may order, the Agency may order.

85. Q. So it is not you?

A. No, I don't need to order. I cannot order.

86. Q. It will be members of the Agency?

A. Members, yes.

87. Q. Let's now look at page 27. I see here a table

of penalty amounts.

A. Yes.

88. Q. What does level mean in this context?

A. In the--okay, the level, it is based on severity of a contravention really.

89. Q. Are these penalty tables found in the Canadian Transportation Agency Designated Provisions Regulations?

A. Yes and no. The level is not written 2, 3, 4. However based on the penalty amount the level can be implied from there.

90. Q. So are you telling me that the Designated Provisions Regulations contain those levels with respect to first violation, second violation and so on?

A. It says up to.

91. Q. My question is about first violation, second violation and so on.

A. So for example in designated provisions you would have a violation and then you would have an amount and that amount would give you the level. So for example 25,000 it is associated with levels 4 and 5. So if you look at the provisions and you see 25,000 that would indicate it is either level 4 or 5.

92. Q. Level 4 and 5, are these words that one would find in the Designated Provisions Regulations, Ms. Sasova?

A. Say again.

93. Q. I am going to look at now the Designated Provisions Regulations, Exhibit D to your Affidavit. The word "level", does it appear there?

A. I think it just says maximum penalty. The level, really the word doesn't appear there. I don't think so.

94. Q. So is there anything in the designated regulations, provisions regulations that speak about first violation, second violation, and so on and so forth.

A. The table, no. It says "minimum" and "maximum", I think, or just "maximum". Let me get it. Just a moment. Here. All right, yes, it just says "maximum", sorry, and it says "corporation". That's why I couldn't recall. Maximum for corporation or the individual, depending on--yes.

95. Q. So do you agree that there is nothing in the regulations about first violation, second violation or about levels?

A. Yes, for the first, second. Yes, correct.

96. Q. Who created this penalty table?

A. This was created--it was actually enforcement--the enforcement section. Now I don't recall for all of those but I can tell you for the latest. It was created and approved by the Agency, by the Chair ultimately.

97. Q. So under what authority this penalty table was

created?

A. I don't know what authority that would be. The Agency's authority to create--

MR. DODSWORTH: I don't know that Ms. Sasova is best placed to answer a question of that sort.

THE WITNESS: I really don't know.

DR. LUKACS: Counsel, Ms. Sasova put this document as an exhibit. This is a matter related to enforcement specifically. Ms. Sasova is the manager of the enforcement division. So I am struggling to find anybody more appropriate to answer this question than the person who daily supposedly applies those provisions.

THE WITNESS: Yes but --

MR. DODSWORTH: Well, as long as you don't ask for a legal opinion.

DR. LUKACS: I don't ask for a legal opinion. I asked whether--under what authority these provisions were made. It is not a legal opinion.

My question is that given that Ms. Sasova provided detailed explanation of applicable legislation to her role, I am asking under what authority these tables were made.

98. Q. If you don't know that is perfectly fine. You can state that. I would just like to know whether you know under what authority.

A. Well, I don't know because you ask about authority. I don't know if there is authority. That is what I don't know. How it is made I can tell you because those are developed internally and they were developed internally for others. This is not the only provisions that we enforce, and based on what we had these were developed internally and run through internal process of approval before we were able to apply them.

99. Q. Let me rephrase the question. You have provided as Exhibit C to your Affidavit a lengthy excerpt from the Canada Transportation Act which outlines enforcement.

A. Okay.

100. Q. Are you aware of any provision in that exhibit to your Affidavit which would authorize making such penalty tables?

A. No, from my head, no I don't. I really--I would have to go through it.

101. Q. Well take your time. This is an exhibit to your Affidavit.

A. There is definitely--no, I won't say anything. You have said paragraph 3. I am sorry, what did you refer to?

102. Q. I asked you concerning Exhibit C to your Affidavit.

A. Okay, once again, I just have to go see.

MR. DODSWORTH: He is referring to the legislation.

THE WITNESS: Oh, the legislation; regarding a reference, yes.

MR. DODSWORTH: Just to be clear that is what you are referring to, Mr. Lukacs?

DR. LUKACS: Yes, I am referring to Part VI of the Canada Transportation Act, being Exhibit C to the Affidavit of Ms. Sasova.

THE WITNESS: Okay, what is not subject to advertising? Oh. So the Agency may, by regulation, designate the provision and prescribe the penalty.

DR. LUKACS:

103. Q. So those--that is the regulations we are talking about.

A. Regulation-making powers, yes.

104. Q. Yes, but we said it--in the regulation you just said there was nothing about levels or first, second and third offences.

A. Well it goes, like, prescribed amount but the amount shall not exceed, you know, so this is it.

105. Q. Which paragraph are you talking about, again?

A. (b), (b), 177.(1)(b), prescribed amount. So you have the prescribed amount.

106. Q. It says, "The Agency may, by regulation".
A. Yes.
107. Q. It has to be done by regulation.
A. Uh-huh.
108. Q. So are you telling me those tables are regulations made by the Agency?
A. I really don't know what you are saying. They can--the Agency may, by regulation, designate any provision of the Act--okay, so there will be designated provision and assign a penalty.
109. Q. And it has done so?
A. That is all, yes.
110. Q. And it has set maximum penalties which we have seen?
A. Yes, yes. The tables--
111. Q. My question is: those penalty tables, is there anything here that authorizes the Agency to make those penalty tables and--do you believe those penalty tables were made under Section 177? Is that what you are saying?
A. I cannot really answer that. I don't know. I don't know where. I don't know. I know that we refer--when we were designating--designing the tables, and I am saying not only for this provision, for any, what is prescribed and what is the maximum penalty and you know

what the levels are, are done internally. That is all.

112. Q. Okay, thank you. Let's now look at paragraph 10 of your Affidavit.

A. Yes.

113. Q. You say you refer here to "the Designated Enforcement Officer"?

A. Uh-huh.

114. Q. Can you please clarify who was this person?

A. I think the designated enforcement officer is used here as a position, the designated. There is not a particular one. I have done some. Yannick has done some. Yes, that would be probably it at that time.

115. Q. But this is your Affidavit.

A. I understand, yes and I am explaining the designated officer is used as a title. It wasn't, you know--I don't know--administrative officer. It was the designated enforcement officer.

116. Q. You state here that an online compliance verification was conducted.

A. Yes.

117. Q. Who initiated this enforcement campaign?

A. I did.

118. Q. You personally?

A. The particular one, in the particular one?

119. Q. The one referred to in paragraph 10.

A. Yes. Well we had--compliance verification is one of the parts of the program, of the enforcement program, so on a daily basis--I would say on a regular basis we do compliance verifications. So this was one of them.

120. Q. Uh-huh.

A. Oh, but if you are talking about the Expedia, that was done by someone else.

121. Q. No, I am referring to paragraph 10 of your Affidavit.

A. Uh-huh. Oh, I see, okay.

122. Q. In paragraph 10 you refer to warning letters and administrative monetary penalties. What is the difference between the two?

A. A warning letter, it is a first step in a penalty process so that would be the first contravention. Depending on the level, if it is level 1, 2, 3, 4, it starts with a warning letter and level 5, those start with a penalty. So when I am talking about penalty that means it is either a second contravention or a first contravention for a level 5.

123. Q. Can you point to any provision of the Canada Transportation Act or any regulation that speaks about the power of a designated enforcement officer to issue a warning letter?

A. To issue a warning letter. It is to apply penalty. We have a provision that talks about to apply penalty where penalties are, as I said before, up to a certain and can start with a warning letter; to my understanding.

124. Q. Can you tell me--show me any place in the statute where a warning letter is referred to as a penalty?

A. I don't think so.

125. Q. So would you agree with me that in terms of the Act penalty means a monetary penalty?

A. In the Act, monetary penalty--interpretation. It is up to--it starts--states up to, a monetary penalty up to a certain amount, yes.

126. Q. So a penalty within the meaning of the Canada Transportation Act is a monetary penalty.

A. I don't know.

127. Q. You don't know. So let me then get back to this question--

A. I don't know about interpretation. I could have asked. You know, if I was going to determine something like that I probably would ask for a legal opinion.

128. Q. So my question is: Under what authority were you issuing and you issue warning letters? What gives you

the authority to issue warning letters? The reason I am asking, I would like it to be clear, is I have no doubt that you can issue monetary penalties.

A. Yes.

129. Q. That is clearly in the Act. My question is: What gives you any authority to issue a warning letter?

A. I would say it is the same authority as issuing administrative monetary penalties.

130. Q. The same authority?

A. Yes.

131. Q. Now what happens if you send someone a warning letter and they disagree with your findings and conclusions?

A. They can apply for review with the Agency.

132. Q. What gives the Agency the power to review the findings of a designated officer, enforcement officer?

A. Say again.

133. Q. What gives the Agency the power to review the findings of a designated enforcement officer?

A. The Agency has power to review. I don't know. I don't know.

MR. DODSWORTH: Is this relevant to the particular appeal?

THE WITNESS: I have no idea.

DR. LUKACS: Counsel, in my submission it is.

Essentially in my submission there is a complete chaos in terms of enforcement and if you will bear with me for one more question you will see that there is a very troubling situation we have here.

MR. DODSWORTH: But you haven't--I mean you have brought an appeal regarding Expedia and this--you are making very broad questions about our entire enforcement to it.

THE WITNESS: Why didn't you ask that? I mean, you know, I would have prepared. I really don't know what authority, plus I just want to--I want to refer when you said--your last question.

DR. LUKACS:

134. Q. I am sorry, you have provided answers to questions so why don't we stick to where we are?

Counsel, just to clarify, this is not an appeal. It is an application for judicial review and the issue here is essentially how my complaints about non-compliance are being dealt with. So in my submission, there is essential chaos here--

MR. DODSWORTH: No, your judicial review is about this particular instance of non-enforcement pardon me, of your allegation of Expedia's non-compliance with air transportation regulations.

And I think your questions are very broad and

outside the bounds of that judicial review application. *O*

THE WITNESS: And I don't know. I cannot answer you. I don't know.

DR. LUKACS: Okay.

135. Q. Section 180.3 of the Canada Transportation Act, and it is part of Exhibit C to your Affidavit, Ms. Sasova, it states that:

"A person who is served with a notice of violation and who wishes to have the facts of the alleged contravention or the amount of the penalty reviewed shall, on or before the date specified in the notice or within any further time that the Tribunal on application may allow, file a written request for a review with the Tribunal at the address set out in the notice".

A. Yes, that's 180.3, you said?

136. Q. Yes.

A. "A person who is served with a notice of violation", yes. Okay, yes, they can appeal at TATC, yes, correct.

137. Q. Yes. Now let's go back to Section 176.1.

A. Okay.

138. Q. "For the purposes of sections 180.1 to 180.7, 'Tribunal' means the Transportation Appeal Tribunal of Canada established by subsection 2(1) of the

Transportation Appeal Tribunal of Canada Act".

A. Yes.

139. Q. Do you agree with me that the body to review violations is not the Agency but the Transportation Appeal Tribunal?

A. No, I don't agree.

MR. DODSWORTH: Mr. Lukacs, again, these are provisions of the Act. If you have arguments about the application of the Act you are free to make those submissions in the judicial review application, and I don't see any point to the questioning of Ms. Sasova about that. *O*

DR. LUKACS: Okay.

140. Q. When you issue a warning letter and an advertiser disagrees with it--

A. Yes.

141. Q. --you said it then goes to the Agency, correct?

A. Correct.

142. Q. Do members of the Agency always agree with the designated enforcement officers on reviews of warnings?

A. I cannot tell you. I don't know all the decisions that have passed. No, I really cannot answer the question. You are asking me every decision that is brought forward--sorry, every warning that is appealed

brought in front of the Agency did they agree with the Agency? I cannot answer you but I don't think so.

143. Q. So the Agency is not bound by your warning letter.

A. No, of course not.

144. Q. Okay.

A. As example the Priceline decision when it is not--okay, go ahead.

145. Q. The Priceline decision, can you please elaborate on that?

A. No—I am sorry, yes, Priceline of course. There was a decision that was issued by the Agency which was--

MR. DODSWORTH: It is available online.

THE WITNESS: Yes, go ahead. It is about targeting Canadian public, what is--was it deemed to be Canadian--but it is relevant to ASPAR. I don't have all the details.

DR. LUKACS:

146. Q. Let's look now at paragraph 11 of your Affidavit. You say in paragraph 11 of your Affidavit that a warning letter was sent to Expedia Canada on January 21st, 2013.

Is Exhibit H to your Affidavit the letter in question?

A. I don't have it marked but I have it here. It is H, you said?

147. Q. Uh-huh.

A. Yes, it could be H. Yes, yes, yes, because I have a copy, the one you copied. Yes, it would be. Yes, yes.

148. Q. Can you please explain in what way Expedia's website back in 2013 was non-complaint?

A. I can; just a moment. I brought this with me. At this time Expedia was non-complaint because it did not have the breakdown so pursuant to--it must include the following: the name and amount of each tax. So they did not have a breakdown. This really is--okay. And then incidental services were not--they did not have a total price. They only said taxes and fees instead of taxes, fees and charges and instead of an air transportation charges they had flight. Then the last one was the surcharges. The person must not--instead of surcharges they had--sorry, instead of tax they had surcharges.

149. Q. Were you the designated enforcement officer in this particular case?

A. No.

150. Q. No. Then how come you are signed off on it? It is on this exhibit.

A. This is a procedure. It is a standard

procedure. I sign all the warning letters and the--as a manager of enforcement and the notices of violation. I review the evidence and I go through with the designated enforcement officer and then I sign off on it.

151. Q. Who was the actual designated enforcement officer involved?

A. It was Yannick Pourret.

152. Q. Pardon me?

A. Mr. Yannick Pourret.

153. Q. Okay. Other than this warning letter what communication did you or anyone else from the Agency have with Expedia about its website in the context of this 2013 warning?

A. Who? You are asking who or what? Sorry, I didn't catch it.

154. Q. I said what communication.

A. Okay, there was--I don't know all the communications. There was a conference call. We had several calls with them. Expedia actually made a presentation to us at one point. There was some email exchanged between Yannick and Expedia.

155. Q. Did you also exchange some faxes?

A. I don't know. It could be. I really don't know. Maybe.

156. Q. Back in 2013 how did Expedia display fuel

surcharges on its website?

A. I am not sure if I will be able but I will try to answer that. I don't know if I will be able to answer it because I may have the copy of 2013 but I don't know. The problem at that time—I don't know how it was displayed. The problem was that there was no breakdown of taxes, fees and charges so we first asked--and this is standard with everybody--to show the breakdown. And only then we can determine whether the fuel surcharge was in the taxes, fees and breakdown—taxes, fees and charges breakdown. This was common across, so this was how we approached it. We first needed to know what is in there.

157. Q. But then they--

A. So I don't know how it was displayed. That is all I am going to say.

158. Q. But you say that they became compliant so I presume that they did then prepare a breakdown of the taxes.

A. Well as you can see there were several areas here that they needed to comply with and at the end where they had the changes they had done were deemed satisfactory.

159. Q. On what basis?

A. On what basis?

160. Q. Yes.

A. According to the changes that we asked them to do such as having a breakdown of taxes, fees and charges, removing fuel surcharges from taxes, fees and charges or any other non-third party charges from taxes, fees and charges. Pretty much it was having the full price--

161. Q. So at that time back in 2013 you already asked Expedia to remove fuel surcharges from taxes?

A. I cannot answer that because what we asked them is to have taxes, fees and charges breakdown and--

162. Q. And when you got that, when they made that change, did you then go back and check what are the actual taxes they list under--

A. Absolutely, yes. If there was a fuel surcharge we would have not deemed them compliant, definitely not. Fuel surcharges absolutely could not be located under taxes, fees and charges.

163. Q. You write in paragraph 12 that you informed Expedia that they were compliant.

A. That they were…?

164. Q. Compliant.

A. Yes, they were. At that time they were compliant. What is the problem with Expedia is that they receive information from hundreds and hundreds--well, not hundreds but hundred, at least a hundred of suppliers. At one point when somebody is compliant it doesn’t mean that

the next day they are. At the time when the compliance verification was done they were deemed compliant. That can change in a few hours because of the coding, because of the information they receive.

MR. DODSWORTH: Excuse me, Mr. Lukacs, is there somebody there with you?

DR. LUKACS: Yes, is taking notes.

MR. DODSWORTH: Ah, I would have appreciated you having informed us of that at the outset but in any case…

DR. LUKACS: I am sorry. I see only the two of you. I don't know who else is in the room either. I wouldn't put here a stranger.

MR. DODSWORTH: We are in a different environment. In any case it is nice to know that you have somebody in the room with you.

DR. LUKACS: Sure, sure, and if it is an issue for you in any future case I will be advising you accordingly. No problem.

165. Q. Now let's look at paragraph 13 of your Affidavit.

A. All right.

166. Q. You summarize my February 24, 2014 complaint as raising two issues; (a) Expedia failed to include fuel surcharges in air transportation charges and (b) Expedia

improperly included and listed airline imposed charges in taxes, fees and charges under the name YR-service charge. Is this accurate?

A. Yes.

167. Q. Did you inquire into the meaning of YR-service charges?

A. I am sorry, if I inquired?

168. Q. Yes.

A. Yes that was the reason why we issued a warning letter, because we did not know what a YR-service charge was.

169. Q. And what is it?

A. They have to--they have to--I cannot tell you. It has to be--they have to refer to all the charges by its proper name. You know, there is thousands and thousands of codes and I unfortunately don't know every code. When they say service charge it just implies to us that it may be--it may not be a third party charge. So we wanted to make sure that they do not include any non-third party charges under taxes, fees and charges. So first we have to know what the code is, what does it mean? Once we know it means it either falls under taxes, fees and charges or it is out of there.

170. Q. In paragraph 14 you refer again to designated enforcement officer.

A. Uh-huh.

171. Q. Who was that? Was it you or somebody else?

A. That was me probably. Yes, that was--yes, that could have been me, yes.

172. Q. It was you.

A. Yes.

173. Q. So then why do you refer to yourself in the third person in your own Affidavit?

A. I don't know, because I used the enforcement officer before. It is just standard. I don't know. I really don't know.

174. Q. Did you write this Affidavit yourself?

A. I swore on it, yes.

175. Q. My question is: Did you--

A. I am not experienced writing affidavits. This is how I wrote it. It is myself.

176. Q. Did you draft the whole Affidavit yourself, the whole text?

A. With legal services help.

177. Q. My complaint was made on February 24th but the warning letter is dated March 27th.

A. Uh-huh.

178. Q. Could you explain why it took so long to issue a warning letter?

A. Because we have priorities and I addressed

situations as I deem appropriate and as much as advertisement may be, you know--I don't want to say important, I guess. We do have other enforcement matters that I have to attend to.

179. Q. So dealing with advertising matters is of a lower priority than other enforcement matters. Is that what you are saying?

A. Illegal operation of flights, yes, takes precedent over advertising matters, yes.

180. Q. Uh-huh?

A. Where the safety of public is in jeopardy, yes, I would say.

181. Q. So do you also deal with safety matters?

A. No, no, we don't. However illegal operation may, may, may be linked to a safety issue. We don't. It is strictly economic. However I am just explaining the priorities.

182. Q. So an illegal operation wouldn't that be a matter for Transport Canada to shut it down--?

A. Illegal operation without--flying without a licence is our jurisdiction.

183. Q. Let's look at Exhibit J to your Affidavit. I would like you to look at page 2. It says, "c.c." and then "XXXXXX". I see there are six X's at the bottom. What does it stand for?

A. I have no idea. No, I don't know.
184. Q. You are the author of this letter.
A. Yes, yes.
185. Q. And you don't know what that means?
A. No, no. That is a typo. It was prepared by an admin officer. It is a template that we use. I really don't know. They usually--we use it when there is somebody to c.c. At this time there was nobody to c.c. so we didn't put--the X's were in there.
186. Q. Okay. Back to paragraph 14, you refer here to Expedia's service charge in paragraph 14. What is that? Can you elaborate on that?
A. Can you--in my Affidavit, Expedia?
187. Q. Yes.
A. Okay, okay, let me see. It is the one from the paragraph before. It is YR-service charge.
188. Q. So in your belief that is not an airline charge but rather a charge imposed by Expedia?
A. It is a service charge, yes. Was a service charge? It is--I am sorry if I say--I probably did not hear what you said.
189. Q. In your belief is that YR-service charge not an airline imposed charge?
A. No, opposite, opposite. A service charge would be an airline imposed charge so it cannot be under

taxes, fees and charges.

190. Q. So that airline service charge should have been under air transportation charges.

A. It should be out of taxes, fees and charges.

191. Q. Thank you. After you sent this--actually between February 24th, 2014 and April 30th, 2014 what communications occurred between Expedia and the enforcement division?

A. There were phone calls. There was some email exchanged about--because Expedia was working on the changes. So there was back and forth communication about you know what codes, where do we get codes from, you know how to break it out, how to put it together and all this. So there were some email communication exchanges and numerous phone calls.

192. Q. Did you also take notes during those calls?

A. No.

193. Q. You were directed to bring those communications, those emails with you. Did you bring them with you?

A. I did. I have some, yes, here.

194. Q. Okay--

A. Well, some; actually, all of those that are related to communications between Expedia and your complaint.

195. Q. We will leave it to the end because we need to have it scanned.

A. Okay, okay.

196. Q. We will deal with that at the end. Okay. In paragraph 15 of your Affidavit you say:

"Expedia has since rectified the problem; the issue has now been resolved; and therefore, Expedia has complied with the requirements identified in the warning letter".

A. That is correct.

197. Q. What problem and issue are you referring to?

A. The problem that was identified in a warning letter that is the taxes that were--well the codes for the taxes and the charges and/or fees that were not there.

198. Q. So did the warning letter refer also to fuel surcharges which were in the wrong place?

A. No, the warning letter did not refer to that. The warning letter only referred to taxes that were--the breakdown of--I am sorry, the name and amount of each tax, I believe, or the name, proper name of the tax. Let me just get it. We are talking the warning letter of March 27th.

199. Q. That's right.

A. Yes, that is it:

"A person must not refer to a third party charge in

an advertisement by" any other name than "under which it was established", yes.

200. Q. So that was only referring to the YR-service charge and not to--

A. Well, it was referring to other because at that time Expedia had several codes that were not identified. So we just wanted to make sure that all the calls that are there are identified and they do belong under taxes, fees and charges.

201. Q. So let's go back now to paragraph 13. You said here that in my letter I complained about the failure of Expedia to include fuel surcharges in air transportation charges.

A. Yes.

202. Q. Did you not issue a warning letter about that too?

A. No, no, we did not.

203. Q. Why?

A. Because at Expedia their display of fuel surcharge was not under taxes, fees and charges. It was broken out.

204. Q. Really?

A. Yes.

205. Q. So are you telling me that air fuel surcharge does not have to be--you just told me earlier, I am sorry,

that fuel surcharges have to be included under air transportation charges?

A. If they are broken out, yes.

206. Q. Yes. Have a look please at my complaint dated February 24th, at page 11 of that complaint?

A. You said--just a second--page 11.

207. Q. Yes.

MR. DODSWORTH: Page 11. Are you referring to the exhibit attached?

DR. LUKACS: Exhibit B, yes, to my complaint.

THE WITNESS: Yes.

DR. LUKACS:

208. Q. So here you see air fuel surcharge broken out.

A. Yes. What you had mentioned is that it is under taxes, fees and charges. Well it is not under taxes. It is not under the heading taxes, fees and charges. It is broken out so we asked them to move it up under air transportation charges.

209. Q. No, no, my complaint was that it was not included in air transportation charges. That is what my complaint said. It was not--

A. It doesn't have to be included in. It doesn't have to be included. It has to be--if it is broken out, okay, it has to be listed under air transportation charges. If they don't want to put a total there then it

just has to be a title. They don't need to put a total for air transportation charges.

210. Q. In this case, still with respect to this specific exhibit.

A. Yes.

211. Q. They chose to put a total to air transportation charges.

A. I don't know if that is a total. I don't know. That could be only a base fare. I don't know and I cannot tell.

212. Q. Well I suggest that you can because if you add up the figures without the bold, they add up to the figure in the bold.

A. Yes, but I am not adding it up because this is not the requirement. For me the requirement is to show the full price, to have a breakdown of taxes, fees and charges to ensure there is no third party--that there is not a third party charge in the third party charges and if they choose to break it down then it is under the proper heading.

213. Q. So are you telling me that air fuel surcharge is not an air transportation charge?

A. It is; it is.

214. Q. It is so then air fuel surcharge, if it is broken out, if it is listed at all, it has to be included

in air transportation charges.

A. It has to be under title air transportation charges. It doesn't have to be included. It has to be under title air transportation charges.

215. Q. As a sub-item?

A. As a sub-item.

216. Q. Yes, but in this case--

A. As a sub-item but the total does not have to be there. They can only--they may call it air transportation charges, then put, you know whatever, a dash and then put airline fuel surcharge or base fare or agency fee or NavCan charge, whatever they want if they want to do it but they don't have to. They just--the title—I am talking about title. That is the only requirement there is. If they mention it, it has to be under the title air transportation charges.

217. Q. In this case do you see it under the title in Exhibit B?

A. No, that is why we had asked them to move it under the title.

218. Q. But there is nothing in the notice of violation about it, is there?

A. No, no, there is none.

219. Q. Why?

A. The reason is because we found this

acceptable.

220. Q. You found this acceptable--

A. Yes.

221. Q. –even though you just told me earlier that it was at the wrong place.

A. It wasn't--well you asked for it to be--not to be under taxes, fees and charges. What we found acceptable with Expedia: Did they break out the airline fuel surcharge? The legislation calls for it to be under the title air transportation charges so yes, that is correct, but we found this acceptable.

222. Q. Even though it was not under the air transportation charges on page 11?

A. Even though it was not under air transportation charges heading.

MR. DODSWORTH: Are we talking with the right exhibit here, if I may? Are you referring to Ms. Sasova's printout that is appended to her--I just want to be sure that we are talking about the right exhibit, sorry.

DR. LUKACS: I was referring to page 11 of my complaint which was—

THE WITNESS: Exhibit B.

DR. LUKACS: --which was Exhibit B to my complaint and my complaint itself, I can tell you in a moment.

THE WITNESS: Do you mind saying the flight? Is

it your trip to Budapest, Hungary, for $985?

DR. LUKACS: I am talking about Exhibit I to the Affidavit of Ms. Sasova and, yes, that was my trip from Halifax to Budapest, correct. It is page 11.

MR. DODSWORTH: I am sorry but you just referred to Exhibit I to Ms. Sasova's--

DR. LUKACS: It is Exhibit I to the affidavit of Ms. Sasova's Affidavit, and--

MR. DODSWORTH: Oh, being your complaint.

DR. LUKACS: My complaint and it is page 11 of the complaint.

MR. DODSWORTH: Right.

DR. LUKACS:

223. Q. Let's look at paragraph 16 of your Affidavit.

A. Yes.

224. Q. You say here and I am quoting that:

"In his letter dated February 24, 2014, Dr. Lukacs also submits that the 'Airline Fuel Surcharge' was improperly listed under the heading 'Taxes, Fees and Charges'.

A. Uh-huh.

225. Q. Can you please point to where it is found in my letter?

A. You had mentioned that failing to--

MR. DODSWORTH: I would just like to ask one more

question. Are all questions being asked today your questions or is participating, because I think my client has the right to know who is asking the questions? You know, you have asked for me to be apparent to you in this session and I have yet to see

DR. LUKACS: These are all my questions. is simply taking notes for me.

THE WITNESS: It is not in your letter but I have a feeling it was in one of your appendices that--this is the reason why it seemed to me that that is what you meant here.

I said "letter" but I meant all the attachments to it, probably communications with Expedia, because I know that this was--the issue was under taxes, fees and charges.

DR. LUKACS:

226. Q. Can you point to where?

A. Yes, I am not sure. I am not sure. I really am not sure. Maybe from the--that it is from the same exhibit that we were looking at airline surcharge--fuel surcharge. It is not under air transportation charges.

227. Q. But my question is: You attribute to me something in your Affidavit.

A. Uh-huh.

228. Q. Did I write something like that? Can you

point out where?

A. Yes--no, I can't point to the exact wording. No, I can't.

229. Q. Okay.

A. Maybe it was just implied.

230. Q. Okay. Now you say at the end of paragraph 16 that Expedia listed airline fuel surcharge separately, which is acceptable because it is clear and so on and so forth.

A. Uh-huh.

231. Q. In whose opinion is this acceptable?

A. It is in my opinion. However this is something that as the enforcement officer I saw. However I had discussed it with my superiors as well.

232. Q. I put it to you, Ms. Sasova, in light of the decision in this Scandinavian Airlines case, fuel surcharges and base fare must be listed together and all under the heading of air transportation charges. Do you agree with me on that?

A. It was a different case. The situation was different there than it is here. We are talking about the heading. I want to stay with heading because I don't want to be talking about the groupings because that is not a requirement. Let's talk about--let's stay with the headings for this purpose. I have a hard time to say yes

to a grouping because that is not the case. However you are partially right with the heading, yes.

233. Q. How so? Can you elaborate on what you mean by I am partially right?

A. Once again when you say about a SAS decision, okay, we are talking about paragraph 55. It is the heading. It has to be under the heading. This decision really reflects SAS's situation because it was all grouped together, but at the end of the day it says that--the ATR are clear that appropriate headings are to be used and the relevant charges are to be found under appropriate headings and that applies if they are broken down. So it is a heading, not grouping.

234. Q. What is the difference between heading and grouping?

A. Because you don't have to group them. You can just have a heading. If they have only one heading, air transportation charge, and one amount that is fine. They don't need to break it down. It is actually--

235. Q. But in fact they do break down.

A. In the Expedia case it is actually better for consumers to have it because what they can do: they can just put one amount, air transportation charges, and you will never know what the airline fuel surcharges and what the Expedia fee is. So if they break it down it is better

for consumers. So this is why we deemed it acceptable because it is even clearer than having one total. There is no requirement to break air transportation charges down.

236. Q. So a fee to Expedia, like a travel agent fee, would that not be a third party charge?

A. No.

237. Q. Really?

A. Uh-huh.

238. Q. Is that a fee required to pay to the airline itself?

A. It is--it is air transportation charge. That is all.

239. Q. Let me rephrase it.

A. Yes.

240. Q. When we talk about air transportation charge isn't--

A. It includes air--travel agent fees as well.

241. Q. It does.

A. Yes.

242. Q. So just to confirm, you said that you communicated the request to move the location of airline fuel surcharge to a different place by email or phone?

A. It was by phone, I think by phone, yes.

243. Q. By phone, uh-huh.

A. Yes because I was on travel status so I was driving. Anyway I could not. I did not have access to email. I believe that was--yes, at that time that I said to move it, yes.

244. Q. Let's go back to Exhibit I. Can you tell me what itineraries are mentioned in the complaint, what pairs of cities, what airlines? "The exhibits--"

A. In...?

245. Q. To your Affidavit.

A. Okay, here. That is your complaint. That is your letter. What itineraries? You have several ones. Okay, is it on page 6, the Ottawa to London? Is that what you are talking about?

246. Q. I believe it starts on page 10 of the exhibit.

A. Oh, there are four itineraries, okay; your trip to London, England, Ottawa to London.

247. Q. Yes, go on. Let's go through all of them.

A. Okay; then your trip to Budapest, Hungary, Halifax to Budapest.

248. Q. Yes.

A. Another Halifax to Budapest.

249. Q. Yes.

A. Then Halifax to Toronto; and that is it.

250. Q. All right?

A. Yes.

251. Q. Now after April 30th, 2014, did you go back and check how the same routes are being advertised on Expedia?

A. I believe so, probably. We did definitely and when I am saying "we" that was my assistant or the officer that works for me and Halifax to Budapest for sure. Halifax to Toronto I believe so as well. Ottawa to London; that is a very common one, we do that often so probably I would say yes.

252. Q. Do you have printouts of those?

A. No, no I don't.

253. Q. Because I tell you that actually on those itineraries involving Finnair--

A. Yes, Finnair is different, yes.

254. Q. --Expedia continues to have the same problems.

A. I know, I know. We have--no, actually right after your complaint they had moved the airline and service fee--sorry, it was agency or airline service fee. They listed it under air transportation charges. They did. But when you are saying that they have it under the title that is correct because that will be fixed on the 10th of September. Everything will be under title air transportation charges. So you are right in that. However when the airline--sorry, not airline. Is it called--it is either called the Agency or Expedia's fee.

I am not really sure.

255. Q. I believe it is called airline service fees.

A. Oh, airline service, correct. That has been out of taxes, fees and charges. It has been separated-- eliminated from that breakdown and put separately.

256. Q. But it is still not included in air transportation charges?

A. Correct, and because of your complaint and really to avoid this litigation we had gone to Expedia and asked them to put everything, and we do have a date. It is a release date of 10th of September that everything will be put under air transportation charges title. I do not know if it will have an amount. However it will be under correct title and it will be broken down there.

257. Q. So you included here as Exhibit K a trip to Dubai.

A. Yes.

258. Q. What was the logical basis for choosing Air Canada and Dubai as a destination where it was never mentioned in the complaint?

A. It is completely sporadic, we do so many itineraries. Nothing, we just pulled this departure and destination. There is absolutely no logic. We do not have prescribed routes that we check. We check whatever comes through. Sometimes it, you know, the cookies that

appear on a computer we go and we check because those are mostly--much easier to update so we want to make sure that those updates that they do on a, you know, frequent basis, they are correct still. So that is about it.

259. Q. So earlier you just said that still with Finnair there are some problems, correct?

A. No, no. What I meant is that with Finnair it is one of those cases where there is an airline service charge. If you look at other itineraries there is no airline service charge. So what I wanted to say: with airline service charge and an airline fuel surcharge it appears separately but as of the 10th of September it will appear under air transportation charges when there is an airline service charge. If there is no airline service charge it will be only airline fuel surcharges that will appear under air transportation charges. That is all what I meant.

260. Q. And they will be included in the air transportation charges?

A. Correct.

261. Q. So when I look at Exhibit K to your Affidavit this trip to Dubai, does this reflect the state of Expedia on May 20, 2014?

A. Yes, I believe so, yes. May 20th, yes. That was May 20th, yes. We took it the same day as the

Affidavit was done to be as close to the date as the Affidavit.

262. Q. But things can change from hour to hour?

A. Absolutely.

263. Q. So do you agree that here the airline fuel surcharge is listed at a separate heading?

A. Yes.

264. Q. Why did you not issue another warning?

A. As I mentioned, because it is acceptable. This is acceptable to us to display it that way.

265. Q. In your opinion?

A. Yes, in my opinion and in the approach. It is not only my opinion. It is the approach that we take based on resources that I have available and based on the priorities and the clarity and transparency to the consumer.

266. Q. So you look at those principles and not at the letter of the law.

A. I follow the law where--when I apply, when I enforce. In this case, as I said, it is an approach that is taken because of the--really of the priorities and the objectives of legislation being met and I said it is something that is cleared through my superiors.

267. Q. You said objective of the legislation.

A. Uh-huh.

268. Q. Canada is one of a few countries where when you go to a store you see the prices without taxes. So you go up to the cashier and the tax is being added to it, correct?

A. Yes.

269. Q. So in this society we do place some value on knowing what taxes we pay and what money goes to the service provider.

A. Absolutely.

270. Q. So you would agree with me that the purpose of the legislation in this case is really to put things in two big bins. One is money going to the service provider and the other bin is money going to third parties.

A. This is strictly my opinion but I disagree with you. The objection of the legislation, as it is posted everywhere and how I understand it and how I interpret it, is to provide a level playing field for airlines and the consumer to make it clear--so they can make a clear and transparent decision when they are purchasing their ticket, so they can see what they are paying in full and that there is no deceit of any air transportation charges being listed as the taxes, fees and charges.

271. Q. Let's go back to page 8 of the interpretation note.

A. All right.

272. Q. We agreed here earlier that the total price is made up of air transportation charges and taxes, fees and charges.

A. That is correct.

273. Q. So would you agree with me that when a passenger looks at an online ad they have to be able to clearly identify which charges are air transportation charges and which charges are the taxes, fees and charges, correct?

A. No, I don't agree.

274. Q. You don't agree.

A. No. When a passenger--and this is according to the legislation and--when a passenger looks at a price it has to be a full price and it has to list taxes, fees and charges and have a proper breakdown with a proper name for each tax. That is it. There is no requirement to list the air transportation charges. If a carrier or an advertiser chooses to put a full price and only a breakdown of taxes, fees and charges they will be compliant.

275. Q. How is it possible to put only a breakdown of taxes, fees and charges without providing some at least subtotal for the air transportation charges?

A. That is how it is.

276. Q. I am asking how is possible in practical terms?

A. Oh, they do it. That is how they do it. Even Expedia was going to comply with your request quickly and they were only going to list the full price and have taxes, fees and charges. They don't need--they don't need to show air transportation charges. But that would not be clear to a consumer so they wanted to show the fuel surcharge and they wanted to show whatever is being charged by the carrier or the advertiser or whoever it is. It is perfectly fine if they only list the full price, let's say $985, and they only break down that there will be taxes, fees and charges, whatever it could be. The rest does not need to be shown.

277. Q. But if air transportation charges are shown at all then it has to be this kind of two bins type of division. Do you agree with me on that?

A. No, air transportation charges could be one total. They don't need to break it down.

278. Q. It doesn't have to be broken down but if it appears then essentially there would be two big headings, air transportation charges and another big heading, taxes, fees and charges which then would have a breakdown.

A. That is right.

279. Q. Okay. So when we look at Exhibit K to your

Affidavit this has three bins, not two bins, correct?

A. Yes.

DR. LUKACS: I suggest we take now a break and you will transmit to me the documents that you have brought and then we will resume after the break.

MR. DODSWORTH: How long are you thinking for a break?

DR. LUKACS: Probably 15 minutes, 15-20 minutes. It depends on how long it takes for the documents to be transmitted to me.

MR. DODSWORTH: And I want to be very clear what documents you are requesting be transmitted.

DR. LUKACS: The documents that Ms. Sasova brought in response to the Direction to Attend. She was directed to bring certain documents and given that this is done over Skype I don't have the physical ability to review those things right now. So it will need to be transmitted over by a scanner and then we can resume.

MR. DODSWORTH: Just to be clear though, do you intend to then cross-examine on those documents?

DR. LUKACS: Absolutely.

MR. DODSWORTH: Okay and you are going to receive them and read them in 15 minutes?

DR. LUKACS: Probably 20 minutes. Can you tell me approximately how many documents we are talking about?

THE WITNESS: There is just an email communication, that's it.

MR. DODSWORTH: Okay.

THE WITNESS: Yes that is the email communication that you requested.

DR. LUKACS: Yes.

THE WITNESS: Yes, I brought it here.

MR. DODSWORTH: Okay.

DR. LUKACS: I would ask you to give it to Madam Clerk and she can transmit it to me.

THE WITNESS: Absolutely, yes.

DR. LUKACS: I guess we are off the record now.

THE REPORTER: Yes.

(SHORT RECESS)

(Upon resuming at 12:30 p.m.)

DR. LUKACS:

280. Q. Ms. Sasova, I understand that you have produced some documents in response to your request to attend.

MR. DODSWORTH: Excuse me, Mr. Lukacs, we can't see you.

DR. LUKACS: Oh, my apologies. Here I am, okay.

281. Q. So Ms. Sasova, I understand that you have produced certain documents in response to the Direction to Attend.

A. Yes.

282. Q. I would like to go through with you these documents because I am having a bit of difficulty understanding what is what here. So I see here a chain of emails starting on the 4th of April.

A. Correct.

283. Q. It is from sdeblois@expedia.com--

A. Uh-huh.

284. Q. --and for some reason I have only two pages of this email here with me.

A. So I just want to--this exchange of email--email exchange plus the one, the 28th of April from Steven de Blois and Paul Lynch, very similar type and then the itinerary—so the printout--it is all together and this is the case package that you had asked that is in reference to the warning letter that was issued to Expedia. This is what we have included in our--this is our case. We don't have anything else for the case.

285. Q. I understand but I also asked you to provide correspondence between Expedia and Agency staff. So I am going to first ask you questions about these first two pages. They are marked pages 1 and 2 of this email.

A. Okay.

DR. LUKACS: I would like to mark it as Exhibit 5, just these two pages.

EXHIBIT NO. 5: Incomplete chain of emails starting with the email of Mr. de Blois, dated April 4, 2014 (total of 2 numbered pages).

DR. LUKACS:

286. Q. My first question is going to be: At the bottom of page 2 the email ends quite abruptly. It doesn't look like a natural ending to the email but rather ends abruptly with the word "Regulations". Can you explain that?

A. Okay. Once again this is what we had kept as the relevant to the case. The last email, what is important in this email for us, for the case, was what is above it and what is on the page. So the email continued and I am not sure where, but we did not keep that for the reason that what is important for our case is what is above it and on the page.

287. Q. Ms. Sasova, do you agree with me that you were the recipient of an email on March 20th from Paul Lynch?

A. I was copied, yes.

288. Q. Copied to it, yes, so you were in receipt that email, yes.

A. Yes.

289. Q. So that was part of this chain of emails, correct?

A. Yes, but I don't—I don't keep all the emails.

290. Q. So are you telling me that even though this email goes on you did not keep the rest of it?

A. No, I did not keep it. This is from Paul Lynch that he had copied to our file in our enforcement module. This is an email excerpt that was kept as part of the file. This is not from the email inbox. This was relevant, the relevant parts, and that is what we do. We take relevant parts of the emails and move them into enforcement module with the second part and yours. This is really the file for us so we have some--

291. Q. Ms. Sasova, I am not asking you about that.

A. No?

292. Q. I am asking you very simply about this specific email.

A. Yes.

293. Q. This email from the 20th of March came into your inbox, correct?

A. Yes.

294. Q. So I presume you have it among your emails.

A. No, I don't. I don't. I get rid of these emails. I was cc'd on it. I don't. Paul had taken it out because that was his communications with Brian Flanagan and copied it. He put it on a file, what is relevant to the case and that is it.

295. Q. Does he have this email in its entirety?

A. What I--no. What I had asked him, I asked him to produce, as stated on yours, what was relevant to--sorry, a copy of the enforcement file that is connected.

296. Q. Ms. Sasova, to be clear, I asked you to produce correspondence, all correspondence.

A. Absolutely.

297. Q. So this would include correspondence sent by Mr. Lynch to Mr. Flanagan.

A. This is the only thing that he was able to produce for me with regards to this case--with regards to this--to your request and the rest--and the other email.

298. Q. Did you direct him to obtain an original copy, a complete copy of this email?

A. I directed him to obtain a case from--a case that is relevant to the March 27th warning letter, what's on the file for the March 27th warning letter plus what communication we had with Expedia with regards to your complaint--sorry, not the complaint, to your letter.

299. Q. Ms. Sasova, this email from March 20th, 2014, its subject is, "Follow-up on All-Inclusive Price Advertising Regulations".

A. Expedia, yes, and the one above. Yes, correct.

300. Q. So this was certainly related to the issue about which a warning letter was subsequently issued?

A. Yes.

301. Q. But can you explain to me why there was communication with Expedia prior to issuing a warning letter?

A. That is a standard procedure. We always do that with everybody. Whenever--actually it is our policy. What we do--whenever there is a contravention we contact the advertiser right away to make sure that they rectify it as soon as possible because what we want to prevent is that--the non-compliance is out there so we want to tell them and then we take appropriate enforcement action being in this case a warning letter or it could be a notice of violation, but the first thing is to contact them with a very reasonable--in a reasonable time.

302. Q. So when was this initial contact with Expedia made?

A. I don't recall. Maybe in--I don't recall. I don't recall the first contact, when it was made.

303. Q. Well, Ms. Sasova, you are here to be cross-examined in relation to this notice of violation.

A. Absolutely, yes.

304. Q. So my question, and my request to you, was to produce all correspondence between the Agency and Expedia in relation to this matter.

A. Absolutely.

305. Q. Now you just admitted a moment ago that this email was as a kind of preliminary to the notice of warning that you sent. So therefore I am asking you to provide me with a complete email dated March 20th and any previous correspondence that you have had with Expedia and anybody else at the Agency had in relation to this notice of violation, notice warning, and its history.

A. Okay.

306. Q. That is what was in the Direction to Attend. The direction was to produce all correspondence.

A. And I did; what I had. This is with regards to the file. You wanted--

307. Q. And I didn't ask you to only produce the file. Why don't we go back to Exhibit 3? Would you like to again have a look at the Direction to Attend?

A. Sure. Do you have it? Oh, good, thank you. Oh, between the Agency and Expedia. Okay, "all correspondence between Agency staff and Expedia", related to your letter.

308. Q. It says in paragraph 2(i), "all correspondence between Agency staff and Expedia".

A. Uh-huh.

309. Q. To read the whole thing:

"Complete enforcement file of the enforcement action(s) referred to in paragraph 14 of your

affidavit and/or related documents, including, but not limited to:

all correspondence between Agency staff and Expedia".

You have just earlier told me that this email sent on March 20th, 2014, to Expedia was related to the warning letter you sent on March 27th.

A. Uh-huh.

310. Q. So therefore it is an email correspondence related to that warning letter. Therefore you were supposed to produce the entire letter and the entire chain of emails because--

A. But I don't have them. I don't have them. I only kept what was relevant to the file, to the warning letter file.

311. Q. Can you tell me who is Mr. Lynch?

A. This is the officer that works for me, yes.

312. Q. So he is your subordinate?

A. Yes, he is, yes.

313. Q. So are you telling me that Mr. Lynch does not have the full correspondence?

A. I believe he does not because he only copies and puts on a file what is relevant. We have a lot of emails and very small mailboxes. So there is--from March there is a possibility that this has all been gone. I

asked him to produce what he had with regards to Expedia and your--since your letter came in and this is what I had received.

314. Q. Well this is an incomplete letter, Ms. Sasova. So my question is where is the rest? And with due respect, for an organization such as the Agency there are backup servers and normally your records are required under law to be kept for a number of years?

A. Relevant records.

315. Q. So I am having a very hard time to believe with due respect that this email has disappeared without a trace.

A. Okay. Should I? I don't know what to do. I cannot say. I cannot tell--I understand but this is a really administrative. I don't know. I can check. This is--I followed your--and this is with due respect--I followed your Direction to Attend and pulled the information that I had. There is a lot of communication that is repetitive going as you can see and there is a lot of communication done verbally and I have asked my staff to produce that as well.

316. Q. I asked a question, Ms. Sasova, I am sorry. I am asking here a specific email chain which has been truncated here and what you want me and the court to believe that actually the Agency which is a government

body does not have the full email and that you are not able to obtain from archives the full email. Is that what you are telling me?

A. I really don't know all the intricacies. I probably would be able to but I cannot tell you right now that we don't keep it and all this. You are asking me whether I had it. I don't. This is part of the file and Paul--I asked Paul what he produced to me and this is what he gave me. I am here. I am not at my desk so I cannot really produce it for you right now. Do you want me to check? What is it that you want?

317. Q. Certainly, certainly I would want you to produce the full chain, the rest of the email, the complete email in its entirety and I reserve my right--

A. Okay. *U*

318. Q. --to continue the cross-examination on at that point at your expense because you were supposed to produce that email. This is an email. The language is "possession, power and control". I am certainly--put it on the record. We will still get back to it possibly at the end. Let's go on.

This was Exhibit 5, correct?

THE REPORTER: Yes. The two page letter.

DR. LUKACS: Yes.

THE WITNESS: Yes, those two pages, yes.

DR. LUKACS:

319. Q. Now, I see here another pile of documents starting on page 3.

A. Yes.

320. Q. It starts with the text at the top, "I will loop back with update before May 19th", signed by Steve.

A. Yes.

321. Q. Can you explain what that is?

A. This is an email communication that I had between Paul, myself and Expedia with regard to your file.

322. Q. But this starts at page 3 and starts right in the middle.

A. Yes, because anything that precedes it is actually past the--past the Affidavit so it is not relevant to this.

323. Q. Past? I am sorry. I didn't ask you to limit your communications to what is in your Affidavit. I asked you to produce all documents and materials and all correspondence between the Agency staff and Expedia. There was no time limit here so with due respect I believe that you haven't complied with your Direction to Attend. So I don't think that--

A. It is--isn't it for the--anything that is after the Affidavit is not really relevant to this. You did not want anything. You wanted to cross-examine me on

my Affidavit so everything that I have done past the Affidavit is not relevant. I would not be producing that, or would I?

324. Q. My position is that yes, you would. You are – the request to direct was not confined in time in any possible way and given I have very serious concerns about your conduct in relation to this case it would certainly be relevant.

MR. DODSWORTH: Your paragraph 2 starts:

"Complete enforcement file of the enforcement action(s) referred to in paragraph 14 of your Affidavit--"

DR. LUKACS: And I suggest that you continue reading.

MR. DODSWORTH: So the Affidavit says--

DR. LUKACS: Counsel, please continue reading the full text.

MR. DODSWORTH: "and/or related documents.

DR. LUKACS: It says: "and/or related documents, including, but not limited to", and also paragraph 1. This is a very broad --

MR. DODSWORTH: No, but those qualifying words are not with respect to the paragraph 14 of the Affidavit. They are with respect to complete an enforcement file. You know, you have asked for something--documents in

relation to the Affidavit. This is a cross-examination on an Affidavit and documents that came into creation after that time are not relevant.

DR. LUKACS: No, I beg to differ with you, counsel. It is my submission that documents that were created in the same file, given that there is an ongoing issue here would be relevant.

Moreover--actually it is quite clear from this email, which I would like to mark this now as Exhibit 6, from pages 3 to 10, this undated package of correspondence that a person says here, "I will loop back with an update before May 19th".

THE WITNESS: Yes.

EXHIBIT NO. 6: Incomplete chain of emails starting with "I will loop back with an update before May 19th" (total of 8 consecutively numbered pages, from page 3 to 10, inclusive).

DR. LUKACS:

325. Q. On what date you swore your Affidavit?

A. On the 20th.

326. Q. Yes, so would you agree with me that therefore the person who wrote that he would loop back to you with an update before May 19th wrote it before May 19th?

A. Yes.

327. Q. So therefore you would agree with me that the

part that is missing from those, from this Exhibit 6, predates your Affidavit.

A. It is only a title. There is no--no everything that was after, any correspondence I had received from them was after May 20th.

328. Q. I am asking--

A. He wrote it on May 19th but I did not receive--the next email that is on pages 1 and 2 is past May 20th and that was the reason why I excluded it because my understanding was that in your Affidavit you state--sorry, in your Direction to Attend it is relevant to the Affidavit. That is why.

329. Q. Let me recap; this email from which I am seeing the last two lines: "I will loop back with an update before May 19th", signed Steve.

A. Uh-huh.

330. Q. What was the date of that email?

A. April 29th.

331. Q. Yes, so therefore it predates the date of your Affidavit.

A. Yes and it is there.

332. Q. No, it is not.

A. No?

333. Q. I am talking about, if you look at the top of page 3, at the very top it says, "I will loop back with an

update this before May 19th, Steve".

A. Okay.

334. Q. That starts on page 2 which I don't have here. My question is: What was that email signed by Steve? What was the date of that email? And I put it to you that given that Steve promises to get back to you by May 19th--

A. May 29th. I am sorry.

335. Q. May 19th it says at the top here.

A. Yes, yes.

336. Q. Therefore this email was also dated before May 19th.

A. Correct.

337. Q. So page 2 and page 1 contain correspondence--

A. Yes.

338. Q. --which dates before May 19th.

A. No, no, no. It is after. I did not receive anything on May 19th. Everything that I had received on pages 1 and 2 it is past May 20th. That is the date of the Affidavit. That is why I did not include it in here.

339. Q. You have just a moment ago agreed with me, Ms. Sasova that Steve said he would "loop back with an update before May 19th". That has been said before May 19th.

A. Yes, yes.

340. Q. So where is the header of that email?

A. On page 2.

341. Q. Yes and that is an email before May 19th.

A. The header is, yes, but there are other emails that are past May 20th.

342. Q. Where is the header? Where is the rest of the text of this email on page 2 which predates May 19th?

A. It is only a header. It is only a header that is from—as the one below. It is only a header and I can supply it but that date is before May 19th. Everything else dates past May 20th.

343. Q. Well, Ms. Sasova, that is what you say but I don't have it here in front of me.

A. Sure.

DR. LUKACS: So I believe we have two outstanding issues here concerning documents, counsel. One concerns Exhibit 5 and one concerns Exhibit 6. With respect to Exhibit 5, my position is that Ms. Sasova has this email in her possession or control or power within the meaning of the law and therefore she should have produced the full email with respect to Exhibit 5 and I am certainly amenable to postponing that until a few hours later. I understand that you are quite close to the Agency so you should be able to obtain that, or in the alternative to resume at a later time. However I think it must be clear that I am not prepared to pay for the costs of any continuation given that--about this there is not even the

slightest doubt.

344. Q. Ms. Sasova, I am sorry it is inappropriate for you to communicate with counsel during cross-examination. I am not consenting for you to communicate with counsel and I appreciate you not making faces at me--

A. I just wanted to ask him because I can get an email right away.

345. Q. Ms. Sasova--

A. Would you like me to ask for it? Sorry.

346. Q. Ms. Sasova, it is inappropriate for you to make faces at me either. It is very impolite. And it is not a proper conduct for a witness.

A. I did not make a face, Mr. Lukacs. I did not make a face, Mr. Lukacs. When we are talking about the faces I would refrain--anyway I won't say anything. Mr. Lukacs, my question is: Would you like me to attempt to get emails right away? If we have a short break maybe I can try to get it right away.

347. Q. Sure, I think that would be a reasonable solution. Sure, I would certainly be agreeable with that and the same thing about Exhibit 6. I would like to have the full email including pages 1 and 2.

I guess we will go now off the record and I would again ask you not to discuss this matter with counsel. You are under cross-examination.

(SHORT RECESS)

(Upon resuming at 1:11 p.m.)

DR. LUKACS: Are we back on the record?

THE REPORTER: Yes.

DR. LUKACS: Okay. Let's mark as Exhibit 7 the complete email sent by Mr. Steven de Blois dated the 4th of April, 2014.

EXHIBIT NO. 7: Chain of emails starting with the email of Mr. de Blois, dated April 4, 2014 (4 unnumbered pages).

348. Q. I am going to ask a few questions maybe about that. On page 3 of that exchange I see there an email coming from Expedia on the 18th of March--

A. Okay.

349. Q. --in which they refer to how much effort it would take to come into compliance.

A. That is correct, yes.

350. Q. Is this something you take into account in deciding whether a website is compliant or how to deal with a non-compliance?

A. Yes, partially; yes, mostly with regards to time.

351. Q. So just to confirm it looks like the first email to Expedia was dated March 11th. That was when the Agency notified Expedia that there was a new complaint

received?

A. There is some--it wasn't really a complaint even though it says here but we dealt with it as information received and there possibly may have been a communication before but as an email, yes.

352. Q. And now I just would like to be clear. What I have here is an email sent by Mr. Paul Lynch to the office of the Reporter which contains a chain of emails. Is that correct?

A. I just asked him to, yes, to forward the email that you wanted.

353. Q. Well I asked you to forward the full chain of emails from which I have only pages 3 to 10. I am missing--

A. What are you missing?

354. Q. I am missing two full pages of emails. What I have--

355. Q. Which one?

A. What I have received is compared to what I seem to be having here is only maybe, you know, 10 lines from the two pages missing. I did not receive--the full two pages are still missing from Exhibit 6.

A. No, no, they are there. It is which one? Okay, let's go through it because, you know, as I received it quickly.

356. Q. I am looking at Exhibit 6 now and Exhibit 6--
A. Yes.
357. Q. I have at the top, "I will loop back with an update before—"
MR. DODSWORTH: I am sorry, Mr. Lukacs. Are you clear what Exhibit 6 is?
THE WITNESS: No.
DR. LUKACS:
358. Q. Exhibit 6 is pages 3 to 10 of a chain of emails with "I will loop back with"--
A. Yes, that is how it starts. That is it. There is no more to it. This is how the whole email starts. There is nothing--it starts with April 29th saying, "Thank you, Simona. I will loop back with you before May" 18th--I am sorry, the 19th, and then it goes down to April 22nd when Paul started too. This is one. That is the one that you were missing when they were talking about the header.
359. Q. I am missing--Ms. Sasova, I am missing a whole two pages of this because this starts on page 3 what you gave me. So I am not only missing simply a header which now I do have--
A. No, this is how I printed. It has nothing to do with a--there is no more email. This is it.
360. Q. Ms. Sasova, earlier you just told me--

A. I know.

361. Q. --that before that there were emails that according to what you claim were post-dating the date of your Affidavit. That is why this is page 3.

A. Yes, but they are not emails. Just a second, Mr. Lukacs. I want to--when I was preparing the package I excluded everything that was after the Affidavit that was written. The email that is of concern here, okay, started on April 29th. I don't have anything that is with regards to the Affidavit, communications with Expedia that would be prior to May 20th. When I mentioned those communications that I had with Expedia was after May 20th when the Affidavit was produced. When I printed them, yes, it was showing pages because of the page number but you wanted absolutely the email that was part of what I had sent and there is nothing else on that email.

362. Q. I wanted pages the 1 and 2 of Exhibit 6 because Exhibit 6 starts on page 3 and ends on page 10 and I want to see what was on page 1 and page 2 of this document.

A. I don't have them with me.

MR. DODSWORTH: Can you get them or is there anything that—

THE WITNESS: No, because it is one email that starts on April 29th. I didn't bring the--it was missing

that header because—anyway, I thought it was a complete email. There is nothing else on that. I don't know why page 1 and 2--because I was printing so many documents and they were numbering but it is my email that I printed out. So Paul has taken now and he has a copy of that email. Sorry, he has the copy of that email and he just reproduced it.

DR. LUKACS:

363. Q. Ms. Sasova, let's phrase it differently. You say that you have had correspondence--

A. Yes.

364. Q. – with Expedia subsequent to the date of your Affidavit?

A. That is correct.

365. Q. Okay. What correspondence did you have with them?

A. It was email, some email but mostly we were talking. But there were some email messages that we exchanged with regards to the September 10th compliance date. That is pretty much, you know. Yes, maybe some in June but mostly July. Then I was off the whole--almost the whole month of August and then now we were talking when they set up a concrete date of September 10th.

366. Q. And so do you know what was on the first two pages of Exhibit 6 which are currently not here, what date

those emails were approximately?

A. I don't--I don't even think there were emails but it could have been emails that were June when we were going to have a--because they were going to become compliant in June if you recall and that didn't happen because they were going to remove everything from--all air transportation charges were going to be removed. So this is where we were talking, exchanging emails a little bit. So that would be probably the page that would be preceding because as I was printing it was numbering the pages. But those numbering of pages has nothing to do--because the email that is preceding the Affidavit, it is the April 29th one.

367. Q. Well, my position remains that you should produce all correspondence with Expedia up to, you know, yesterday and certainly it is my position that you did not fully comply with the Direction to Attend. I am wondering if you would like to produce those as well and resume or if a court order will be necessary.

MR. DODSWORTH: I am sorry, the last part?

DR. LUKACS: Or if a court will be necessary.

MR. DODSWORTH: A court order. I didn't think that that was necessary. I was not--not that we are trying to intentionally be difficult here. We will comply with that. We will take—

THE WITNESS: Sure.

MR. DODSWORTH: But I don't know that there is much purpose in trying to scramble and do that today. I guess we will have to reconvene if that is something that you will want to do, having seen them. But--

DR. LUKACS: Well certainly I am able to do that provided the Agency will be paying or Ms. Sasova paying for the cost of continuation of the examination given that in my position she was supposed to produce those documents and she failed to do so and there would be some additional costs associated with that including set-up fees. Certainly on those terms I would be amendable to that.

THE WITNESS: I understood from your Direction to Attend it was with regards to the Affidavit. You are wanting to cross-examine me on the Affidavit, everything that was relevant to it, and that is the reason why I produced those documents. Anything after, even what is happening today or any time when Expedia is writing, I did not think was relevant to it as it is specifically written in your Direction to Attend.

DR. LUKACS:

368. Q. Well it was quite clear, it was:

"--all documents and other materials in your possession, power or control that are relevant to the present application".

So is it your position that anything that happened after the date of your Affidavit is not relevant to this proceeding?

Is that the position the Agency intends to take, Mr. Dodsworth?

MR. DODSWORTH: Well, you have a specific judicial review application that is framed in a very specific way and you have asked for specific things and we have endeavoured to comply with the spirit and intent of that application. We can consider and discuss this and return if needed after this afternoon, I guess.

DR. LUKACS: Mr. Dodsworth, one point I would like to raise with you while we are still on the record is that this Direction to Attend was served first on June 6th. As it is almost three months ago I would suspect that perhaps that those months would have been enough to discuss with me any issues that may have been--or any doubts as to what was the intent or what is the scope of the production.

I am really puzzled and having difficulty to understand if there were such doubts, which I believe they are not reasonable--but if there were such reasonable doubts, why, Ms. Sasova, you have not contacted me to discuss this matter, ahead of the--

MR. DODSWORTH: Well, if you recall, the original postponement of the cross-examination was with regards to

the relevancy of the documents you were requesting. So this is not a surprise and we can't discuss what has happened since then, but the indication is that in either direction that happened on that point.

THE WITNESS: Sorry, I just wanted to add something. We were--it was all--you wanted to drop this if Expedia was to become compliant.

MR. DODSWORTH: I am sorry, we can't talk.

THE WITNESS; I am sorry, we can't talk but they are coming to compliance on the 10th and this is why, the reason we had--

MR. DODSWORTH: We probably shouldn't talk any more about this.

THE WITNESS: Okay, but they are compliant on the 10th so this is why--

DR. LUKACS:

369. Q. How do you know that they are going to be compliant on the 10th?

A. Because of my experience with the carriers and travel agencies I know what they have to go through, make changes and the difficult--really, no, challenging schedule of IT releases that they are on and this is not they just said it. They have their whole team working on it and several teams--

370. Q. How do you know?

A. Because of my communications with them.

371. Q. Okay, so after--as you recall, I have requested copies of those communications as well from counsel.

A. But I have—-some of them are verbal. There is --a lot of them are verbal because they are from California. They are talking from meetings and so forth, so a lot of it is verbal. However the 10th of September, compliance date, is--yes, I do have an email about that.

372. Q. Okay, and can you explain why counsel did not provide me with that email prior to this examination when I explicitly requested that?

A. I don't know. My understanding is and this— Mr. Lukacs, my understanding is that the Direction to Attend was with regards to the Affidavit and it is--

MR. DODSWORTH: No.

THE WITNESS: So I don't know.

MR. DODSWORTH: If I may answer that, these are matters that are somewhat sensitive when you are dealing with enforcement matters, right? The issue of whether or not I produce anything--and most of it as Ms. Sasova has just said was oral--so the full flavour of the discussion couldn't be produced. We are willing to produce that, that one document, but I didn't think after you said that we were proceeding with cross-examinations that that would

actually satisfy you. In any case you scheduled these cross-examinations so we proceeded. It didn't become relevant at that point.

DR. LUKACS:

373. Q. Mr. Dodsworth, I advised you by email that I would be prepared to postpone this cross-examination if you provided me with some correspondence or undertaking or some form of communication from Expedia confirming that they were making changes by September 10th, correct?

MR. DODSWORTH: And what I am saying is and what Ms. Sasova more importantly has just said is most of that was done verbally. It is her belief. So it is impossible to produce the full rationale in writing.

DR. LUKACS: Just a moment ago you heard Ms. Sasova testify under oath that she has an email to that effect. That email is something that you could have provided to me in a timely manner and perhaps avoided this cross-examination.

I think that what we are going to do now is: I am going to adjourn this examination pursuant to Rule 96.(2) as no full production has been made in accordance with the Direction to Attend and I reserve my right to bring a motion to the court to seek production or otherwise we will be in touch to discuss on what terms this examination may resume and continue.

Is that clear, counsel?

MR. DODSWORTH: I understand what you are saying, yes.

DR. LUKACS: I guess for today we are done. We can go off record.

--THIS CROSS-EXAMINATION ADJOURNED AT 1:26 P.M., ON September 4, 2014.

WE HEREBY CERTIFY THAT the foregoing was transcribed, to the best of our skill and ability, from digitally recorded and monitored proceedings.

.....

G R S / M J A

From: Steven de Blois <sdeblois@expedia.com>
Sent: 04/04/2014 2:54:54 PM
To: Paul.Lynch@otc-cta.gc.ca
CC: bflanagan@expedia.com
BCC:
Subject: RE: Expedia.ca

Hi Paul,

Attached is a complete list of all IATA codes including customer friendly name. We have translated the English names to French.

In order to meet the CTA's core requirement, we have assigned - to the best of our ability - each code into one of the following 2 buckets:

1. Air Transportation Charges

2. Taxes, Fees, and Charges

Question: can you kindly confirm that we have accurately bucketed each tax code?

We would like to confirm above before moving into development.

Thank you for your support
Steve

Steven de Blois
Sr Manager, Product Management, CA & LatAm
o 416.202.8664
m 416.930.5058
expedia.ca<http://www.expedia.ca/> | expedia.mx<http://www.expedia.com.mx/> | expedia.com.br
<http://www.expedia.com.br/> | expedia.com.ar<http://www.expedia.com.br/>

From: Steven de Blois
Sent: Thursday, March 27, 2014 10:29 AM
To: 'Paul.Lynch@otc-cta.gc.ca'
Cc: Brian Flanagan
Subject: Expedia.ca

Hi Paul,

Thank you for providing additional clarity re: below.
I will follow-up with you next week.

Best regards,
Steve

Steven de Blois
Sr Manager, Product Management, CA & LatAm
o 416.202.8664
m 416.930.5058
expedia.ca<http://www.expedia.ca/> | expedia.mx<http://www.expedia.com.mx/> | expedia.com.br
<http://www.expedia.com.br/> | expedia.com.ar<http://www.expedia.com.br/>

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

From: Brian Flanagan

Sent: Friday, March 21, 2014 5:37 PM

To: 'Paul Lynch'

Cc: Alexei Baturin; Simona Sasova

Subject: RE: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

Hi Paul,

We found the list of the IATA (not Sabre) codes. There are over 1000 codes in this list, many of which are country specific. Do all of these need to be named? Or just those codes that impact Canadian airlines?

As you can appreciate, the complexity for OTAs like us is that we sell over 100 global airlines which adds significant complexity to this exercise.

We've noticed that iTravel2000 does call out some taxes as the code name with tax as in "OG Tax" (see attached). According to the initial IATA document, it is a "Carbon Offset Service Code (Optional - validating)" but has now been changed to " OG - Spain & Canary Islands Aviation Safety and Security Fee". Is their approach allowed within the guidelines?

Thanks for your guidance and insight on this.

Brian

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Thursday, March 20, 2014 11:04 AM

To: Brian Flanagan

Cc: Alexei Baturin; Simona Sasova

Subject: RE: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

Hi Brian,

Just to confirm our conversation of this morning, a separate line item under Air Transportation Charges for an 'Airline Service Charge' would be compliant.

As far as naming third party charges in the breakdown of the taxes, fees and charges, any 'unknown' codes (e.g. HU, FE, XU, WL etc) would have to be identified as per section 135.92 of the Air Transportation

Regulations:

I will loop back with an update before May 19th.

Steve

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

From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]

Sent: Tuesday, April 29, 2014 9:35 AM

To: Steven de Blois

Cc: Brian Flanagan; Paul Lynch

Subject: Re: www.expedia.ca<http://www.expedia.ca>

Good morning Steven,

As requested, the extension to May 19, 2014 has been approved.

Thank you

Simona

Simona Sasova

Gestionnaire, Application de la loi

Manager, Enforcement Division

Regulatory Approvals & Compliance Directorate Direction, générale et des déterminations de l'industrie

Tel: 819-953-9786

Cell: 613-864-7960

Fax: 819-953-1972

Simona.Sasova@otc-cta.gc.ca<mailto:Simona.Sasova@otc-cta.gc.ca>

>>> Steven de Blois <sdeblois@expedia.com<mailto:sdeblois@expedia.com>>
28/04/2014 2:45 PM >>>

190

Hi Simona,

On behalf of Expedia Canada Corp., I am writing to request an extension of the April 30th date per the warning letter dated March 27, 2014.

The teams at Expedia have been actively working to implement the agreed upon experience that will ensure we are compliant. This is a high-priority project. It is scheduled to be released week of May 19th, 2014. There is a possibility that it will be delivered before this date.

Thank you for your consideration,

Steve

Steven de Blois

Senior Manager

Product Management - CA/LatAm

416.930.5058

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Monday, April 28, 2014 11:21 AM

To: Steven de Blois

Cc: Simona Sasova

Subject: RE: Question : www.expedia.ca<http://www.expedia.ca>

Hi Steve,

As Expedia Canada Corporation received a formal warning letter with a compliance date, we would require a written request (email is OK) from Expedia to extend the date of compliance along with justification for the extension. It appears from recent emails that the April 30th compliance date cannot be met. **191**

Therefore, please address your request for extension to Simona Sasova (simona.sasova@otc-cta.gc.ca<mailto:simona.sasova@otc-cta.gc.ca>),
Manager, Enforcement Division.

Regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com<mailto:sdeblois@expedia.com>>
28/04/2014 10:08 AM >>>

Hi Paul - I just sent you a response on the other email thread.

We are actively working on it and expect the new compliant experience to launch in coming 2 weeks. I will be sure to loop back with you to confirm live date.

Is this ok? I understand the date in letter states Apr 30th. We have been working diligently to resolve this issue.

Thank you for your support

Steve

192

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Monday, April 28, 2014 10:03 AM

To: Steven de Blois

Cc: Simona Sasova

Subject: Re: Question : www.expedia.ca<http://www.expedia.ca>

Hi Steve,

I continued with a few more searches and found the contravention again on the attached pdf - please be aware that Exepdia Canada Corporation have until April 30, 2014 to fix this issue as per the warning letter of March 27, 2014.

You will see the attached flight breakdown has two taxes with codes only - the tax is not identified.

Regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

>>> Paul Lynch 28/04/2014 9:39 AM >>>

Hi Steve,

The collapsed fare in option 2 is not an issue, so long as the relevant information is available by either a click or hover over - by relevant I refer to a tax breakdown that includes the name of each tax or third party charge (the contravention for which the warning letter dated March 27 was issued). As you are aware, the Air Transportation Charge is not required to be broken down.

I have reviewed the expedia.ca web site and have not been able to replicate the contravention highlighted in the warning letter - i.e. the names of all taxes appear in the breakdown. Are you confident that this issue has now been fully resolved?

Kind regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9

Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9

Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com<mailto:sdeblois@expedia.com>>
25/04/2014 4:36 PM >>>

Great. Thank you Paul.

Steve

On 2014-04-25, at 4:24 PM, "Paul Lynch"
<Paul.Lynch@otc-cta.gc.ca<mailto:Paul.Lynch@otc-cta.gc.ca>>

wrote:

> Hi Steve - I will review proposal 2 with my supervisor on Monday -

so

> long as you can click it or hover over it to get the beakdown, it

may

be

> OK...let me confirm.

>

> Regards,

>

>

>

> Paul Lynch

> Enforcement Support Officer

> 819-953-9764 | télécopieur/facsimile 819-953-5562

> | ATS/TTY 800-669-5575

> Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

> Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9

> Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9

> Gouvernement du Canada | Government of Canada

>

>

>>>> Steven de Blois
<sdeblois@expedia.com<mailto:sdeblois@expedia.com>>
22/04/2014 12:55 PM >>>

> Hi Paul,

>

> I have a question regarding the Flight path on

>
www.expedia.ca<http://www.expedia.ca<http://www.expedia.ca%3chttp:/www.expedia.ca>>

>

> Below is the default view. As you can see, the "Trip Summary" module

is

> expanded by default. The Traveller1 and Traveller2 details are both

> expanded.

>

> Default view:

> [cid:image003.jpg@01CF5E2A.190F1550]

>

>

> I would like to understand if below proposals are compliant.

>

> Proposal #1 - Traveller2 details is collapsed. Is this compliant?

> [cid:image005.jpg@01CF5E2A.190F1550]

>

>

> Proposal #2 - Traveller1 and Traveller2 details are both collapsed.

Is

> this compliant?

> [cid:image007.jpg@01CF5E2A.190F1550]

>

>

> Thank you

> Steve

>

>

> Steven de Blois

> Sr Manager, Product Management, CA & LatAm

> o 416.202.8664

> m 416.930.5058

> expedia.ca<http://www.expedia.ca/> |

> expedia.mx<http://www.expedia.com.mx/> |

> expedia.com.br<http://www.expedia.com.br/> |

> expedia.com.ar<http://www.expedia.com.br/>

>

From: Steven de Blois <sdeblois@expedia.com>
Sent: 04/04/2014 2:54:54 PM
To: Paul.Lynch@otc-cta.gc.ca
CC: bflanagan@expedia.com
BCC:
Subject: RE: Expedia.ca

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expedia.com.br<http://www.expedia.com.br/> | expedia.com.ar<http://www.expedia.com.br/>

From: Steven de Blois
Sent: Thursday, March 27, 2014 10:29 AM
To: 'Paul.Lynch@otc-cta.gc.ca'
Cc: Brian Flanagan
Subject: Expedia.ca

Hi Paul,

Thank you for providing additional clarity re: below.
I will follow-up with you next week.

Best regards,
Steve

Steven de Blois
Sr Manager, Product Management, CA & LatAm
o 416.202.8664
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expedia.ca<http://www.expedia.ca/> | expedia.mx<http://www.expedia.com.mx/> |
expedia.com.br<http://www.expedia.com.br/> | expedia.com.ar<http://www.expedia.com.br/>

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

From: Brian Flanagan

Sent: Friday, March 21, 2014 5:37 PM

To: 'Paul Lynch'

Cc: Alexei Baturin; Simona Sasova

Subject: RE: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

Hi Paul,

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Thanks for your guidance and insight on this.

Brian

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Thursday, March 20, 2014 11:04 AM

To: Brian Flanagan

Cc: Alexei Baturin; Simona Sasova

Subject: RE: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

Hi Brian,

Just to confirm our conversation of this morning, a separate line item under Air Transportation Charges for an 'Airline Service Charge' would be compliant.

As far as naming third party charges in the breakdown of the taxes, fees and charges, any 'unknown' codes (e.g. HU, FE, XU, WL etc) would have to be identified as per section 135.92 of the Air Transportation

Regulations:

135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

Therefore, a warning letter will be issued to Expedia Canada to rectify this issue.

Kind regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

>>> Brian Flanagan <bflanagan@expedia.com<mailto:bflanagan@expedia.com>> 18/03/2014 4:29 PM >>>

Hi Paul,

It turns out that it is much easier for our team to break out the YR tax as a separate item vs. moving it into the ATC amount.

If we were to break it out as a separate item, would it be acceptable to put it below the Fuel Surcharge line?

Moving it would require a couple of months of effort across numerous teams vs. breaking it out which would be done in weeks.

Please let me know if this would be acceptable to you.

Thanks,

Brian Flanagan

Sr. Director, Product & Retail for Canada and Latin America Expedia Canada Corp

Phone: +1 416 202 8668 | Email: bflanagan@expedia.com<mailto:bflanagan@expedia.com>
www.expedia.ca<http://www.expedia.ca> | www.expedia.mx<http://www.expedia.mx> | http://www.expedia.com.br | http://www.expedia.com.ar

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Tuesday, March 11, 2014 3:27 PM

To: Brian Flanagan

Cc: Simona Sasova

Subject: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

Hi Brian,

You had been in contact with Yannick Pouret here at the Canadian Transportation Agency last year, when the Agency highlighted violations of the Air Transportation Regulations (ATR) governing All-Inclusive Air Price Advertising on the expedia.ca web site.

Those violations were fixed by the end of October last year but we recently received a complaint and subsequently reviewed the expedia.ca web site again. We found two violations within the breakdown of the taxes, fees and charges. Both relate to a 'Service Charge' with the code 'YR' and appear in the breakdown on our examples. These are not third party charges and should be incorporated within the Air Transportation Charge.

Knowing that Expedia fixed this issue last year, this may be a coding error of some kind and hopefully a quick fix can be implemented.

Perhaps you could call me on 819-953-9764 at your earliest convenience to discuss.

Kind regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

<<File: TEXT.htm>>
<<File: IATA Tax List_breakout.xlsx>>
<<File: Mime.822>>

Examination No. 14-0857 Court File No. A-167-14

FEDERAL COURT OF APPEAL

B E T W E E N:

DR. GABOR LUKACS

APPLICANT

- and -

CANADIAN TRANSPORTATION AGENCY

RESPONDENT

****

CONTINUED CROSS-EXAMINATION OF SIMONA SASOVA ON HER AFFIDAVIT sworn May 20th, 2014, pursuant to an appointment made on consent of the parties, to be reported by Gillespie Reporting Services, on the 15th day of September, 2014, commencing at the hour of 11:29 in the forenoon.

****

APPEARANCES:

Dr. Gabor Lukacs, for the Applicant

Mr. John Dodsworth, for the Respondent

This continued Cross-Examination was digitally recorded by Gillespie Reporting Services at Ottawa, Ontario, having been duly appointed for the purpose.

INDEX

NAME OF WITNESS: SIMONA SASOVA

CONTINUED CROSS-EXAMINATION BY: DR. GABOR LUKACS

NUMBER OF PAGES: 93 THROUGH 153 INCLUSIVE

ADVISEMENTS, OBJECTIONS & UNDERTAKINGS

EXHIBITS

DATE TRANSCRIPT ORDERED: SEPTEMBER 15, 2014

DATE TRANSCRIPT COMPLETED: OCTOBER 06, 2014

SIMONA SASOVA, PREVIOUSLY SWORN:

CONTINUED CROSS-EXAMINATION BY DR. LUKACS:

374. Q. I understand that last time there was a concern about . She is-- you can say hello to her too.

MR. DODSWORTH: Hello, How are you?

Hi, good, thank you.

MR. DODSWORTH: Thank you.

DR. LUKACS: All right. Are we on the record now?

THE REPORTER: Yes, the sound is good.

DR. LUKACS:

375. Q. This is the continuation of the cross-examination of Ms. Simona Sasova, commenced on September 4th, 2014, which was adjourned pursuant to Rule 96(2)of the *Federal Courts Rules*.

During cross-examination, I ask you questions, and you are required to answer them, subject to objections of counsel. Do you understand that, Ms. Sasova?

A. Yes.

376. Q. Do you understand that you are not to speak to counsel or anyone else while you are being cross-examined?

A. Yes.

377. Q. Ms. Sasova, do you know why you were required to re-attend for cross-examination today?

A. Yes.

378. Q. What was the reason?

A. It was to be cross-examined on the documents that you had asked for that you had received.

DR. LUKACS: Let's mark as Exhibit 8 the bundle of email correspondence between March 11th, 2014 and May 27th, 2014 between Agency staff and Expedia, which is I believe 84 numbered pages.

THE REPORTER: Exhibit Number 8?

DR. LUKACS: Yes, we are continuing the numbering.

THE REPORTER: Okay.

EXHIBIT NO. 8: Bundle of email correspondence between March 11, 2014 and May 27, 2014 between Agency Staff and Expedia, 84 numbered pages.

MR. DODSWORTH: Can I see a copy of those documents?

DR. LUKACS: I believe it was printed out, counsel, was it not?

MR. DODSWORTH: Yes, but I don't have a copy here.

THE REPORTER: I am giving it to you right now.

MR. DODSWORTH: Thank you.

DR. LUKACS: Are you okay with it, counsel? Can we proceed?

MR. DODSWORTH: Yes.

DR. LUKACS:

379. Q. Ms. Sasova, do you recognize Exhibit 8?

A. Yes.

380. Q. Did you cause Exhibit 8 to be sent to me?

A. Yes.

381. Q. Was Exhibit 8 provided to me on September 9th, 2014?

A. On September 9th. When did we send that out?

382. Q. This was last Tuesday.

A. On September 9th, yes, I believe it--Sorry, I don't know what date it was sent to you. If it was-- if that is what you are referring to, then I believe so.

383. Q. Can you please look at page 20 and 25?

A. All right.

384. Q. And be so kind to confirm that the string of emails from page 20 continues on page 25?

A. Oh, this is the question, okay, let me see.

MR. DODSWORTH: Do you understand the question?

THE WITNESS: I just--I have to--I have to go back; just a second. That is March 11th, 18th--one, two, the message was--This is the format how the emails were saved. If you probably ask me another question--I cannot see that connection but those emails that are following each other--the email that you are asking about, on page 20, that email is from March 21st, 2014, 5:37, appears on page 5.

DR. LUKACS:

385. Q. My question to you is whether that header that you see at the bottom of page 20--

A. Yes.

386. Q. --the body of the email is on page 25. Is this correct?

A. Let me see. Let me check. It will take a moment, okay.

387. Q. Take your time.

A. Yes. Okay, 21st, 5:37. So that is the email, okay.

MR. DODSWORTH: That is what he is asking.

THE WITNESS: This is what he is asking which is on 25. Just a second and I will go to 25. I am looking for this email:

"Hi Paul,

"We found the list of the IATA codes..."

Yes.

DR. LUKACS:

388. Q. So just to be clear, just due to some scanning problems, it was not scanned consecutively but it should have--page 25, which has 3 at the bottom, should have appeared after page 20 which has 2 at the bottom.

A. I cannot tell you. This is how we saved them. This is how they appeared. I know you had sent the email requesting that but this is the best--I really cannot

answer how the scanning--why it appeared like this. But the complete email appears on page 5 as I had mentioned in the answer.

389. Q. Uh-huh. Let's now look at page 6. On March 11th, 2014, Mr. Lynch wrote to Expedia.

A. Uh-huh.

390. Q. In his March 11th, 2014 email, Mr. Lynch stated that two new violations were found.

A. All right.

391. Q. Is that correct?

MR. DODSWORTH: Is that what--?

THE WITNESS: Okay, yes.

DR. LUKACS:

392. Q. Correct. Mr. Lynch referred to previous violations of Expedia from 2013?

A. Yes.

393. Q. So, this email of Mr. Lynch from 2014 was about a second violation of Expedia within two years?

MR. DODSWORTH: Ms. Sasova has already answered questions with regard to this email. *O*

DR. LUKACS: I am sorry, counsel. I have received a whole new package of emails with a wealth of new correspondence and given how incomplete the original chain was, I intend to examine Ms. Sasova on the whole document. We agreed that--?

MR. DODSWORTH: No, we did not agree to that. We agreed to--we provided the entire package to make sure that you were clear that you had them all but all those documents you are referring to were provided prior to this--or at the September 4th cross-examinations--

THE WITNESS: It was after.

MR. DODSWORTH: --and you had an opportunity to answer her--ask her questions at that time. If you can identify a text or an email that was provided since that time, that is what we are here to do, to answer questions with respect to those. *O*

DR. LUKACS: Counsel, with the utmost respect, this current exhibit, it has 84 pages. As I recall the exhibits back on September 4th were less than 20 pages. So there has been a substantial amount of information not disclosed and therefore--

MR. DODSWORTH: No, no, that doesn't follow. The fact is that there is a lot of repetition.

DR. LUKACS: Counsel, if you would allow me to finish please. The disclosures were so grossly incomplete that it was not possible to fully and meaningfully conduct the cross-examination based on that. I have done my very best but given that there have been a wealth of more information disclosed at this point certainly I do intend to go through these matters thoroughly.

MR. DODSWORTH: Well, Ms. Sasova will not be answering any questions having to do with emails that you were provided on September 4th. *O*

DR. LUKACS: Counsel, so is it an objection and you actually refuse to answer questions?

MR. DODSWORTH: That is right. We are objecting to the line of questioning having to do with emails and information that you had at your disposal on September 4th. *O*

DR. LUKACS: Well, counsel, I am going to state those questions on the record and I guess we will have then a judge of the court decide whether it is appropriate or not.

I note however that I had a grossly inappropriate productions at the time and certainly that will be sufficient ground in my submission to allow this examination.

I would also caution you, counsel, that given that it appears that you are interfering with the examination costs may be sought against you personally. I hope you are aware of that.

394. Q. So my last question was: So this was the second violation of Expedia within two years.

A. As I said, this was part of it. It was part of the cross-examination--

MR. DODSWORTH: Ms. Sasova is not going to answer

questions—

THE WITNESS: No.

MR. DODSWORTH: --having to do with the information that was available to you on the previous cross-examinations. *O*

DR. LUKACS:

395. Q. Mr. Lynch stated that 'YR' and 'Service Charges' are not third party charges.

A. Once again, you have already seen those emails.

396. Q. Mr. Lynch stated that 'YR' and 'Service Charges' should be incorporated within 'Air Transportation charge'.

A. Once again, that was in a package that we had provided to you on September 4th.

397. Q. Listing an air transportation charge as a third party charge is a violation of Section 135.91 of the Air Transportation Regulations, isn't it?

A. I have already answered that question, Mr. Lukacs, I recall.

398. Q. I don't--can you help me to recall that?

A. I recall--

MR. DODSWORTH: You can read the transcript when it comes. *O*

DR. LUKACS: Well I don't have the transcript yet,

counsel.

MR. DODSWORTH: Well you can evaluate and assess her response at that time.

DR. LUKACS: Counsel, I reserve my right to continue this line of questioning subject to an order from the court. I am then going to move on because I really see no point given how you are frustrating this line of questioning. So, I am going to move on as a matter of due diligence but I am not satisfied that Ms. Sasova is answering questions properly.

399. Q. All right, let's look at page 9. This is an email from March 27th, 2014, at 10:29 a.m.

A. Uh-huh.

400. Q. The top; Expedia thanks here Mr. Lynch "for providing additional clarity re: below", correct?

A. Yes.

401. Q. What was Expedia referring to here?

A. Wasn't that--

MR. DODSWORTH: This was a document that was provided before to you, unless you can prove otherwise. *O*

DR. LUKACS: No counsel this document was not provided to me. If you look at Exhibit 5, I believe, Exhibits 5, 6 and 7 it is not among them. This email was not provided to me earlier and therefore I am asking questions about it and I request that Ms. Sasova answer

questions about them.

MR. DODSWORTH: I am sorry. When you are referring to this having been provided can you just confirm that, that it was not provided? I don't know how you--

DR. LUKACS: That's what I have here. I am looking here at the papers that I have here and I don't see this email among them.

MR. DODSWORTH: Did you provide this package?

THE WITNESS: This package, yes, with the 1,000 codes. Yes, that was given to you. I am pretty sure it was part of it.

DR. LUKACS: Counsel, this email at the top, of March 27, 2014, 10:29, I don't have it here, among the exhibits that I have here so I am requesting that Ms. Sasova answer the question.

MR. DODSWORTH: Do we have the exhibit from the previous--

DR. LUKACS: Yes.

MR. DODSWORTH: If this line of questioning is going to continue perhaps we need the previous exhibit to compare it.

THE WITNESS: Yes, we would need them here.

DR. LUKACS: Sure.

MR. DODSWORTH: Perhaps if we--can I suggest then,

Mr. Lukacs, we adjourn until we have that in front of us to allow us to consider this issue.

DR. LUKACS: Are you sure? Do you have those exhibits right there or...?

THE REPORTER: I may have the previous exhibits in the other room. I just have to go and get them.

DR. LUKACS: So we need Exhibits 5, 6 and 7.

THE REPORTER: Okay. Do you want to go off record while I just go out of the room to get them?

MR. DODSWORTH: Sure.

DR. LUKACS: Sure.

THE REPORTER: Okay, hang on.

(SHORT RECESS)

--UPON RESUMING AT 11:45 A.M.

DR. LUKACS: Are we back on the record?

THE REPORTER: Yes, back on.

DR. LUKACS: Thank you.

402. Q. So can you tell me, Ms. Sasova, if this email at that the top of page 9 of Exhibit 8 if it appears anywhere else in Exhibits 5, 6 or 7?

A. Yes, it appears. It is Exhibit 5.

403. Q. Exhibit 5, yes?

A. And it is the second email from the top.

404. Q. Oh, okay, you are quite right. Okay, withdrawn.

Let's look at page 17 of Exhibit 8. On April 8th, 2014, Expedia drew Mr. Lynch's attention to the non-compliance of FlightNetwork with the advertising regulations, correct?

A. Yes.

405. Q. What was the Agency staff's response to this email?

MR. DODSWORTH: Are you asking--I'm sorry, Mr. Lukacs, just to be clear, are you asking where the response is? Again this is prior to one of those documents that was provided, unless you can establish otherwise.

DR. LUKACS:

406. Q. I am asking what was--how did Agency staff respond to this given that this is the first time I am seeing this email?

A. This is the email that has the attachments, the Expedia attachments, and I don't think there was any response. I am still looking. I don't think there was any answer to that.

407. Q. There was no answer.

A. No. I can reply I don't think there was any answer.

408. Q. Were enforcement actions taken against FlightNetwork as a result of this email?

MR. DODSWORTH: That is not relevant to this proceeding.

DR. LUKACS: So you object to it, counsel?

MR. DODSWORTH: I object to that question, yes. *O*

DR. LUKACS:

409. Q. Let's now look at page 19 at the top. Expedia advised Agency staff that the "target roll-out date" was "mid/end May", correct?

A. Yes.

MR. DODSWORTH: I am sorry, should we--I think we should clarify that this is a new email.

THE WITNESS: Okay, 16/04, I think we gave it to him. Okay.

DR. LUKACS:

410. Q. Okay, let's look at page 21. Expedia asked Agency staff about two different ways to show the charges on its website, correct?

A. Yes, but we have given this one to you already.

411. Q. Let's look at page 23--

A. Yes, we have given that to you.

412. Q. --on April 25, 2014, Mr. Lynch advised that he would confirm with his supervisor, correct?

A. Yes, I think this is here.

413. Q. And Mr. Lynch was referring to you as his

supervisor?

A. It already was given to you on September 9th.

414. Q. Which exhibit?

A. I just had it. September 4th.

MR. DODSWORTH: Just clarify this.

THE WITNESS: I am sorry, September 4th was the date. It is on page--it is in Exhibit 6 on page--well the second page but the page is marked 4.

DR. LUKACS: Counsel, with the utmost respect, when you provide an incomplete chain of emails such as Exhibit 6 which starts right in the middle, I don't think it would be fair to expect a party to cross-examine based on an incomplete document.

So my position is that Ms. Sasova should respond to questions about everything, that whole email in that exhibit, given that I received something which was incomplete last time.

MR. DODSWORTH: I continue my objection that that information was provided. The question that you are asking about is about an email that was provided on September 4th. You had an opportunity to ask questions and you did ask questions at that time.

If you have a question about something in that email chain, it is a separate email, it is a separate document that you would like to ask questions about, then

that is a different matter. *O*

DR. LUKACS: Counsel, your objection is noted. I certainly may have to bring up some of these issues with a judge.

415. Q. Let's look at page 43 of Exhibit 8. So on April 29, 2014, Expedia thanked you, and stated that they would get back to you before May 19th, 2014; correct?

A. Just a moment, please. I just want to see what I have given you.

416. Q. This was the email that was partially disclosed, but not completely, in Exhibit 6 which was dated--

A. All right, yes.

417. Q. So certainly a new email.

A. Just a moment, please.

MR. DODSWORTH: Mr. Lukacs, could you clarify again which email you are referring to?

THE WITNESS: Yes. We have given you an email that had "I will loop back with an update before May 19th". That was--you were looking for the header for that email so the header, it is the one above it.

DR. LUKACS:

418. Q. I do see here Exhibit 6 is the body of the email and the header is not part of Exhibit 6.

A. Yes, that is right.

419. Q. So I just would like to confirm with you that email we see on page 43 was sent on April 29th, 2014 to you.

A. That is the header for it.

420. Q. Yes and now that we see the full email, it was Mr. de Blois from Expedia, telling you, "Thank you Simona" that was missing from Exhibit 6.

A. That is right.

421. Q. And it says: "I will loop back with an update before May 19th".

A. That is right, yes, that header wasn't there. Correct.

422. Q. For how long have you been on a first-name basis with Mr. de Blois?

MR. DODSWORTH: That is not a relevant question. *O*

DR. LUKACS: Counsel, it is relevant because it speaks to the bias of Ms. Sasova. It speaks to her credibility, bias and integrity of her carrying out her work. She is an enforcement officer who is on a first name basis, apparently, with the people against whom she is supposed to act. Do you still maintain your objection?

MR. DODSWORTH: I object to this line of questioning. *O*

DR. LUKACS: All right, I am also going to put another question on the record which I expect you will

also be objecting to.

423. Q. Is it your practice to be on a first-name basis with executives of corporations against whom you take enforcement actions?

A. Yes.

DR. LUKACS: So, counsel, now that I have that answer would you withdraw your objection to answer this specific question about Expedia?

MR. DODSWORTH: Yes, I withdraw my objection.

DR. LUKACS: Okay.

424. Q. So for how long have you been on a first-name basis with Mr. de Blois of Expedia?

A. Probably since we started communicating. It is a common practice.

425. Q. Now let’s look at page 49. On May 1, 2014, Expedia had further questions for Mr. Lynch, correct?

MR. DODSWORTH: Before you ask your question, we will just confirm that this is in fact a new document.

DR. LUKACS: Please take your time.

THE WITNESS: Yes, go ahead. That is a new one, yes. That is a new one. I am sorry, what was the question again?

DR. LUKACS:

426. Q. The question was: Expedia had further questions for Mr. Lynch on May 1, 2014.

A. Yes.

427. Q. Let's look at page 51 now. On May 2, 2014, Mr. Lynch advised Expedia that he was unable to "comment further", correct?

A. Where do you see that?

428. Q. On page 51 in the middle of the page.

A. I am not sure I am the best person to ask this question.

429. Q. Ms. Sasova, I am examining you and my question to you is: Give that you were cc'd to this email dated May 2, 2014 at 4:20 p.m. from Mr. Lynch to Expedia, the second line Mr. Lynch here stated that he "cannot comment further", correct?

A. Mr. Lukacs, I am answering your question and when I ask a supplementary it is to clarify so that I can provide you with the best possible answer.

430. Q. My question to you is: Is it correct that Mr. Lynch wrote to Expedia that he "cannot comment further"?

A. "Cannot comment further", yes.

431. Q. And then at the top of the page Expedia thanked Mr. Lynch, correct?

A. Yes.

432. Q. Now let's look at page 53. On May 14, 2014, Expedia wrote to Mr. Lynch and to you, correct?

A. Yes.

433. Q. Expedia stated that: "The French language website has been updated per the CTA requirement", correct?

A. Yes.

434. Q. Expedia stated that: "The English language website will be updated on May 23rd", correct?

A. Yes.

435. Q. Expedia also expressed hope that "this 4 day delay is satisfactory".

A. Yes.

436. Q. Expedia also stated that it would "loop back once English has been updated".

A. Correct.

437. Q. What was the response of Agency staff to Expedia's email dated May 14th, 2014?

A. I don't believe there was any response.

438. Q. Not even a phone call?

A. No, I don't recall that there was a phone call. Maybe it could have been. I am not sure. I cannot with certainty answer. As for emails, no; but there could have been. I don't know.

439. Q. Let's look at page 61 in the middle. On May 26, 2014, Expedia advised you and Mr. Lynch that its "English language website has been updated per the CTA requirement as of May 23", correct?

A. All right, yes.

440. Q. On May 27, 2014, Mr. Lynch wrote that Expedia's website was compliant, correct?

A. Yes.

DR. LUKACS: Now let's mark as Exhibit 9 the bundle of email correspondence between June 9th, 2014 and August 21st, 2014 between Agency staff and Expedia, 16 numbered pages.

EXHIBIT NO. 9: Bundle of email correspondence between June 9, 2014 and August 21, 2014 between Agency staff and Expedia, 16 numbered pages.

THE REPORTER: Okay.

DR. LUKACS:

441. Q. Do you recognize Exhibit 9, Ms. Sasova?

A. Yes.

442. Q. Did you cause Exhibit 9 to be sent to me?

A. Yes.

443. Q. Was Exhibit 9 provided to me on September 12, 2014?

A. I believe it was September 12th.

444. Q. Last Friday?

A. Yes, it was last Friday.

445. Q. The first email in Exhibit 9 is from June 9th, 2014, correct?

A. Correct.

446. Q. Did you or anyone else from the Agency communicate with Expedia between May 27th, 2014 and June 9th, 2014?

A. No, I don't know. I don't think so.

447. Q. Okay.

A. It could have been.

448. Q. Did you or other Agency staff issue a warning letter to Expedia since May 27th, 2014?

A. No, no.

449. Q. Did you or other Agency staff impose an administrative monetary penalty on Expedia since May 27th, 2014?

A. No.

450. Q. Now let's look at this email. This is by Mr. de Blois. Am I pronouncing his name correctly?

A. Yes, I think so, it is de Blois.

451. Q. Mr. de Blois of Expedia wrote to you. Mr. de Blois wrote to "confirm the details of our conversation".

A. Oh, yes, we did have a conversation. It could have been on June 9th, though.

452. Q. So, the conversation took place on June 9th. How did the conversation take place?

A. By phone.

453. Q. Who participated in the conversation?

A. Myself and him, Steven de Blois.

454. Q. Anybody else?

A. Sometimes Paul sits on the conference calls. I don't recall whether he was there or not.

455. Q. Did you have any counsel from the Agency sitting in on the call?

A. No.

456. Q. Was the conversation related to your role as an enforcement officer?

A. The conversation that we had was with regards to trying to reach a settlement with regards to your letter and pursuance. That was the conversation.

457. Q. Ms. Sasova, my question to you was: Was this conversation related to your role as an enforcement officer of the Agency?

A. I don't understand your question. What do you mean "your role as an enforcement officer"?

458. Q. You told me as I recall last time that your role as an enforcement officer is to enforce the laws and regulations.

A. That is correct.

459. Q. So what regulations were Expedia violating at this time?

A. This is strictly again to your request--well for the settlement, the issue that you had raised. The warning letter with Expedia that we had issued, that

enforcement action was finished.

460. Q. Why? If it was finished why would you be talking to Expedia? What enforcement matter was in process?

A. Because of your letter. That was because--to try to reach settlement and for you, what you had brought forward, you know. That was the only reason.

461. Q. As an enforcement officer you enforce laws and regulations, correct?

A. Yes.

462. Q. So was there any law or regulation that you were enforcing when you were having this discussion with Expedia?

A. My conversation with Expedia was with regards, again, to air transportation charges that were raised by you. It was under ASPAR. It is under Air Service Price Advertising Regulations.

463. Q. So was there any enforcement procedure that you were speaking to Expedia about at that time?

A. No, no.

464. Q. Okay. What did you discuss during that conversation exactly? Can you recall that?

A. As you see in the email there, we talked about a way to satisfy you to reach a settlement, what the options would be.

465. Q. Expedia advised you that it would take several months to make further changes to its website, correct? I am talking about the phone conversation.

A. Oh, phone conversation. We discussed, as it is stated in the email, possibilities to--and the length, time length, yes. I am not really sure whether I can say what would take several months because as you know it is quite specific what would take several months to fix.

466. Q. Would you agree with me that the additional changes would be time and cost consuming for Expedia?

A. Yes, I believe so.

467. Q. Would it be fair to say that we are talking about hundreds of thousands of dollars?

A. I really don't know.

468. Q. Why should Expedia spend the time and cost to change its website at this stage?

A. To--so we can reach settlement with you.

469. Q. Who can reach settlement? Can you please specify? Who would be settling with whom?

MR. DODSWORTH: I believe we are referring to--you are referring and Ms. Sasova is referring to the settlement discussions that caused this matter to be adjourned in fact on an ongoing basis so there is no--

DR. LUKACS: Counsel, I am sorry. I asked Ms. Sasova to answer the question because she is--You see,

counsel, settlement discussions between parties is one thing but when it goes outside the parties it is an entirely different matter so I would--

MR. DODSWORTH: Well--but you are referring to matters that were discussed between yourself and myself and in fact are--

THE WITNESS: Yes.

MR. DODSWORTH: --on a without prejudice basis so you can understand my interest in this. Ms. Sasova did not participate in those conversations.

DR. LUKACS:

470. Q. I understand that but--so Ms. Sasova, how did you learn about any settlement matters?

A. From my counsel, from John.

471. Q. Okay.

MR. DODSWORTH: But those conversations are privileged.

DR. LUKACS: Certainly.

472. Q. So would it be fair to say that you were asking Expedia to change its website so that the Agency would be able to settle with me? Can you please answer my question?

A. It is to satisfy you. The way you put it, it is to satisfy you. You had--after we had issued a warning letter to Expedia and they complied there was still

something outstanding that you were not satisfied with. So it was really for that.

473. Q. So you were speaking to Expedia and asking Expedia to make changes to make me, Gabor Lukacs, happy?

A. Yes.

474. Q. Uh-huh. Do you agree that the further changes that were being discussed here were necessary for Expedia to comply with the law?

A. No.

475. Q. No.

A. With the law. Okay, okay, I take it back. No, no, not really, no. I am not sure what you are going to say.

476. Q. With the regulations, with the Price Advertising Regulations.

A. Were they necessary? No.

477. Q. No. So what rationale did you give to Expedia about having to make further changes to their website? What did you tell Expedia? Why? What you are telling me here is that you told--

A. I know where you--what you are trying to ask. I believe I do. This regulation called for a title Air Transportation Charges and I have already answered those questions, and this is what I had explained to Expedia.

478. Q. I am not sure if I understand your answer. My

question to you was what rationale you gave to Expedia about having to make further changes to their website after May 27th.

A. I said air transportation charges. There needs to be a title for air transportation charges.

479. Q. Why was a title necessary?

A. Because of the regulations.

480. Q. So then would you agree with me that on June 9th Expedia's website was not complying with the regulations?

A. With not all the regulations. The one that you had raised before it was compliant with.

481. Q. But there were some other regulations it wasn't compliant with on June 9th?

A. I have already answered this. I already answered it in my cross-examination where they were compliant.

482. Q. Ms. Sasova, with the utmost respect, we had no discussions because these emails--

A. Yes.

483. Q. --were not exposed until last Friday, as you just admitted. Therefore we could not have had this kind of discussion based on those emails.

A. I think it is in my--

MR. DODSWORTH: No.

THE WITNESS: Oh, this is not. This is--

MR. DODSWORTH: No.

THE WITNESS: But this part, the two--oh, no. Okay, sorry. Yes, go ahead.

DR. LUKACS:

484. Q. Ms. Sasova, what I am trying to understand is: Can you confirm that on June 9, 2014, Expedia's website was not compliant with all the Price Advertising Regulations?

A. Yes.

485. Q. Did you issue Expedia a warning letter of its non-compliance?

A. We issued on March 27th, yes.

486. Q. I am talking about on June 9th. You said, on June 9th, Expedia was not compliant.

A. No.

487. Q. Why didn't you issue a warning letter?

A. Because, as I explained and as I mentioned in my Affidavit, the display how Expedia had it was satisfactory and I had answered those questions. We had tried to move specific, about the specific airline fuel surcharge into air transportation charges or eliminate those altogether in order to satisfy your request.

488. Q. A moment ago you just stated that on June 9th Expedia's website was not compliant, correct?

A. Yes.

489. Q. If it wasn't compliant on June 9th, my question to you then is: What enforcement action in terms of warning letters and fines have you taken since June 9th to bring Expedia to compliance?

A. There was no warning letter. There was no--I am sorry--enforcement action.

490. Q. Why on June 9th did you not take enforcement action against Expedia, against those issues that were non-compliant on June 9th?

A. Because I was satisfied with how it was displayed.

491. Q. Even though it was non-compliant; correct?

A. It was acceptable as I mentioned in my Affidavit and answered the question to you already.

492. Q. A moment ago you just said that on June 9th it was not complaint.

A. I said--as I said in my Affidavit, again, it was satisfactory.

493. Q. I am asking you--my question is not about your Affidavit, Ms. Sasova. I am asking you about what you said just five minutes ago.

A. Yes, and I answered yes.

494. Q. You said that on June 9th Expedia's website was not compliant.

A. That is correct. Not all of it was. There was--the majority was compliant. Air Transportation Charges title was not there. Everything else was compliant. It was a miniscule part but yes, non-compliant.

495. Q. It was not compliant. So my question to you is: How is it possible that on June 9th Expedia's website was non-compliant and you were nevertheless satisfied with the website?

A. Because--and I have answered that already. I don't know if I have to answer it again.

496. Q. I don't believe you have answered that question. I am sorry.

A. Do I have to answer it again?

497. Q. I am talking about June 9th specifically.

A. Yes.

498. Q. On June 9th the website was not fully compliant, as you put it. You nevertheless claim that you were satisfied with it. How is that possible?

A. On June 9th and May 20th the website was in the same state. So May 20th was the date of the Affidavit and I was satisfied because in the majority and what is important on it was compliant. As I mentioned before and I answered it already, the objectives of the legislation were satisfied and we went through that during my cross-

examination with you on September 4th.

499. Q. I am not asking you about the objectives of the legislation. I am asking you about the enforcement of whatever outstanding issues there were on June 9th.

A. But this is what I had answered, Mr. Lukacs.

500. Q. Now you stated that the website was in the same state on May 20th as on June 9th, and I am telling you that that is not the case.

A. No?

501. Q. Do you agree with me that Expedia's website had changed between May 20th and June 9th?

A. On May 20th when the Affidavit was written we had taken a screen shot that was attached to the Affidavit which had a Dubai flight on it and it had the same display, I believe--I believe, as on June 9th where the air transportation fuel surcharges were listed separately.

502. Q. And I put it to you, Ms. Sasova, that there are some serious problems with Exhibit J. The way Expedia's website looked like is not what is shown there and the reason is, I am telling you, because Expedia changed its website only on May 23rd.

A. That is not the case. They say 23rd but they do changes before that. It is a ballpark date, Mr. Lukacs. On May 20th the screen shot that I have taken was from Expedia.

503. Q. Ms. Sasova, why don't we go back to the email of Expedia to you?

MR. DODSWORTH: Which email, Mr. Lukacs?

THE WITNESS: Yes.

DR. LUKACS: I am trying to find it, counsel. It appears in the middle of page 61.

MR. DODSWORTH: In which exhibit?

DR. LUKACS: Exhibit 8.

THE WITNESS: It is on May 27th, yes.

DR. LUKACS:

504. Q. Expedia, itself, tells you here that this was being updated as of May 23rd.

A. Yes, but they updated it before.

505. Q. That is what you say but it is not what is in the email here.

A. It is a conversation, an email. It is--what I go--it's by evidence and by facts. In my Affidavit I had--the exhibits that we had attached have a May 20th screen shot, Mr. Lukacs, and it shows compliance.

506. Q. Well you have just admitted a moment ago that on June 9th the website was not compliant.

A. With what you had asked, what we had issued a warning letter for.

507. Q. Let's go back to this conversation, Ms. Sasova, taking place between you and Mr. de Blois on June

9th. When did you inform Expedia about the present litigation between the Agency and myself?

A. I am sorry, between…?

508. Q. When did you inform Expedia about this present litigation?

A. I don't believe I informed about a litigation. They--Expedia, I had a conversation with them about it changing and putting it altogether under air transportation charges but I did not say anything about a litigation. I did not.

509. Q. I don't understand. Earlier you just--

A. I said about complaint. I didn't say about litigation. I said there was a complaint.

510. Q. So you earlier told me that you had been asking Expedia to make further changes to its website in order to settle this litigation.

A. The complaint, yes. But if—it is what you call complaint--information from, yes, from the passenger.

511. Q. So earlier you just said that your counsel told you about some settlement discussions that were going on.

A. Yes.

512. Q. So then you went to Expedia and told them please change its website because there is some settlement discussion, didn't you?

A. No.

513. Q. No. Then what did you tell Expedia? Change its website why?

A. Because of the complaint.

514. Q. Because of what complaint?

A. Passenger complaint.

515. Q. But on May 27th Expedia was told already that its website is compliant so--correct?

A. Yes, it was compliant with regards to the warning letter, Mr. Lukacs.

516. Q. Okay but not--just please bear with me for a moment.

A. Sure.

517. Q. Let's go back again to page 61 from Exhibit 8.

A. Uh-huh.

518. Q. I see here Mr. Lynch confirming to Expedia with cc to you that: "A review of the attached and the expedia.ca web site confirms compliance", correct?

A. This is in the context of a warning letter of May--of March 27th, Mr. Lukacs.

519. Q. My question to you is: Is it what Mr. Lynch wrote to Expedia?

A. Yes.

520. Q. Did he write to Expedia: "A review of the attached and the expedia.ca web site confirms compliance",

correct?

A. Yes.

521. Q. It is an unqualified statement.

A. Uh-huh. It is understood through--because of the warning letter of March 27th.

522. Q. And then you have this call with Expedia on June 9th and you tell them you need to make more changes to your website.

A. Correct.

523. Q. Let's go to page 3 of Exhibit 9. On June 9, 2014, you confirmed to Expedia the changes that it was required to make, correct?

A. Yes.

524. Q. On June 9, 2014, Expedia stated that it would contact you the following day, correct?

A. Yes.

525. Q. Now let's look at page 5. Expedia asked you to confirm a revised display of the price. This is still on June 9th.

A. Yes.

526. Q. Expedia also asked you about the date by which the change must be made.

A. Uh-huh.

527. Q. Yes?

A. Yes.

528. Q. What did you answer Expedia about the deadline for making these additional changes?

A. I said immediately, as soon as possible.

529. Q. Where is that response?

A. It was verbal.

530. Q. On the phone?

A. Yes.

531. Q. Do you have notes taken during those--

A. No.

532. Q. You never take notes?

A. No, not in a conversation with airlines and advertisers while I am trying to bring them, you know, to do the changes and so forth. There are so many, no.

533. Q. There are many of them.

A. Yes, there are many of them and there are many calls that are not--no, we don't take notes, no. We don't really take notes, no.

534. Q. How can you remember all of them?

A. Just a good memory. I don't need to. Whatever I don't remember it is in the email. I am not sure what you--I remember the conversation in general terms. I am not sure where you are trying to head but in this I can tell you I am here to answer those questions and I gladly will. But I remember the discussion and once again with--having in mind that it was for the settlement

this was--I was trying to get them to act as soon as possible.

535. Q. Can you tell me at what time the conversation took place?

A. What type?

536. Q. Yes.

A. It is always phone conversation.

537. Q. I mean what time of the day?

A. During working hours.

538. Q. Well you just said you have a good memory of things so perhaps you can tell me what time the conversation took place.

A. I really don't look outside. I can tell you the content of the conversation and not the time or the weather.

539. Q. Let's look at page 7 now, from the bottom. On June 10, 2014, you asked Expedia, "Any news?"

A. Correct.

540. Q. What was your question referring to?

A. The changes that they were going to proceed with.

541. Q. On June 11, 2014, you wrote to Expedia, "I will need to know shortly", correct?

A. Yes.

542. Q. What was it that you needed to know shortly?

A. Their answer.
543. Q. Answer to what?
A. About the changes.
544. Q. Can you please elaborate?
A. There is a--as you recall that was around the time when there was supposed to be a cross-examination and there were discussions about a settlement.
545. Q. Ms. Sasova, in this--I am asking you a question so--
A. This is with regards to--this is with regards to this, absolutely.
546. Q. Ms. Sasova, in this case I am asking you questions saying things like--
A. I didn't pose any questions.
547. Q. Well you said as you recall so I would like you to stick to answering my question. My question was: What was it that you needed to know shortly? Not why but what was it that you needed to know shortly.
A. I believe this was the changes, when they will be able to do the changes.
548. Q. So the timeline.
A. I believe so. I believe so, yes.
549. Q. You are not sure.
A. Well it goes any news. It was all with regards to the settlement. It was when they will be able

to do the changes to satisfy what you had requested.

550. Q. On June 11, 2014, Expedia wrote you that "It will be completed within next two weeks", correct?

A. Correct.

551. Q. And these were referring to the changes to Expedia's website?

A. This was with regards to removal of air transportation charges completely.

552. Q. The removal of--was this something that I requested?

A. It is something that would be--yes, that would be--yes, actually it is. It is something that you had requested. You had requested that the air transportation charges title, it is there, and the Regulation is if they break it out then there is--it must be appear under the title or they can--they don't need to break it out. So there are two options as they were mentioned in my email previously that you had asked about.

553. Q. Let's go back to Exhibit I of your Affidavit. That is my complaint.

MR. DODSWORTH: Do you have it?

THE WITNESS: Yes, I think so. Have you questioned--you may have before.

DR. LUKACS:

554. Q. Do you have Exhibit I?

A. Yes.

555. Q. Can you point here anything in my complaint in which I am asking that air transportation charges be removed altogether?

A. I understand, Mr. Lukacs, that you had agreed to settle if Expedia became compliant.

556. Q. My question to you, Ms. Sasova, was: Can you point to something in Exhibit I to your Affidavit, which is my complaint, where I am asking that Expedia remove air transportation charges altogether?

A. You said: "Failing to include fuel surcharges in 'Air Transportation Charges'". They are but if they are not there they can--they don't have to have it there.

557. Q. Would you agree with me that I did not ask for air transportation charges to be removed in my complaint? There is nothing in my complaint that asks for that. Yes or no?

A. Well it is not written.

558. Q. Okay, so it is a no.

A. You asked them--you asked for them to be compliant. This is further. This is past the Affidavit. We are the past the Affidavit which was on the 20th of May.

559. Q. My question to you is about my complaint. Was there anything in my complaint requesting that Expedia be ordered, for example, to remove air transportation charges

altogether?

A. Not in your complaint but after.

560. Q. No. Thank you, okay. So Expedia, they were still on June 11th--let's go back to page 7 of Exhibit 9. Expedia said--

MR. DODSWORTH: I am sorry. Can we just be sure we have the right email. Which one are you referring to?

DR. LUKACS: It is page 7 of Exhibit 9, an email from June 11, 2014, at 1:55 p.m.

THE WITNESS: All right, yes.

DR. LUKACS:

561. Q. Expedia advised, I believe, Ms. Sasova that the changes would be completed within the next two weeks. Correct?

A. Correct.

562. Q. What actions did you and Agency staff take to check whether Expedia made the required changes within two weeks?

A. We have--we had probably done a compliance verification of Expedia. However as I said, Mr. Lukacs, this was two--as you recall there are two options there. It is either to remove air transportation charges or to have them listed under the title Air Transportation Charges. The option that is being talked about there is to remove them. That did not materialize. They chose to

put air transportation charges all together. So this is why this just did not go through. I was informed by a telephone conversation that they were going to proceed with having air transportation charges put together under the title Air Transportation Charges.

563. Q. My question to you, Ms. Sasova, was: What actions did you and the Agency staff take to check whether Expedia made the required changes within two weeks?

A. And I have answered, Mr. Lukacs. The actions were that the process changed. This did not stop there. There was no action after because they had decided to do something else in order to satisfy your request.

564. Q. How were you informed that they decided to do something else?

A. Via telephone.

565. Q. When were you informed about it?

A. That was after, shortly after. I am not really sure what date it was but I was informed. This was the conversation. There were several conversations that I had with them in order to resolve this and to satisfy your request.

566. Q. Let's look at the bottom of page 11 and the top of page 12. On July 23rd, 2014, you wrote to Expedia, correct?

A. Yes.

567. Q. What communications did you have with Expedia between June 11th, 2014 and July 23rd, 2014?

A. Conference calls and telephone conversations.

568. Q. Who participated in those conference calls and telephone conversations?

A. Myself. I believe Paul may have been in one and then Mr. de Blois. He had--I believe at one point he had somebody from a technical team at Expedia that participated as well.

569. Q. Did you take notes?

A. No, I did not take notes, Mr. Lukacs.

570. Q. Did, perhaps, Mr. Lynch take notes?

A. No, he did not take notes.

571. Q. In this July 23, 2014 email you asked for an update about the "result of yesterday's meeting".

A. Yes.

572. Q. What meeting were you referring to?

A. They had a team meeting, a technical team meeting somewhere and they were going to update me. This, as I explained, is a big process that they have to go through and consult on, you know, various levels. So there was a meeting and I was looking for the results of the meeting.

573. Q. How did you know that a meeting would take place?

A. Because they told me.
574. Q. How?
A. By a telephone conversation.
575. Q. Then on July 25, 2014, you had a teleconference with Expedia, correct?
A. Yes.
576. Q. What did you discuss during that teleconference?
A. The changes.
577. Q. Can you elaborate, please?
A. There were--it was air transportation charges and really going through their booking, you know, page and seeing where the air transportation charges and to put them together. It was very straightforward.
578. Q. How long was the conversation?
A. I really cannot recall. It wasn't long.
579. Q. Was it half an hour long?
A. I really cannot recall.
580. Q. You just said earlier you have a good memory, don't you?
A. Yes, I do, but as I said of the context of the conversation, not the length of time or the weather.
581. Q. Can you please elaborate more what was exactly discussed in that conversation details?
A. No, I can't. It was really to bring them to

compliance as per your request or rather to make the changes with your--to satisfy your request and it was to really under--move the title of Air Transportation Charges. It takes a lot of changes they need to do and as I said it could be air transportation charges with the broken down items or it could be air transportation charges altogether with the amount or it could be air transportation charges, no amount, but then broken down with the amount. So, this is what we were discussing.

582. Q. So you said it is a very time-consuming process for Expedia.

A. It is a complex process, yes, for any booking, any advertiser that receives hundreds of different suppliers and processes the data. Yes, it is.

583. Q. And Expedia had to go through this because they had to comply with the regulations, correct?

A. Expedia went through it because we asked them to comply with regulations based on the complaint that we had received from you.

584. Q. You asked Expedia to comply with the regulations, correct?

A. To satisfy your complaint. I have to say that because that is the case. That is the key.

585. Q. In what way is my complaint relevant to whether Expedia's website is compliant or not? Can you

elaborate on that? You seem to be referring--

A. Yes, I have already replied to that and I have said it several times, Mr. Lukacs. You had asked if we were satisfied--if I was satisfied with Expedia's display. It was because of your--what you had brought forward and your settlement, the possibility of a settlement. That is why we had gone to Expedia and asked them to do those further modifications.

586. Q. A moment ago you said that Expedia wasn't compliant. Can you make up your mind, please? What--

A. Mr. Lukacs, I have never said something different. I did say Expedia was not compliant but it was satisfactory as stated in my Affidavit. What changes we had required them to do was strictly based to reach a settlement with you.

587. Q. So even though Expedia's website was not compliant you wouldn't have asked Expedia to make those changes without my complaint, would it be fair to say?

A. What I may have not done—that is speculation. What I have done is I had gone to Expedia and asked them to do the changes because of your--what you had brought forward --and not really what you had brought forward because that was addressed in a letter but really to just satisfy, to reach a settlement.

588. Q. So you would actually as an enforcement

officer push Expedia to make changes to settle something with a complaint of a third party.

A. It is a complaint that you had and you had agreed that there was the possibility of a settlement if Expedia makes those changes. So this is the reason.

589. Q. And you used your position as an enforcement officer to push Expedia to make these changes because you wanted to settle something?

A. As you have stated before, because you had requested.

590. Q. So what I am trying to understand, Ms. Sasova, is, were you trying to enforce the law, the regulations, in June and July against Expedia or were you just trying to make an application for judicial review go away?

A. I believe, Mr. Lukacs, that you had asked for--in view of a settlement, you wanted to see those changes and this is the reason I went to Expedia. As I said, I was satisfied with--as I said in my Affidavit, with the display.

591. Q. So even though you were satisfied with Expedia's display you nevertheless asked them to make further changes. Is that correct?

A. Yes, because of your--because of a possibility of a settlement, yes.

592. Q. Then on July 28th, Expedia wrote to you. We

are on page 11.

A. Right.

593. Q. Correct?

A. Yes.

594. Q. Expedia referred to "required changes" in the email.

A. Uh-huh.

595. Q. These required changes were what?

A. I see "requested changes". Which line are you talking about?

596. Q. Line 2, it says: "Per our conversation on Friday, we look forward to receiving screenshots of all pages within our air booking path highlighting the specific required changes".

A. Yes, required or requested changes. I am not sure why they said required, yes. What is your question, sorry?

597. Q. What were those required changes?

A. It was--the air transportation charges changes. There were conversations going on. What we had it is because of air transportation charges and a booking fee and then sometimes having one or the other or an airline fuel surcharge or it is a service charge and so forth. So this is all in connection to that. Requested and required--

598. Q. Let's look at page 14 now at the bottom.
A. Uh-huh.
599. Q. On July 28th Mr. Lynch wrote to Expedia, correct?
A. Uh-huh.
600. Q. You were carbon copied to this email, correct?
A. Yes.
601. Q. You are the supervisor of Mr. Lynch, correct?
A. Correct, yes.
602. Q. Did you take any action to correct the statement made in Mr. Lynch's email?
A. Which statement?
603. Q. Any of the statements made in his email.
A. No.
604. Q. Why not?
A. "The trip summary..."—no, I didn't. Why not? Why would I? Like I am not sure what you are trying to ask me. I didn't. Why I didn't? I didn't because I didn't see anything wrong with it.
605. Q. So there is nothing wrong with this email.
A. No, this email is correct. It is fine.
606. Q. For greater clarity, would you care to read into the record the third paragraph of the email starting with, "The current display"?
MR. DODSWORTH: I am sorry, Mr. Lukacs, who are

you asking to do that?

DR. LUKACS: Pardon me?

MR. DODSWORTH: Who are you asking? You are asking--

DR. LUKACS: I am asking Ms. Sasova for clarity to read into the record the third paragraph of Mr. Lynch's email of July 28th, at 1:20 p.m. starting with, "The current display", just for clarity.

THE WITNESS: "The current displays appear to have a fuel surcharge (carrier charge) under 'Taxes and Fees' and this surcharge must form part of the Air Transportation Charge".

DR. LUKACS:

607. Q. Thank you. On August 5th, 2014, Mr. Lynch wrote a follow-up email to Expedia, correct?

A. Yes.

608. Q. Mr. Lynch asked when the "first page issues" would be corrected.

A. Yes.

609. Q. What were these "first page issues"?

A. This is the display of air transportation charges that is based on your request.

610. Q. Let's look at the bottom of page 13 and the top of page 14. Mr. Lynch sent another follow-up email to Expedia on August 11th, 2014, correct?

A. Yes.

611. Q. Why was this second follow-up email necessary?

A. Necessary from whom? Do you mean from Mr. de Blois?

612. Q. This was an email sent by Mr. Lynch.

A. Oh, the bottom one.

613. Q. Yes, the bottom, yes.

A. Okay, I am sorry.

614. Q. So my question to you is: Why was this second follow-up email necessary?

A. Because at first Expedia said they would do it within six weeks and we wanted to know the exact date. They could not--at six weeks ahead because of the release schedule of their IT--anyway the IT release schedule. They were not exactly sure what the exact date would be so this was within six weeks. This is why.

615. Q. On August 11, 2014, Expedia wrote to you and Mr. Lynch at 2:46 p.m., correct?

A. Yes.

616. Q. In this email Expedia referred to "First Page Project" and "Subsequent Pages Project", correct?

A. Yes.

617. Q. So the first page project was related to again what?

A. To your request.

618. Q. And what is the subsequent pages project?

A. This is unrelated to your request.

619. Q. What is it?

A. I really don't want to elaborate on this because it is being assessed. It is not enforcement. Anyway, it is not something that is related to what is being discussed here with regards to your request and with regards to all the work that Expedia had done to implement what your--well what your request--I will call it your request is.

620. Q. Well I don't know that so I request that you answer that question and clarify what a "subsequent pages project" is.

A. As I said, it is a subsequent pages project. It is a display of their fares and how it appears, yes.

621. Q. What changes are they required to do under that?

A. As I said this is still under discussion, Mr. Lukacs. I cannot elaborate on this. This is not relevant to what we are trying to--to what I am trying to answer for you and what you are asking me and what the request was.

622. Q. With the utmost respect, your counsel didn't object to this matter. So I am requesting that you answer the question therefore. There is no objection from

counsel to the question so you must answer it.

A. It is a display. As I said it is a display of subsequent pages. It is how it appears, how the display is.

623. Q. Can you elaborate on that, please?

A. No, I can't because I don't have it in front of me.

624. Q. You certainly have a good memory you stated earlier so you should be able to--

A. You have to understand that during that time I was on vacation. I was not present. I was out of the country and I did not--I wasn't privy to this. Yes, I was copied. You are right but I was not here until August 21st.

625. Q. Okay. Then on August 21st Expedia wrote to you and Mr. Lynch again, correct?

A. Yes.

626. Q. Expedia advised that the first page project would be completed by September 10th, 2014.

A. Yes.

627. Q. And Expedia did not provide a completion date for the "subsequent pages project"?

A. No.

628. Q. Correct?

A. Yes.

629. Q. Are telephone calls received or made by Agency staff recorded?

A. I don't think so.

630. Q. Let's go back to page 14 at the bottom, so back to the email of Mr. Lynch to Expedia.

A. Uh-huh.

631. Q. Mr. Lynch here states: "Please ignore any previous emails to me dated July 28th—sent in error", correct?

A. Yes.

632. Q. What previous emails does Mr. Lynch refer to in this email?

A. I have no idea, Mr. Lukacs. I don't know. They were sent in error. I really don't know.

633. Q. Well certainly, you are the supervisor of Mr. Lynch and somebody who was cc'd to this email.

A. Yes, but I wasn't cc'd on the previous. I don't know. It was something he sent in error and recalled it. I don't know. I don't know how to answer that for you.

634. Q. Okay.

A. I have made those mistakes before too. It is something that--

635. Q. I am requesting that you produce these emails now or undertake to produce them.

MR. DODSWORTH: I object to providing any further emails with respect to that. *O*

DR. LUKACS: Okay.

636. Q. What communications did you and Agency staff have with Expedia since August 21st, 2014?

A. From August 21st, 2014, none.

637. Q. None?

A. No.

638. Q. Not even phone calls.

A. Up to--we are talking with regards to--

MR. DODSWORTH: I am sorry. Could you repeat the dates?

DR. LUKACS:

639. Q. My question is: What communications did you and/or Agency staff have with Expedia since August 21st, 2014?

MR. DODSWORTH: And I object to that question. It is irrelevant to this proceeding. *O*

DR. LUKACS: All right.

640. Q. I am requesting that you produce any emails now or undertake to produce them.

MR. DODSWORTH: I object to that request. *O*

DR. LUKACS: Now let's look at Exhibit 10. Do you have there Exhibit 10?

THE REPORTER: No.

DR. LUKACS: Okay. I guess I am going to just-- can you check it? I can resend it if necessary.

THE REPORTER: We will have to go off record.

DR. LUKACS: Okay, then let's go.

MR. DODSWORTH: I am sorry, maybe you could clarify what Exhibit 10 is.

THE REPORTER: What am I looking for?

DR. LUKACS: Exhibit 10 is an email and I would like to question Ms. Sasova about that email.

MR. DODSWORTH: I am sorry. It is not related to any information that is before this proceeding. It is not related, I presume, to Ms. Sasova's Affidavit so I am not sure of the relevancy of this document.

DR. LUKACS: First I suggest that apparently the-- that Exhibit needs to be retrieved. So I suggest you have a look at the exhibit and then we discuss it on the record, counsel.

MR. DODSWORTH: Okay.

DR. LUKACS: Okay. Let's just go--

MR. DODSWORTH: I am just, I guess, objecting to the idea it is even an exhibit at this point. *O*

DR. LUKACS: I am sorry?

MR. DODSWORTH: I am objecting to it being considered an exhibit at this point until we actually see the document.

DR. LUKACS: I understand. Your point is well taken. We can also mark it, if necessary, as an exhibit for identification if you wish. Let's just go off the record to allow Madame Reporter to obtain the document, okay.

MR. DODSWORTH: Okay.

THE REPORTER: Okay. It will take me a couple of minutes.

DR. LUKACS: No problem.

THE REPORTER: Okay.

(SHORT RECESS)

--UPON RESUMING AT 1:01 P.M.

DR. LUKACS: Let's go back on the record.

THE REPORTER: Okay.

MR. DODSWORTH: Well can we have some time to read the email?

DR. LUKACS: Sure, take your time.

MR. DODSWORTH: Okay.

DR. LUKACS: So are you comfortable with marking it as Exhibit 10, counsel?

MR. DODSWORTH: I am not, no. It is clearly marked "without prejudice". It is not something that should be placed on the public record. It has to do with communications between yourself and myself regarding settlement negotiations which Ms. Sasova was not privy to,

and therefore I object to this being placed on the record. *O*

DR. LUKACS: Well, counsel, Ms. Sasova here is purporting to provide detailed knowledge of what discussions have been going on and has been certainly dragged into this matter so certainly it would be appropriate to mark it as--this as an exhibit for identification.

MR. DODSWORTH: Absolutely not. What you are referring to as well are communications of a privileged nature--I have already made this point--between Ms. Sasova and myself regarding the nature of the settlement discussions and the strategy that we are going to be involved in. I do not believe that we are in a position to talk about that. I know that we are not.

DR. LUKACS: Counsel, Ms. Sasova has already answered questions about her source of knowledge. My request is not to go into details of discussions between you, but rather to put this exhibit for identification to Ms. Sasova.

MR. DODSWORTH: No, I object to that. *O*

DR. LUKACS: You object to it, okay. So I certainly understand it will be marked as an exhibit for identification and your objection is--

EXHIBIT NO. A FOR IDENTIFICATION: Email correspondence from Dr. Lukacs to Mr. Dodsworth,

marked 'Without Prejudice'.

MR. DODSWORTH: Neither myself nor the court reporter are aware of what you are referring to.

DR. LUKACS: Sorry?

MR. DODSWORTH: We are not aware of what you are referring to, the status of an exhibit for the purpose of--I don't know. It is your words. I am objecting to it being placed on the record as an exhibit, period. *O*

DR. LUKACS: Well, counsel, normally when there is an item that there is a concern about, or perhaps an item that it is not clear that a witness is familiar with, then you place it on the record as an exhibit for identification at which point the witness is asked to identify it.

MR. DODSWORTH: That is not what you are asking about, though. You are asking to put a document that is clearly marked "without prejudice" on a public record and I object to that. If you have a concern with that then you can go to the court and you can seek an order. It does not need to be on record to make that application. *O*

DR. LUKACS: Well, counsel, given that Ms. Sasova made a lengthy reference to what she purportedly claimed to be in this document certainly, it would be appropriate.

MR. DODSWORTH: She did not. She did not. She referred to the objective of settling this application and

she has been motivated by that. She has been clear on the record.

DR. LUKACS: And she stated she made certain statements as to what allegedly I represented to the Agency as a fair settlement.

MR. DODSWORTH: No, she did not.

THE WITNESS: No, I did not.

DR. LUKACS: Well, counsel, I guess we will then have to adjourn this cross-examination of Ms. Sasova pursuant to Rule 96.(2) of the Federal Court Rules for failure to produce documents therefore refusal to answer questions.

MR. DODSWORTH: And I stand by all of my objections and we do not consent to reconvening until that issue has been resolved.

DR. LUKACS: That is your prerogative, counsel, and we are going to take it from there. Thank you very much.

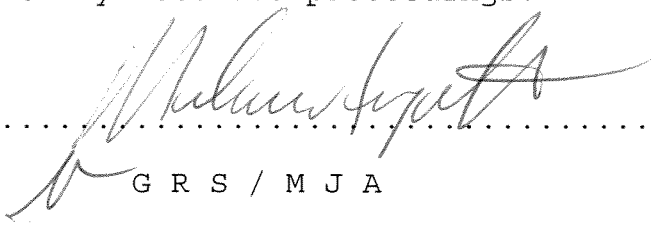
MR. DODSWORTH: Thank you.

THE REPORTER: We are off record now.

DR. LUKACS: Yes.

--THIS CONTINUED CROSS-EXAMINATION ADJOURNED AT 1:05 P.M., ON SEPTEMBER 15TH, 2014.

WE HEREBY CERTIFY THAT the foregoing was transcribed, to the best of our skill and ability, from digitally recorded proceedings.



.....

G R S / M J A

Paul Lynch

From: Brian Flanagan <bflanagan@expedia.com>
Sent: March-20-14 5:20 PM
To: Paul Lynch
Cc: Alexei Baturin; Simona Sasova
Subject: RE: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

Thanks Paul, we will sort these out.

I have asked our team to reach out to Sabre again on the items that we did not previously identify to see if we can get better details as to what they are. If you are aware of some kind of master list, I'd be grateful if you could share it.

I will get back to you shortly with our estimated timing to complete this work.

Sincerely,

Brian Flanagan
Sr. Director, Product & Retail for Canada and Latin America
Expedia Canada Corp
Phone: +1 416 202 8668 | Email: bflanagan@expedia.com
www.expedia.ca | www.expedia.mx | http://www.expedia.com.br | http://www.expedia.com.ar

-----Original Message-----
From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Thursday, March 20, 2014 11:04 AM
To: Brian Flanagan
Cc: Alexei Baturin; Simona Sasova
Subject: RE: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

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135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

Therefore, a warning letter will be issued to Expedia Canada to rectify this issue.

Kind regards,

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562
| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

>>> Brian Flanagan <bflanagan@expedia.com> 18/03/2014 4:29 PM >>>
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Paul Lynch

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Gouvernement du Canada | Government of Canada


itravel search.png


itravel OG.jpg

Paul Lynch

From: Steven de Blois <sdeblois@expedia.com>
Sent: March-27-14 10:29 AM
To: Paul Lynch
Cc: Brian Flanagan
Subject: Expedia.ca

Hi Paul,

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I will follow-up with you next week.

Best regards,
Steve

Steven de Blois
Sr Manager, Product Management, CA & LatAm
o 416.202.8664
m 416.930.5058
expedia.ca | expedia.mx | expedia.com.br | expedia.com.ar

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Sent: Friday, March 21, 2014 5:37 PM
To: 'Paul Lynch'
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Brian

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From: Steven de Blois <sdeblois@expedia.com>
Sent: 04/04/2014 2:54:54 PM
To: Paul.Lynch@otc-cta.gc.ca
CC: bflanagan@expedia.com
BCC:
Subject: RE: Expedia.ca

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Sent: Tuesday, March 11, 2014 3:27 PM

To: Brian Flanagan

Cc: Simona Sasova

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<<File: TEXT.htm>>
<<File: IATA Tax List breakout.xlsx>>
<<File: Mime.822>>

From: Steven de Blois <sdeblois@expedia.com>
Sent: 08/04/2014 8:44:12 AM
To: Paul.Lynch@otc-cta.gc.ca
CC:
BCC:
Subject: question

Hi Paul - we are in process of ensuring our experience on Expedia.ca is compliant.

I noticed the following on FlightNetwork. It looks to be non-compliant.

I would like to confirm this is indeed non-compliant as it conflicts with our understanding of what is considered desired state.

1. YQ included in Taxes Fees and Charges

[cid:image009.jpg@01CF5306.B505D040]

[cid:image010.jpg@01CF5306.B505D040]

2. "Airline use only" included in Taxes Fees and Charges

[cid:image011.jpg@01CF5306.B505D040]

[cid:image012.jpg@01CF5306.B505D040]

<<File: TEXT.htm>>
<<File: image009.jpg>>
<<File: image010.jpg>>
<<File: image011.jpg>>
<<File: image012.jpg>>
<<File: Mime.822>>

From: Steven de Blois <sdeblois@expedia.com>
Sent: 16/04/2014 8:34:08 PM
To: Paul.Lynch@otc-cta.gc.ca
CC: Alexei.Baturin@otc-cta.gc.ca;Simona.Sasova@otc-cta.gc.ca;bflanagan@expedia.com
BCC:
Subject: RE: Expedia.ca

Hello Paul,

A quick follow-up per below email dated April 4th.

The Expedia technology team is actively working on the agreed upon changes (per below) to ensure we remain compliant.
Target roll-out date for this new experience is mid/end May.
I am sure you can appreciate the level of effort and coordination of teams that is involved.

As agreed, the Travelocity.ca implementation is our guide.

We will be sure to loop back with you as soon as it is live.

Thank you for your support
Steve

Steven de Blois
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m 416.930.5058
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From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Friday, April 04, 2014 3:20 PM
To: Steven de Blois
Cc: Brian Flanagan; Alexei Baturin; Simona Sasova
Subject: RE: Expedia.ca

Hi Steven,

Thank you for the attached IATA code list and your interpretation of which are Air Transportation Charges and which are third party charges.

It would be beyond the scope of Agency staff to confirm your efforts to identify each code, but it certainly looks like you are on the right path. Perhaps IATA themselves would be better placed to confirm which code belongs in which column.

From an Agency viewpoint, an air transportation charge is a charge related directly to the airline, for which fuel surcharge would be the best example. A third party charge is one that falls outside of an airline's scope and would include security charges, airport improvement fees, HST to name but a few.

Again, a quick scan of your list appears to have most of those in order but this does not constitute a confirmation from the Agency that they are correct and therefore compliant.

Are you in a position to offer a time line for completion of this project?

Kind regards,

Paul Lynch
Enforcement Support Officer
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Sent: Friday, March 21, 2014 5:37 PM

To: 'Paul Lynch'

Cc: Alexei Baturin; Simona Sasova

Subject: RE: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

From: Steven de Blois <sdeblois@expedia.com>
Sent: 22/04/2014 12:55:22 PM
To: Paul.Lynch@otc-cta.gc.ca
CC:
BCC:
Subject: Question : www.expedia.ca

Hi Paul,

I have a question regarding the Flight path on www.expedia.ca<http://www.expedia.ca>

Below is the default view. As you can see, the "Trip Summary" module is expanded by default. The Traveller1 and Traveller2 details are both expanded.

Default view:
[cid:image003.jpg@01CF5E2A.190F1550]

I would like to understand if below proposals are compliant.

Proposal #1 - Traveller2 details is collapsed. Is this compliant?
[cid:image005.jpg@01CF5E2A.190F1550]

Proposal #2 - Traveller1 and Traveller2 details are both collapsed. Is this compliant?
[cid:image007.jpg@01CF5E2A.190F1550]

Thank you
Steve

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<<File: TEXT.htm>>
<<File: image003.jpg>>
<<File: image005.jpg>>
<<File: image007.jpg>>
<<File: Mime.822>>

From: Steven de Blois <sdeblois@expedia.com>
Sent: 25/04/2014 4:36:35 PM
To: Paul.Lynch@otc-cta.gc.ca
CC:
BCC:
Subject: Re: Question : www.expedia.ca

Great. Thank you Paul.

Steve

On 2014-04-25, at 4:24 PM, "Paul Lynch" <Paul.Lynch@otc-cta.gc.ca> wrote:

> Hi Steve - I will review proposal 2 with my supervisor on Monday - so
> long as you can click it or hover over it to get the beakdown, it may be
> OK...let me confirm.
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> Regards,
>
>
>
> Paul Lynch
> Enforcement Support Officer
> 819-953-9764 | télécopieur/facsimile 819-953-5562
> | ATS/TTY 800-669-5575
> Paul.Lynch@cta-otc.gc.ca
> Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9
> Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9
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> Steven de Blois
> Sr Manager, Product Management, CA & LatAm
> o 416.202.8664
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<<File: Mime.822>>

Hi Paul,

We found the list of the IATA (not Sabre) codes. There are over 1000 codes in this list, many of which are country specific. Do all of these need to be named? Or just those codes that impact Canadian airlines?

As you can appreciate, the complexity for OTAs like us is that we sell over 100 global airlines which adds significant complexity to this exercise.

We've noticed that iTravel2000 does call out some taxes as the code name with tax as in "OG Tax" (see attached). According to the initial IATA document, it is a "Carbon Offset Service Code (Optional - validating)" but has now been changed to " OG - Spain & Canary Islands Aviation Safety and Security Fee". Is their approach allowed within the guidelines?

Thanks for your guidance and insight on this.

Brian

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Thursday, March 20, 2014 11:04 AM

To: Brian Flanagan

Cc: Alexei Baturin; Simona Sasova

Subject: RE: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

Hi Brian,

Just to confirm our conversation of this morning, a separate line item under Air Transportation Charges for an 'Airline Service Charge' would be compliant.

As far as naming third party charges in the breakdown of the taxes, fees and charges, any 'unknown' codes (e.g. HU, FE, XU, WL etc) would have to be identified as per section 135.92 of the Air Transportation

Regulations:

135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

Therefore, a warning letter will be issued to Expedia Canada to rectify this issue.

Kind regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

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>>> Brian Flanagan
<bflanagan@expedia.com<mailto:bflanagan@expedia.com>>
18/03/2014 4:29 PM >>>

Hi Paul,

It turns out that it is much easier for our team to break out the YR tax as a separate item vs. moving it into the ATC amount.

If we were to break it out as a separate item, would it be acceptable to put it below the Fuel Surcharge line?

Moving it would require a couple of months of effort across numerous teams vs. breaking it out which would be done in weeks.

Please let me know if this would be acceptable to you.

Thanks,

Brian Flanagan

Sr. Director, Product & Retail for Canada and Latin America Expedia Canada Corp

Phone: +1 416 202 8668 | Email:
bflanagan@expedia.com<mailto:bflanagan@expedia.com>
www.expedia.ca<http://www.expedia.ca> |
www.expedia.mx<http://www.expedia.mx> |

http://www.expedia.com.br | http://www.expedia.com.ar

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Tuesday, March 11, 2014 3:27 PM

To: Brian Flanagan

Cc: Simona Sasova

Subject: Follow-up on All-Inclusive Air Price Advertising regulations - Expedia.ca

Hi Brian,

You had been in contact with Yannick Pouret here at the Canadian Transportation Agency last year, when the Agency highlighted violations of the Air Transportation Regulations (ATR) governing All-Inclusive Air Price Advertising on the expedia.ca web site.

Those violations were fixed by the end of October last year but we recently received a complaint and subsequently reviewed the expedia.ca web site again. We found two violations within the breakdown of the taxes, fees and charges. Both relate to a 'Service Charge' with the code 'YR' and appear in the breakdown on our examples. These are not third party charges and should be incorporated within the Air Transportation Charge.

Knowing that Expedia fixed this issue last year, this may be a coding error of some kind and hopefully a quick fix can be implemented.

Perhaps you could call me on 819-953-9764 at your earliest convenience to discuss.

Kind regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

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From: Steven de Blois <sdeblois@expedia.com>
Sent: 28/04/2014 10:05:40 AM
To: Paul.Lynch@otc-cta.gc.ca
CC: Simona.Sasova@otc-cta.gc.ca;bflanagan@expedia.com
BCC:
Subject: RE: Question : www.expedia.ca

Hi Paul,

Thank you for confirming below re: the collapsed fare option.

Regarding the contravention highlighted in the warning letter, did you receive attached update sent 04/16? We are actively working on it and expect the new compliant experience to launch in coming 2 weeks. I will be sure to loop back with you to confirm live date.

Thank you for your support
Steve

Steven de Blois
Sr Manager, Product Management, CA & LatAm

-----Original Message-----
From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Monday, April 28, 2014 9:40 AM
To: Steven de Blois
Cc: Simona Sasova
Subject: Re: Question : www.expedia.ca

Hi Steve,

The collapsed fare in option 2 is not an issue, so long as the relevant information is available by either a click or hover over - by relevant I refer to a tax breakdown that includes the name of each tax or third party charge (the contravention for which the warning letter dated March
27 was issued). As you are aware, the Air Transportation Charge is not required to be broken down.

I have reviewed the expedia.ca web site and have not been able to replicate the contravention highlighted in the warning letter - i.e. the names of all taxes appear in the breakdown. Are you confident that this issue has now been fully resolved?

Kind regards,

Paul Lynch
Enforcement Support Officer
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<<File: Mail>>
<<File: Mime.822>>

From: Steven de Blois <sdeblois@expedia.com>
Sent: 28/04/2014 10:08:26 AM
To: Paul.Lynch@otc-cta.gc.ca
CC: Simona.Sasova@otc-cta.gc.ca
BCC:
Subject: RE: Question : www.expedia.ca

Hi Paul - I just sent you a response on the other email thread.

We are actively working on it and expect the new compliant experience to launch in coming 2 weeks. I will be sure to loop back with you to confirm live date.
Is this ok? I understand the date in letter states Apr 30th. We have been working diligently to resolve this issue.

Thank you for your support
Steve

-----Original Message-----
From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Monday, April 28, 2014 10:03 AM
To: Steven de Blois
Cc: Simona Sasova
Subject: Re: Question : www.expedia.ca

Hi Steve,

I continued with a few more searches and found the contravention again on the attached pdf - please be aware that Exepdia Canada Corporation have until April 30, 2014 to fix this issue as per the warning letter of March 27, 2014.

You will see the attached flight breakdown has two taxes with codes only - the tax is not identified.

Regards,

Paul Lynch
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27 was issued). As you are aware, the Air Transportation Charge is not required to be broken down.

I have reviewed the expedia.ca web site and have not been able to replicate the contravention highlighted in the warning letter - i.e. the names of all taxes appear in the breakdown. Are you confident that this issue has now been fully resolved?

Kind regards,

Paul Lynch
Enforcement Support Officer

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>>> Steven de Blois <sdeblois@expedia.com> 25/04/2014 4:36 PM >>>
Great. Thank you Paul.

Steve

On 2014-04-25, at 4:24 PM, "Paul Lynch" <Paul.Lynch@otc-cta.gc.ca>
wrote:

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From: Paul Lynch
Sent: 28/04/2014 11:21:14 AM
To: sdeblois@expedia.com
CC: Simona.Sasova@otc-cta.gc.ca
BCC:
Subject: RE: Question : www.expedia.ca

Hi Steve,

As Expedia Canada Corporation received a formal warning letter with a compliance date, we would require a written request (email is OK) from Expedia to extend the date of compliance along with justification for the extension. It appears from recent emails that the April 30th compliance date cannot be met.

Therefore, please address your request for extension to Simona Sasova (simona.sasova@otc-cta.gc.ca), Manager, Enforcement Division.

Regards,

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>

Simona Sasova

rom: Steven de Blois <sdeblois@expedia.com>
Sent: April-28-14 2:46 PM
To: Simona Sasova
Cc: Paul Lynch; Brian Flanagan
Subject: www.expedia.ca

Hi Simona,

On behalf of Expedia Canada Corp., I am writing to request an extension of the April 30th date per the warning letter dated March 27, 2014.

The teams at Expedia have been actively working to implement the agreed upon experience that will ensure we are compliant. This is a high-priority project. It is scheduled to be released week of May 19th, 2014. There is a possibility that it will be delivered before this date.

Thank you for your consideration,
Steve

Steven de Blois
Senior Manager
Product Management - CA/LatAm
416.930.5058

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From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Monday, April 28, 2014 11:21 AM
To: Steven de Blois
Cc: Simona Sasova
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> this compliant?
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>
>
> Thank you
> Steve
>
>
> Steven de Blois
> Sr Manager, Product Management, CA & LatAm
> o 416.202.8664
> m 416.930.5058
> expedia.ca<http://www.expedia.ca/> |
> expedia.mx<http://www.expedia.com.mx/> |
> expedia.com.br<http://www.expedia.com.br/> |
> expedia.com.ar<http://www.expedia.com.br/>
>

Simona Sasova

From: Steven de Blois <sdeblois@expedia.com>
Sent: April-29-14 9:37 AM
To: Simona Sasova
Cc: Paul Lynch; Brian Flanagan
Subject: RE: www.expedia.ca

Thank you Simona.
I will loop back with an update before May 19th.

Steve

-----Original Message-----
From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]
Sent: Tuesday, April 29, 2014 9:35 AM
To: Steven de Blois
Cc: Brian Flanagan; Paul Lynch
Subject: Re: www.expedia.ca

Good morning Steven,

As requested, the extension to May 19, 2014 has been approved.

Thank you
Simona

Simona Sasova
Gestionnaire, Application de la loi
Manager, Enforcement Division
Regulatory Approvals & Compliance Directorate Direction, générale et des déterminations de l'industrie
Tel: 819-953-9786
Cell: 613-864-7960
Fax: 819-953-1972

Simona.Sasova@otc-cta.gc.ca

>>> Steven de Blois <sdeblois@expedia.com> 28/04/2014 2:45 PM >>>
Hi Simona,

On behalf of Expedia Canada Corp., I am writing to request an extension of the April 30th date per the warning letter dated March 27, 2014.

The teams at Expedia have been actively working to implement the agreed upon experience that will ensure we are compliant. This is a high-priority project. It is scheduled to be released week of May 19th, 2014. There is a possibility that it will be delivered before this date.

Thank you for your consideration,
Steve

Steven de Blois
Senior Manager
Product Management - CA/LatAm

-----Original Message-----
From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Monday, April 28, 2014 11:21 AM
To: Steven de Blois
Cc: Simona Sasova
Subject: RE: Question : www.expedia.ca

Hi Steve,

As Expedia Canada Corporation received a formal warning letter with a compliance date, we would require a written request (email is OK) from Expedia to extend the date of compliance along with justification for the extension. It appears from recent emails that the April 30th compliance date cannot be met.

Therefore, please address your request for extension to Simona Sasova (simona.sasova@otc-cta.gc.ca), Manager, Enforcement Division.

Regards,

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562
| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com> 28/04/2014 10:08 AM >>>
Hi Paul - I just sent you a response on the other email thread.

We are actively working on it and expect the new compliant experience to launch in coming 2 weeks. I will be sure to loop back with you to confirm live date.
Is this ok? I understand the date in letter states Apr 30th. We have been working diligently to resolve this issue.

Thank you for your support
Steve

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From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
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Subject: Re: Question : www.expedia.ca

Hi Steve,

I continued with a few more searches and found the contravention again on the attached pdf - please be aware that Exepdia Canada Corporation have until April 30, 2014 to fix this issue as per the warning letter of March 27, 2014.

You will see the attached flight breakdown has two taxes with codes only - the tax is not identified.

Regards,

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>>> Paul Lynch 28/04/2014 9:39 AM >>>
Hi Steve,

The collapsed fare in option 2 is not an issue, so long as the relevant
information is available by either a click or hover over - by relevant I
refer to a tax breakdown that includes the name of each tax or third party charge (the contravention for which the warning letter dated March
27 was issued). As you are aware, the Air Transportation Charge is not
required to be broken down.

I have reviewed the expedia.ca web site and have not been able to replicate the contravention highlighted in the warning letter - i.e. the
names of all taxes appear in the breakdown. Are you confident that this
issue has now been fully resolved?

Kind regards,

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>>> Steven de Blois <sdeblois@expedia.com> 25/04/2014 4:36 PM >>>

Great. Thank you Paul.

Steve

On 2014-04-25, at 4:24 PM, "Paul Lynch" <Paul.Lynch@otc-cta.gc.ca>
wrote:

> Hi Steve - I will review proposal 2 with my supervisor on Monday -
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> long as you can click it or hover over it to get the beakdown, it
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> Gouvernement du Canada | Government of Canada
>
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>>>> Steven de Blois <sdeblois@expedia.com> 22/04/2014 12:55 PM >>>
> Hi Paul,
>
> I have a question regarding the Flight path on
> www.expedia.ca<http://www.expedia.ca>
>
> Below is the default view. As you can see, the "Trip Summary" module
is
> expanded by default. The Traveller1 and Traveller2 details are both
> expanded.
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> Default view:
> [cid:image003.jpg@01CF5E2A.190F1550]
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> Steven de Blois
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> expedia.ca<http://www.expedia.ca/> |
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> expedia.com.br<http://www.expedia.com.br/> |
> expedia.com.ar<http://www.expedia.com.br/>
>

Paul Lynch

From: Steven de Blois <sdeblois@expedia.com>
Sent: May-01-14 2:39 PM
To: Paul Lynch
Subject: Expedia.ca

Hi Paul,

One final question, can you please confirm that the label for YQ and YR "Airline Service Charge" is correct?

YQ	Airline Service Charge	Frais de service de la compagnie aérienne
YR	Airline Service Charge	Frais de service de la compagnie aérienne

Thank you
Steve

Steven de Blois
Sr Manager, Product Management, CA & LatAm
o 416.202.8664
m 416.930.5058
expedia.ca | expedia.mx | expedia.com.br | expedia.com.ar

Paul Lynch

From: Steven de Blois <sdeblois@expedia.com>
Sent: May-02-14 4:35 PM
To: Paul Lynch
Cc: Simona Sasova
Subject: RE: Expedia.ca

Thank you Paul.

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Friday, May 02, 2014 4:20 PM
To: Steven de Blois
Cc: Simona Sasova
Subject: Re: Expedia.ca

Hi Steve,

Not sure I am the best person to ask this question...the codes you refer to are IATA codes but yes, I have seen both YQ and YR used to represent a fuel surcharge and an airline service charge but cannot comment further. IATA themselves would be your best confirmation of labeling when it comes to these codes.

Kind regards,

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562
| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
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Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com> 01/05/2014 2:38 PM >>>
Hi Paul,

One final question, can you please confirm that the label for YQ and YR "Airline Service Charge" is correct?

[cid:image001.png@01CF654A.FF7B7520]

Thank you
Steve

Steven de Blois
Sr Manager, Product Management, CA & LatAm
o 416.202.8664

m 416.930.5058
expedia.ca<http://www.expedia.ca/> | expedia.mx<http://www.expedia.com.mx/> |
expedia.com.br<http://www.expedia.com.br/> | expedia.com.ar<http://www.expedia.com.br/>

Paul Lynch

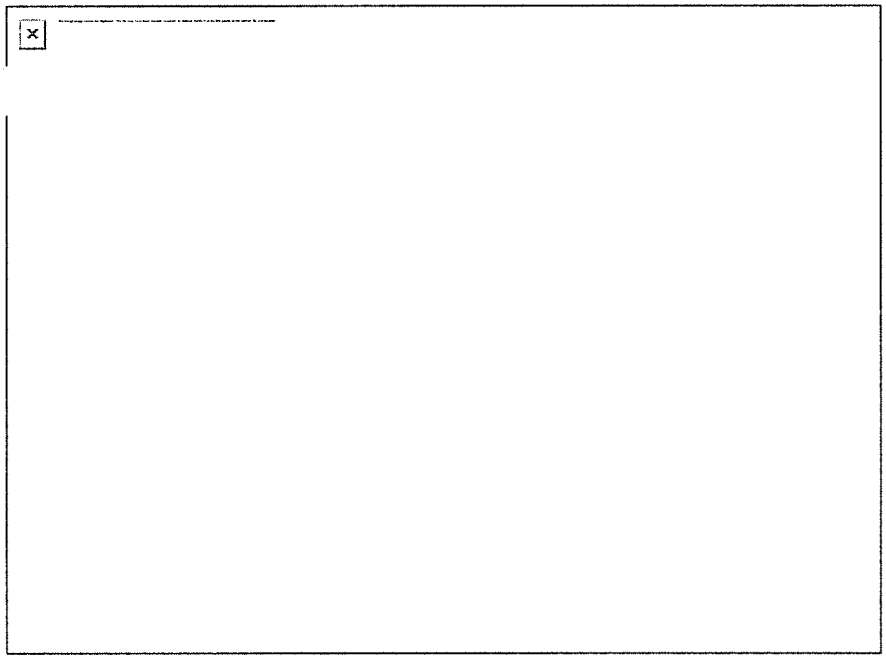
rom: Steven de Blois <sdeblois@expedia.com>
Sent: May-14-14 5:32 PM
To: Paul Lynch; Simona Sasova
Cc: Brian Flanagan
Subject: RE: www.expedia.ca
Attachments: image003.jpg

Hello Simona and & Paul,

Pleased to report that our www.expedia.ca French language website has been updated per the CTA requirement. Please refer to below screenshot.

The English language website will be updated on May 23. I understand our extension has been granted to May 19. It is our hope that this 4 day delay is satisfactory.

We will loop back once English has been updated.
Thank you
Steve



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Cc: Brian Flanagan; Paul Lynch
Subject: RE: www.expedia.ca

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Tel: 819-953-9786
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Simona.Sasova@otc-cta.gc.ca

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Product Management - CA/LatAm
416.930.5058

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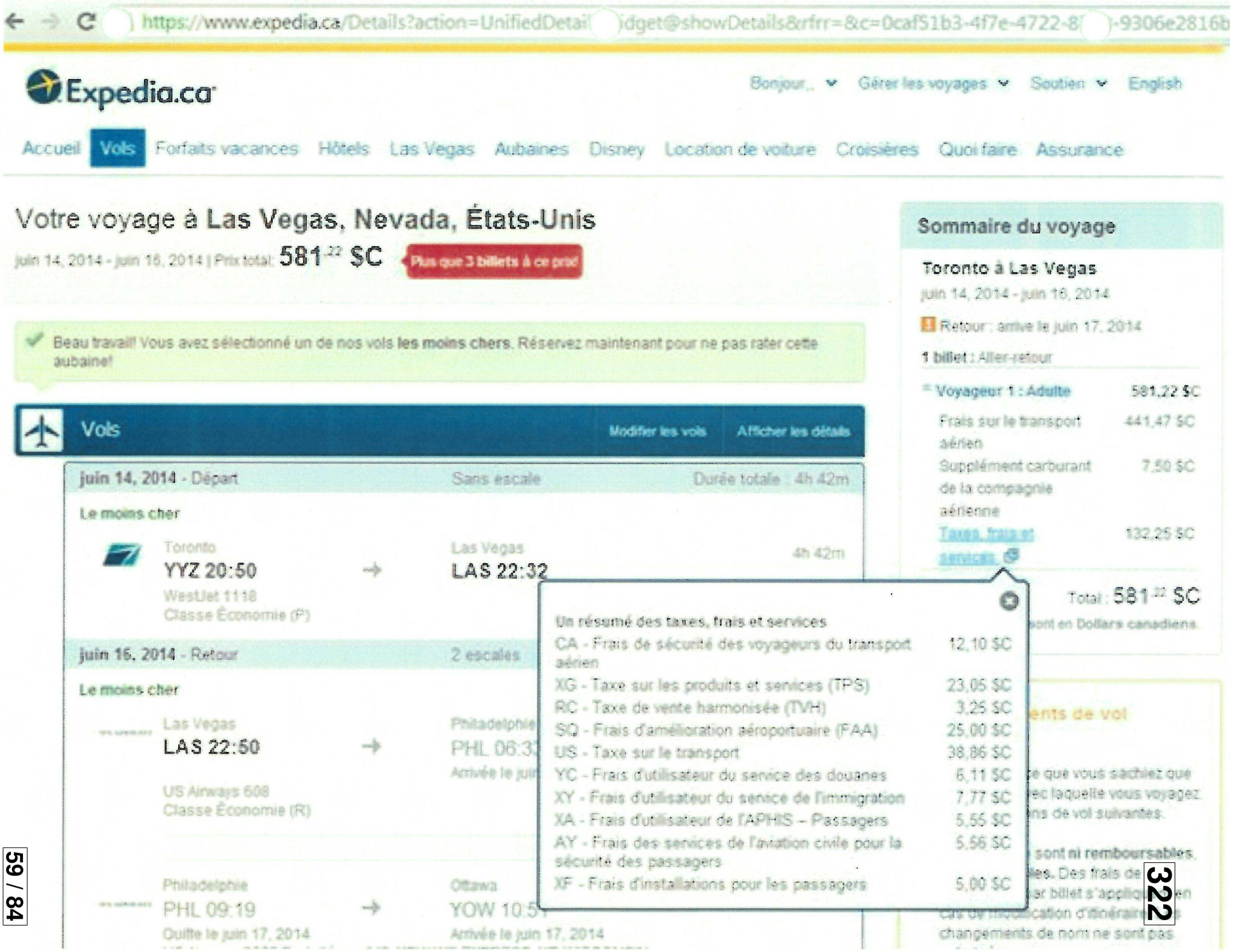
https://www.expedia.ca/Details?action=UnifiedDetai idget@showDetails&rfrr=&c=0caf51b3-4f7e-4722-8 -9306e2816b
Expedia.ca
Bonjour,. Gérer les voyages Soutien English
Accueil Vols Forfaits vacances Hôtels Las Vegas Aubaines Disney Location de voiture Croisières Quoi faire Assurance
Votre voyage à Las Vegas, Nevada, États-Unis
juin 14, 2014 - juin 16, 2014 | Prix total: 581 22 $C
Plus que 3 billets à ce prix!
Beau travail! Vous avez sélectionné un de nos vols les moins chers. Réservez maintenant pour ne pas rater cette aubaine!
Vols
Modifier les vols
Afficher les détails
juin 14, 2014 - Départ
Sans escale
Durée totale : 4h 42m
Le moins cher
Toronto
YYZ 20:50
Las Vegas
LAS 22:32
4h 42m
WestJet 1118
Classe Économie (P)
juin 16, 2014 - Retour
2 escales
Le moins cher
Las Vegas
LAS 22:50
Philadelphie
PHL 06:3
Arrivée le jui
US Airways 608
Classe Économie (R)
Philadelphie
PHL 09:19
Ottawa
YOW 10:5
Quitte le juin 17, 2014
Arrivée le juin 17, 2014
Sommaire du voyage
Toronto à Las Vegas
juin 14, 2014 - juin 16, 2014
Retour : arrive le juin 17, 2014
1 billet : Aller-retour
Voyageur 1 : Adulte 581,22 $C
Frais sur le transport aérien 441,47 $C
Supplément carburant de la compagnie aérienne 7,50 $C
Taxes, frais et services 132,25 $C
Total : 581 22 $C
ont en Dollars canadiens
Un résumé des taxes, frais et services
CA - Frais de sécurité des voyageurs du transport aérien 12,10 $C
XG - Taxe sur les produits et services (TPS) 23,05 $C
RC - Taxe de vente harmonisée (TVH) 3,25 $C
SQ - Frais d'amélioration aéroportuaire (FAA) 25,00 $C
US - Taxe sur le transport 38,86 $C
YC - Frais d'utilisateur du service des douanes 6,11 $C
XY - Frais d'utilisateur du service de l'immigration 7,77 $C
XA - Frais d'utilisateur de l'APHIS – Passagers 5,55 $C
AY - Frais des services de l'aviation civile pour la sécurité des passagers 5,56 $C
XF - Frais d'installations pour les passagers 5,00 $C
ents de vol
e que vous sachiez que
ec laquelle vous voyagez
ns de vol suivantes.
sont ni remboursables.
les. Des frais de
ar billet s'appliq
en cas de modification d'itinéraire
changements de nom ne sont pas

Paul Lynch

From: Paul Lynch <Paul.Lynch@otc-cta.gc.ca>
Sent: May-27-14 2:19 PM
To: Simona Sasova; Steven de Blois
Cc: Brian Flanagan
Subject: RE: www.expedia.ca

Hi Steven,

A review of the attached and the expedia.ca web site confirm compliance.

Kind regards,

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562
| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
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Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com> 26/05/2014 2:51 PM >>>
Hi Simona and Paul,

We are pleased to report that our www.expedia.ca<http://www.expedia.ca> English language website has been updated per the CTA requirement as of May 23. Please refer to below screenshot.

Can you kindly confirm we are compliant?

Thank you

Steve

Steven de Blois

Senior Manager

Product Management - CA/LatAm

416.930.5058

[cid:image004.jpg@01CF78F1.EEAE5E50]

From: Steven de Blois
Sent: Wednesday, May 14, 2014 5:32 PM
To: 'Simona Sasova'; 'Paul Lynch'
Cc: Brian Flanagan
Subject: RE: www.expedia.ca

Hello Simona and & Paul,

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Steve

[cid:image003.jpg@01CF78F1.EDA18230]

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

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Senior Manager
Product Management - CA/LatAm
416.930.5058

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>>> Paul Lynch 28/04/2014 9:39 AM >>>
Hi Steve,

The collapsed fare in option 2 is not an issue, so long as the relevant information is available by either a click or hover over - by relevant I refer to a tax breakdown that includes the name of each tax or third party charge (the contravention for which the warning letter dated March 27 was issued). As you are aware, the Air Transportation Charge is not required to be broken down.

I have reviewed the expedia.ca web site and have not been able to replicate the contravention highlighted in the warning letter - i.e. the names of all taxes appear in the breakdown. Are you confident that this issue has now been fully resolved?

Kind regards,

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9
Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9
Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com> 25/04/2014 4:36 PM >>>
Great. Thank you Paul.

Steve

On 2014-04-25, at 4:24 PM, "Paul Lynch" <Paul.Lynch@otc-cta.gc.ca> wrote:

> Hi Steve - I will review proposal 2 with my supervisor on Monday - so
> long as you can click it or hover over it to get the beakdown, it may
be
> OK...let me confirm.
>
> Regards,
>
>
>
> Paul Lynch
> Enforcement Support Officer
> 819-953-9764 | télécopieur/facsimile 819-953-5562
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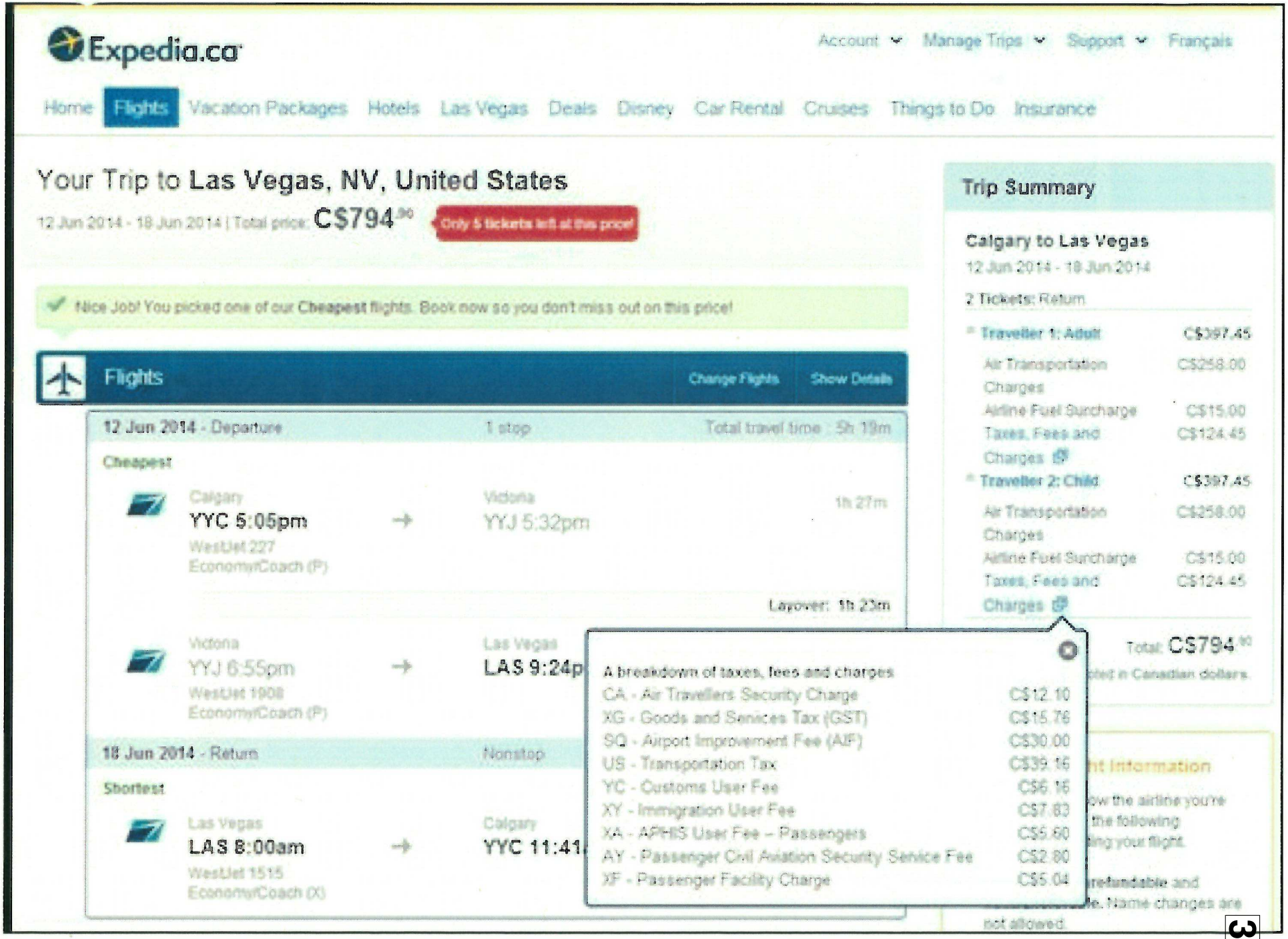
> Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9
> Gouvernement du Canada | Government of Canada
>
>
>>>> Steven de Blois <sdeblois@expedia.com> 22/04/2014 12:55 PM >>>
> Hi Paul,
>
> I have a question regarding the Flight path on
> www.expedia.ca<http://www.expedia.ca>
>
> Below is the default view. As you can see, the "Trip Summary" module is
> expanded by default. The Traveller1 and Traveller2 details are both
> expanded.
>
> Default view:
> [cid:image003.jpg@01CF5E2A.190F1550]
>
>
> I would like to understand if below proposals are compliant.

>
> Proposal #1 - Traveller2 details is collapsed. Is this compliant?
> [cid:image005.jpg@01CF5E2A.190F1550]
>
>
> Proposal #2 - Traveller1 and Traveller2 details are both collapsed.
Is
> this compliant?
> [cid:image007.jpg@01CF5E2A.190F1550]
>
>
> Thank you
> Steve
>
>
> Steven de Blois
> Sr Manager, Product Management, CA & LatAm
> o 416.202.8664
> m 416.930.5058
> expedia.ca<http://www.expedia.ca/> |
> expedia.mx<http://www.expedia.com.mx/> |
> expedia.com.br<http://www.expedia.com.br/> |
> expedia.com.ar<http://www.expedia.com.br/>
>


Expedia.ca
Account
Manage Trips
Support
Français
Home
Flights
Vacation Packages
Hotels
Las Vegas
Deals
Disney
Car Rental
Cruises
Things to Do
Insurance
Your Trip to Las Vegas, NV, United States
12 Jun 2014 - 18 Jun 2014 | Total price: C$794.90
Only 5 tickets left at this price!
Nice Job! You picked one of our Cheapest flights. Book now so you don't miss out on this price!
Flights
Change Flights
Show Details
12 Jun 2014 - Departure
1 stop
Total travel time : 5h 19m
Cheapest
Calgary
YYC 5:05pm
WestJet 227
Economy/Coach (P)
Victoria
YYJ 5:32pm
1h 27m
Layover: 1h 23m
Victoria
YYJ 6:55pm
WestJet 1908
Economy/Coach (P)
Las Vegas
LAS 9:24p
18 Jun 2014 - Return
Nonstop
Shortest
Las Vegas
LAS 8:00am
WestJet 1515
Economy/Coach (X)
Calgary
YYC 11:41
Trip Summary
Calgary to Las Vegas
12 Jun 2014 - 18 Jun 2014
2 Tickets: Return
Traveller 1: Adult C$397.45
Air Transportation Charges C$258.00
Airline Fuel Surcharge C$15.00
Taxes, Fees and Charges C$124.45
Traveller 2: Child C$397.45
Air Transportation Charges C$258.00
Airline Fuel Surcharge C$15.00
Taxes, Fees and Charges C$124.45
Total: C$794.90
A breakdown of taxes, fees and charges
CA - Air Travellers Security Charge C$12.10
XG - Goods and Services Tax (GST) C$15.76
SQ - Airport Improvement Fee (AIF) C$30.00
US - Transportation Tax C$39.16
YC - Customs User Fee C$6.16
XY - Immigration User Fee C$7.83
XA - APHIS User Fee – Passengers C$5.60
AY - Passenger Civil Aviation Security Service Fee C$2.80
XF - Passenger Facility Charge C$5.04
not allowed.

Simona Sasova

From: Steven de Blois <sdeblois@expedia.com>
Sent: May-27-14 2:26 PM
To: Paul Lynch; Simona Sasova
Cc: Brian Flanagan
Subject: RE: www.expedia.ca

Great. Thank you Paul.

Steve

-----Original Message-----
From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Tuesday, May 27, 2014 2:19 PM
To: Steven de Blois; Simona Sasova
Cc: Brian Flanagan
Subject: RE: www.expedia.ca

Hi Steven,

A review of the attached and the expedia.ca web site confirm compliance.

Kind regards,

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562
| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com> 26/05/2014 2:51 PM >>>
Hi Simona and Paul,

We are pleased to report that our www.expedia.ca<http://www.expedia.ca>
English language website has been updated per the CTA requirement as of May 23. Please refer to below screenshot.

Can you kindly confirm we are compliant?

Thank you

Steve

Steven de Blois

Senior Manager

Product Management - CA/LatAm

416.930.5058

[cid:image004.jpg@01CF78F1.EEAE5E50]

From: Steven de Blois
Sent: Wednesday, May 14, 2014 5:32 PM
To: 'Simona Sasova'; 'Paul Lynch'
Cc: Brian Flanagan
Subject: RE: www.expedia.ca

Hello Simona and & Paul,

Pleased to report that our www.expedia.ca<http://www.expedia.ca> French language website has been updated per the CTA requirement. Please refer to below screenshot.

The English language website will be updated on May 23. I understand our extension has been granted to May 19. It is our hope that this 4 day delay is satisfactory.

We will loop back once English has been updated.

Thank you

Steve

[cid:image003.jpg@01CF78F1.EDA18230]

-----Original Message-----
From: Steven de Blois
Sent: Tuesday, April 29, 2014 9:37 AM
To: 'Simona Sasova'
Cc: Brian Flanagan; Paul Lynch
Subject: RE: www.expedia.ca<http://www.expedia.ca>

Thank you Simona.

I will loop back with an update before May 19th.

334

Steve

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

From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]

Sent: Tuesday, April 29, 2014 9:35 AM

To: Steven de Blois

Cc: Brian Flanagan; Paul Lynch

Subject: Re: www.expedia.ca<http://www.expedia.ca>

Good morning Steven,

As requested, the extension to May 19, 2014 has been approved.

Thank you

Simona

Simona Sasova

Gestionnaire, Application de la loi

Manager, Enforcement Division

Regulatory Approvals & Compliance Directorate Direction, générale et des déterminations de l'industrie

Tel: 819-953-9786

Cell: 613-864-7960

Fax: 819-953-1972

Simona.Sasova@otc-cta.gc.ca<mailto:Simona.Sasova@otc-cta.gc.ca>

>>> Steven de Blois <sdeblois@expedia.com<mailto:sdeblois@expedia.com>>
28/04/2014 2:45 PM >>>

335

Hi Simona,

On behalf of Expedia Canada Corp., I am writing to request an extension of the April 30th date per the warning letter dated March 27, 2014.

The teams at Expedia have been actively working to implement the agreed upon experience that will ensure we are compliant. This is a high-priority project. It is scheduled to be released week of May 19th, 2014. There is a possibility that it will be delivered before this date.

Thank you for your consideration,

Steve

Steven de Blois

Senior Manager

Product Management - CA/LatAm

416.930.5058

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Monday, April 28, 2014 11:21 AM

To: Steven de Blois

Cc: Simona Sasova

Subject: RE: Question : www.expedia.ca<http://www.expedia.ca>

Hi Steve,

As Expedia Canada Corporation received a formal warning letter with a compliance date, we would require a written request (email is OK) from Expedia to extend the date of compliance along with justification for the extension. It appears from recent emails that the April 30th compliance date cannot be met.

Therefore, please address your request for extension to Simona Sasova (simona.sasova@otc-cta.gc.ca<mailto:simona.sasova@otc-cta.gc.ca>),
Manager, Enforcement Division.

Regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com<mailto:sdeblois@expedia.com>>
28/04/2014 10:08 AM >>>

Hi Paul - I just sent you a response on the other email thread.

We are actively working on it and expect the new compliant experience to launch in coming 2 weeks. I will be sure to loop back with you to confirm live date.

Is this ok? I understand the date in letter states Apr 30th. We have been working diligently to resolve this issue.

Thank you for your support

Steve

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

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]

Sent: Monday, April 28, 2014 10:03 AM

To: Steven de Blois

Cc: Simona Sasova

Subject: Re: Question : www.expedia.ca<http://www.expedia.ca>

Hi Steve,

I continued with a few more searches and found the contravention again on the attached pdf - please be aware that Exepdia Canada Corporation have until April 30, 2014 to fix this issue as per the warning letter of March 27, 2014.

You will see the attached flight breakdown has two taxes with codes only - the tax is not identified.

Regards,

Paul Lynch

Enforcement Support Officer

819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9 Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9 Gouvernement du Canada | Government of Canada

>>> Paul Lynch 28/04/2014 9:39 AM >>>

Hi Steve,

The collapsed fare in option 2 is not an issue, so long as the relevant information is available by either a click or hover over - by relevant I refer to a tax breakdown that includes the name of each tax or third party charge (the contravention for which the warning letter dated March 27 was issued). As you are aware, the Air Transportation Charge is not required to be broken down.

I have reviewed the expedia.ca web site and have not been able to replicate the contravention highlighted in the warning letter - i.e. the names of all taxes appear in the breakdown. Are you confident that this issue has now been fully resolved?

Kind regards,

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562

| ATS/TTY 800-669-5575

Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9

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Gouvernement du Canada | Government of Canada

>>> Steven de Blois <sdeblois@expedia.com<mailto:sdeblois@expedia.com>>
25/04/2014 4:36 PM >>>

Great. Thank you Paul.

Steve

On 2014-04-25, at 4:24 PM, "Paul Lynch"
<Paul.Lynch@otc-cta.gc.ca<mailto:Paul.Lynch@otc-cta.gc.ca>>

wrote:

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so

> long as you can click it or hover over it to get the beakdown, it

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> OK...let me confirm.

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> 819-953-9764 | télécopieur/facsimile 819-953-5562

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> Paul.Lynch@cta-otc.gc.ca<mailto:Paul.Lynch@cta-otc.gc.ca>

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> Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9

> Gouvernement du Canada | Government of Canada

>

>

>>>> Steven de Blois
<sdeblois@expedia.com<mailto:sdeblois@expedia.com>>
22/04/2014 12:55 PM >>>

> Hi Paul,

>

> I have a question regarding the Flight path on

>
www.expedia.ca<http://www.expedia.ca<http://www.expedia.ca%3chttp:/www.expedia.ca>>

>

> Below is the default view. As you can see, the "Trip Summary" module

is

> expanded by default. The Traveller1 and Traveller2 details are both

> expanded.

>

> Default view:

> [cid:image003.jpg@01CF5E2A.190F1550]

>

>

> I would like to understand if below proposals are compliant.

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> Proposal #1 - Traveller2 details is collapsed. Is this compliant?

> [cid:image005.jpg@01CF5E2A.190F1550]

>

>

> Proposal #2 - Traveller1 and Traveller2 details are both collapsed.

Is

> this compliant?

> [cid:image007.jpg@01CF5E2A.190F1550]

>

>

> Thank you

> Steve

>

>

> Steven de Blois

> Sr Manager, Product Management, CA & LatAm

> o 416.202.8664

> m 416.930.5058

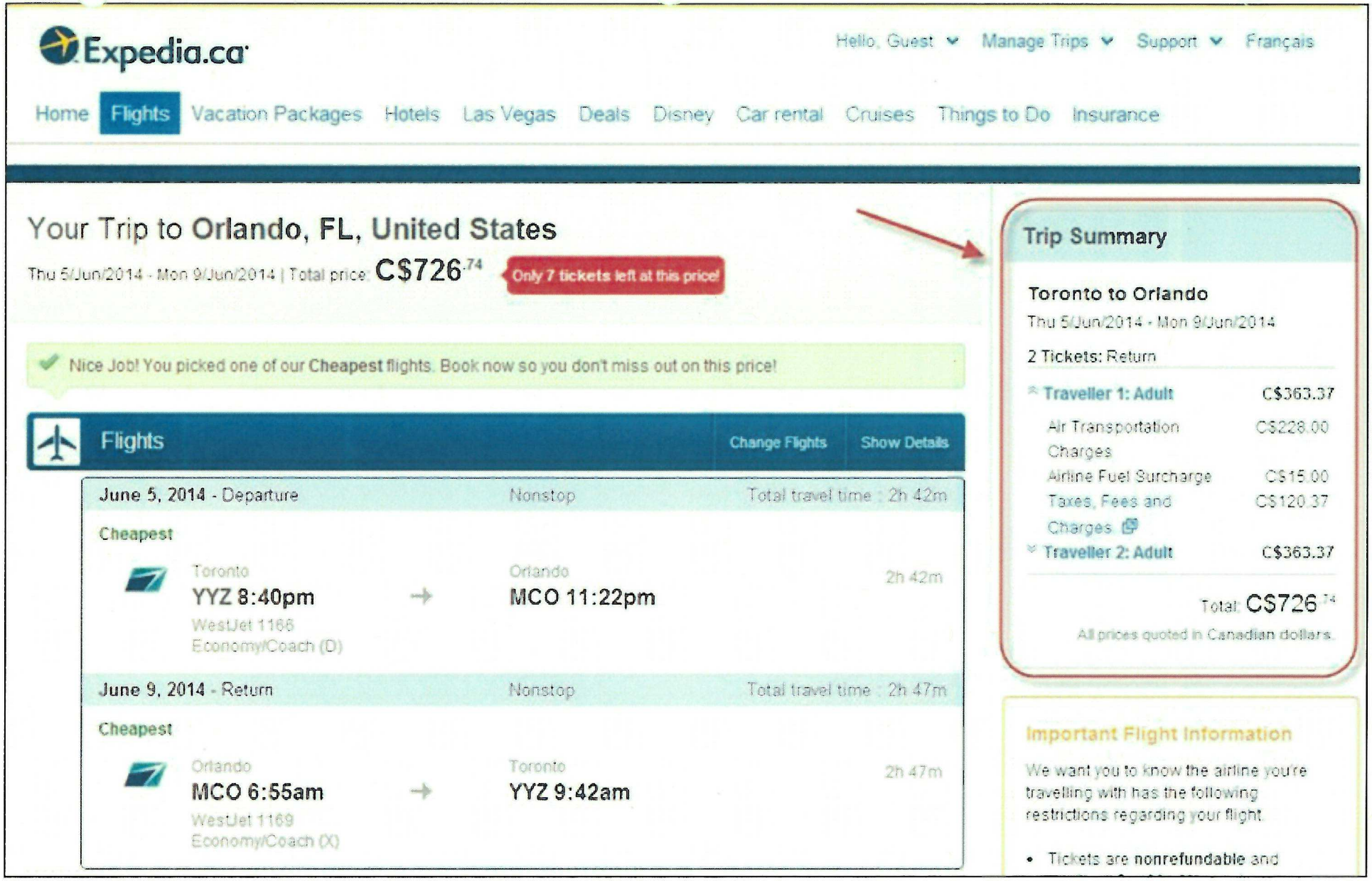
> expedia.ca<http://www.expedia.ca/> |

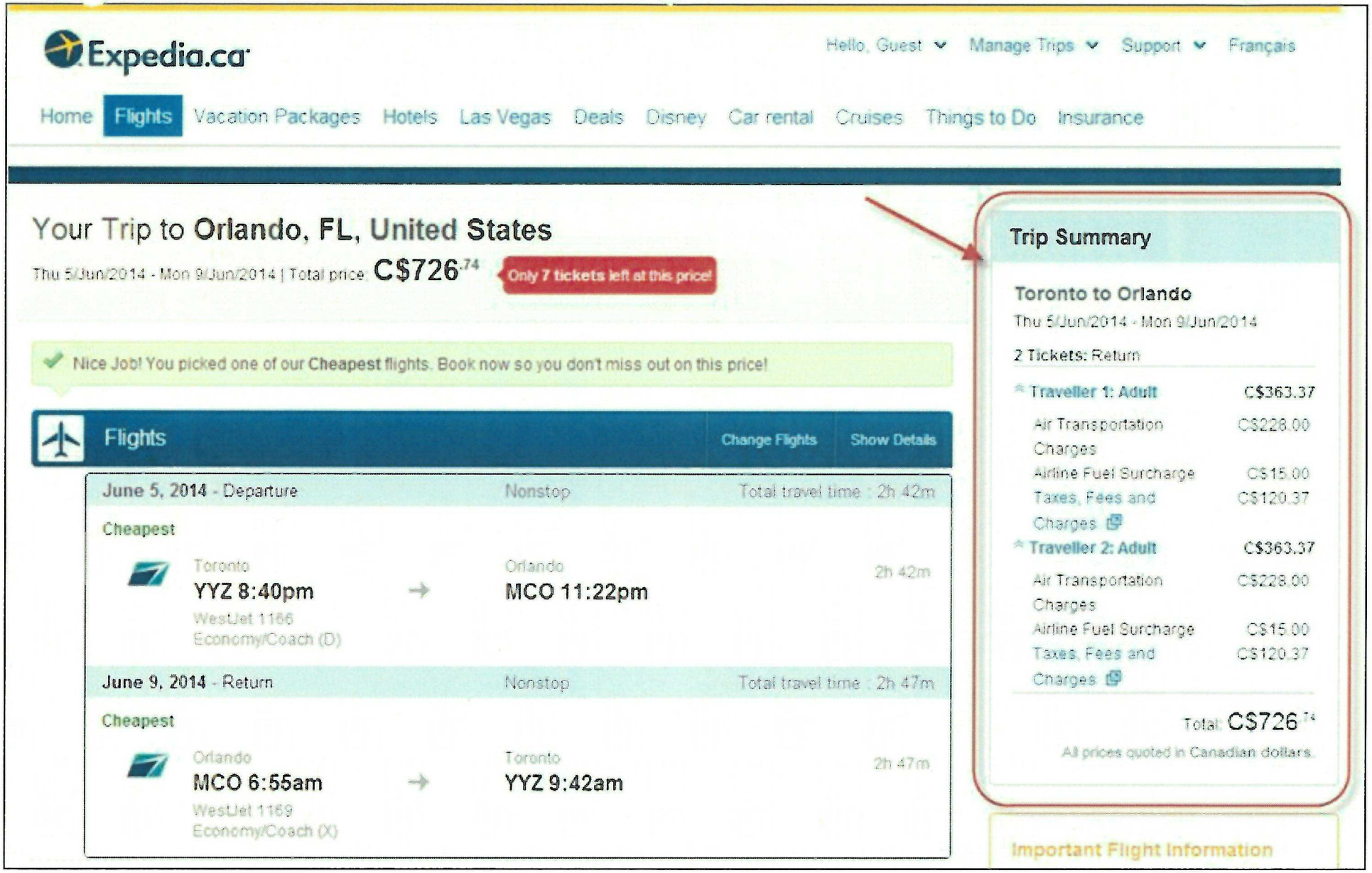
> expedia.mx<http://www.expedia.com.mx/> |

> expedia.com.br<http://www.expedia.com.br/> |

> expedia.com.ar<http://www.expedia.com.br/>

>


Expedia.ca
Hello, Guest
Manage Trips
Support
Français
Home
Flights
Vacation Packages
Hotels
Las Vegas
Deals
Disney
Car rental
Cruises
Things to Do
Insurance
Your Trip to Orlando, FL, United States
Thu 5/Jun/2014 - Mon 9/Jun/2014 | Total price: C$726.74
Only 7 tickets left at this price!
Nice Job! You picked one of our Cheapest flights. Book now so you don't miss out on this price!
Flights
Change Flights
Show Details
June 5, 2014 - Departure
Nonstop
Total travel time : 2h 42m
Cheapest
Toronto
YYZ 8:40pm
Orlando
MCO 11:22pm
2h 42m
WestJet 1166
Economy/Coach (D)
June 9, 2014 - Return
Nonstop
Total travel time : 2h 47m
Cheapest
Orlando
MCO 6:55am
Toronto
YYZ 9:42am
2h 47m
WestJet 1169
Economy/Coach (X)
Trip Summary
Toronto to Orlando
Thu 5/Jun/2014 - Mon 9/Jun/2014
2 Tickets: Return
Traveller 1: Adult
C$363.37
Air Transportation Charges
C$228.00
Airline Fuel Surcharge
C$15.00
Taxes, Fees and Charges
C$120.37
Traveller 2: Adult
C$363.37
Total: C$726.74
All prices quoted in Canadian dollars.
Important Flight Information
We want you to know the airline you're travelling with has the following restrictions regarding your flight.
Tickets are nonrefundable and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Trip Summary
Toronto to Orlando
Thu 5/Jun/2014 - Mon 9/Jun/2014
2 Tickets: Return
Traveller 1: Adult C$363.37
Air Transportation Charges C$228.00
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Taxes, Fees and Charges C$120.37
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Taxes, Fees and Charges C$120.37
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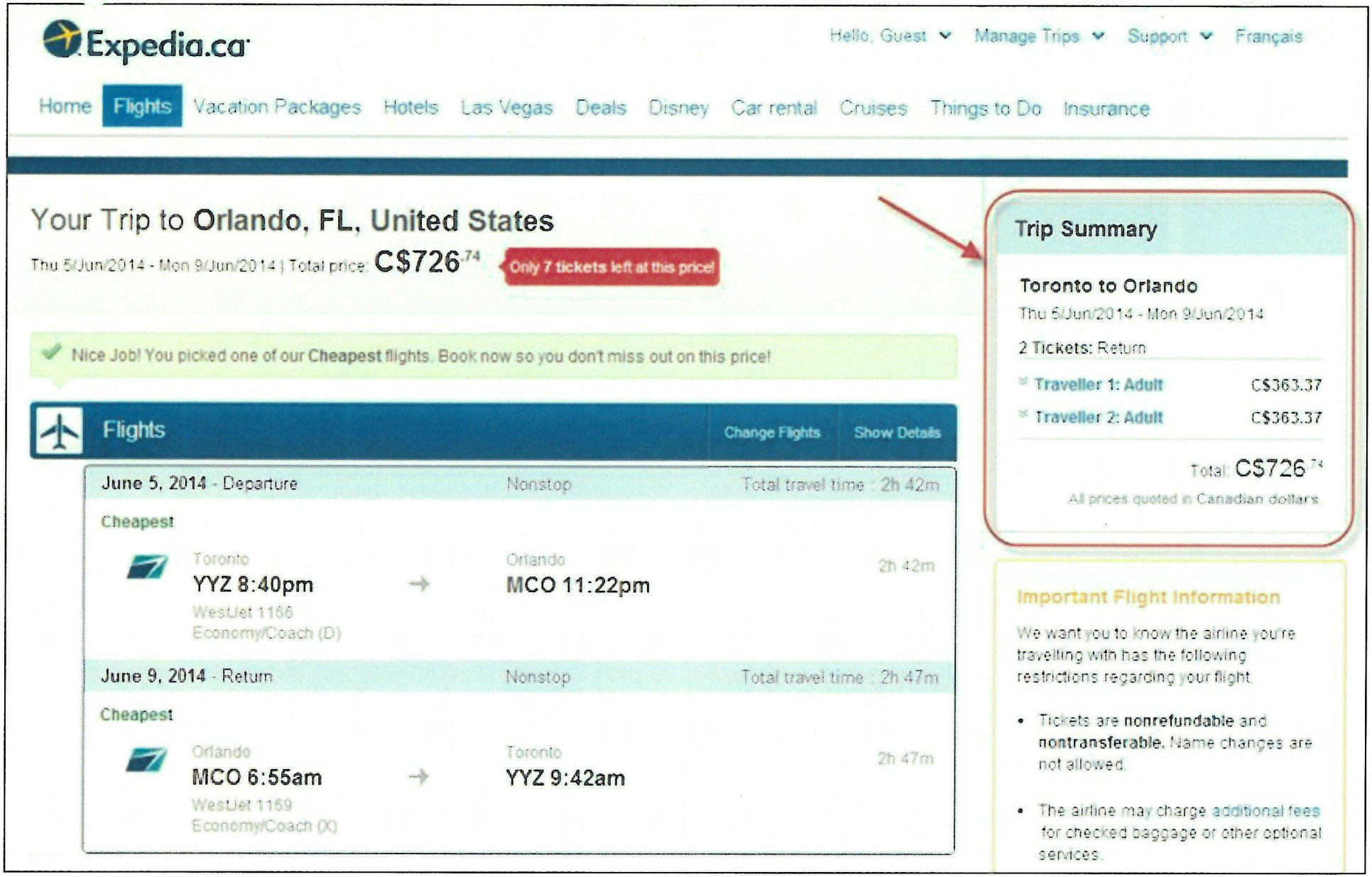
All prices quoted in Canadian dollars.
Important Flight Information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Nice Job! You picked one of our Cheapest flights. Book now so you don't miss out on this price!
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WestJet 1169
Economy/Coach (X)
Trip Summary
Toronto to Orlando
Thu 5/Jun/2014 - Mon 9/Jun/2014
2 Tickets: Return
Traveller 1: Adult
C$363.37
Traveller 2: Adult
C$363.37
Total: C$726.74
All prices quoted in Canadian dollars
Important Flight Information
We want you to know the airline you're travelling with has the following restrictions regarding your flight.
Tickets are nonrefundable and nontransferable. Name changes are not allowed.
The airline may charge additional fees for checked baggage or other optional services.

Simona Sasova

From: Steven de Blois <sdeblois@expedia.com>
Sent: June-09-14 3:18 PM
To: Simona Sasova
Subject: CTA

Hi Simona - to confirm the details of our conversation, below are the 2 options for us to implement:

1. Remove "Air Transportation Charges" and remove "Airline Fuel Surcharge"
2. Combine Air Transportation Charges" and "Airline Fuel Surcharge" into a single line titled Remove "Air Transportation Charges"

Trip Summary

Ottawa to Paris

28 Jul 2014 - 11 Aug 2014

Departure: Arrives on 29 Jul 2014

2 Tickets: Return

Traveller 1: Adult	C$1,092.96
Air Transportation Charges	C$444.00
Airline Fuel Surcharge	C$476.00
Taxes, Fees and Charges	C$172.96
Traveller 2: Adult	C$1,092.96
Air Transportation Charges	C$444.00
Airline Fuel Surcharge	C$476.00
Taxes, Fees and Charges	C$172.96

Total: C$2,185.92

All prices quoted in Canadian dollars.

Steven de Blois
Sr Manager, Product Management, CA & LatAm
o 416.202.8664
m 416.930.5058
expedia.ca expedia.mx expedia.com.br expedia.com.ar

Simona Sasova

From: Steven de Blois <sdeblois@expedia.com>
Sent: June-09-14 3:33 PM
To: Simona Sasova
Subject: RE: CTA

Thank you. I will loop back tomorrow.

-----Original Message-----
From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]
Sent: Monday, June 09, 2014 3:22 PM
To: Steven de Blois
Subject: Re: CTA

Hi Steve,

Yes, confirmed, both are correct.

Thank you
Simona

Simona Sasova
Gestionnaire, Application de la loi
Manager, Enforcement Division
Regulatory Approvals & Compliance Directorate Direction, générale et des déterminations de l'industrie
Tel: 819-953-9786
Cell: 613-864-7960
Fax: 819-953-1972

Simona.Sasova@otc-cta.gc.ca

>>> Steven de Blois <sdeblois@expedia.com> 09/06/2014 3:18 PM >>>
Hi Simona - to confirm the details of our conversation, below are the 2 options for us to implement:

1. Remove "Air Transportation Charges" and remove "Airline Fuel Surcharge"

2. Combine Air Transportation Charges" and "Airline Fuel Surcharge" into a single line titled Remove "Air Transportation Charges"

[cid:image001.png@01CF83F6.060ECB20]

Steven de Blois
Sr Manager, Product Management, CA & LatAm o 416.202.8664 m 416.930.5058 expedia.ca<http://www.expedia.ca/> | expedia.mx<http://www.expedia.com.mx/> | expedia.com.br<http://www.expedia.com.br/> | expedia.com.ar<http://www.expedia.com.br/>

Simona Sasova

From: Steven de Blois <sdeblois@expedia.com>
Sent: June-09-14 4:52 PM
To: Simona Sasova
Cc: Brian Flanagan
Subject: RE: CTA

Hi Simona,

Good news. I have been able to confirm with our Technology team that we can remove mention of "Air Transportation Charges" and "Airline Fuel Surcharge"

The new experience will look similar to below. Can you please approve this revised display?

Also, can you confirm when this change needs to be effective?

Thank you
Steve

-----Original Message-----
From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]
Sent: Monday, June 09, 2014 3:33 PM
To: Steven de Blois
Subject: RE: CTA

reat. Thank you

>>> Steven de Blois <sdeblois@expedia.com> 09/06/2014 3:32 PM >>>
Thank you. I will loop back tomorrow.

-----Original Message-----
From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]
Sent: Monday, June 09, 2014 3:22 PM
To: Steven de Blois
Subject: Re: CTA

Hi Steve,

Yes, confirmed, both are correct.

Thank you
Simona

Simona Sasova
Gestionnaire, Application de la loi
Manager, Enforcement Division
Regulatory Approvals & Compliance Directorate Direction, générale et des déterminations de l'industrie
Tel: 819-953-9786
Cell: 613-864-7960
Fax: 819-953-1972

Simona.Sasova@otc-cta.gc.ca

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Hi Simona - to confirm the details of our conversation, below are the 2 options for us to implement:

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[cid:image001.png@01CF83F6.060ECB20]

Steven de Blois
Sr Manager, Product Management, CA & LatAm o 416.202.8664 m
416.930.5058 expedia.ca<http://www.expedia.ca/> | expedia.mx<http://www.expedia.com.mx/> | expedia.com.br<http://www.expedia.com.br/> | expedia.com.ar<http://www.expedia.com.br/>

Simona Sasova

From: Steven de Blois <sdeblois@expedia.com>
Sent: June-11-14 1:55 PM
To: Simona Sasova
Cc: Brian Flanagan
Subject: Re: CTA

Hi Simona - just received confirmation from our Technology team. It will be completed within next 2 weeks.

Steve

On 2014-06-11, at 11:49 AM, "Simona Sasova" <Simona.Sasova@otc-cta.gc.ca> wrote:

> Hello Steve,
>
> I've left you a voicemail this morning. I will need to know shortly. Is it possible to let me know.
>
> Thanks
> Simona
>
> Sent from my BlackBerry 10 smartphone on the Rogers network.
>
> **From:** Steven de Blois
> **Sent:** Tuesday, June 10, 2014 1:28 PM
> **To:** Simona Sasova
> **Cc:** Brian Flanagan
> **Subject:** RE: CTA
>
> Hi Simona - not yet - will know more end of day today.
>
> Steve
>
> -----Original Message-----
> From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]
> Sent: Tuesday, June 10, 2014 1:26 PM
> To: Steven de Blois
> Cc: Brian Flanagan
> Subject: RE: CTA
>
> Hi Steve,
>
> Any news?
>
> Thanks
> Simona
>
> Simona Sasova
> Gestionnaire, Application de la loi

Manager, Enforcement Division
Regulatory Approvals & Compliance Directorate Direction, générale et des déterminations de l'industrie
Tel: 819-953-9786
Cell: 613-864-7960
Fax: 819-953-1972

Simona.Sasova@otc-cta.gc.ca

>>> Steven de Blois 09/06/2014 4:51 PM >>>
Hi Simona,

Good news. I have been able to confirm with our Technology team that we can remove mention of "Air Transportation Charges" and "Airline Fuel Surcharge"

The new experience will look similar to below. Can you please approve this revised display?

Also, can you confirm when this change needs to be effective?

Thank you

Steve

[cid:image001.png@01CF8403.1FC646D0]

-----Original Message-----
From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]
Sent: Monday, June 09, 2014 3:33 PM
To: Steven de Blois
Subject: RE: CTA

Great. Thank you

>>> Steven de Blois <sdeblois@expedia.com>

09/06/2014 3:32 PM >>>

Thank you. I will loop back tomorrow.

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

From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]

Sent: Monday, June 09, 2014 3:22 PM

To: Steven de Blois

Subject: Re: CTA

Hi Steve,

Yes, confirmed, both are correct.

Thank you

Simona

Simona Sasova

Gestionnaire, Application de la loi

Manager, Enforcement Division

Regulatory Approvals & Compliance Directorate Direction, générale et des déterminations de l'industrie

Tel: 819-953-9786

Cell: 613-864-7960

Fax: 819-953-1972

Simona.Sasova@otc-cta.gc.ca

>>> Steven de Blois <sdeblois@expedia.com>
09/06/2014 3:18 PM >>>

Hi Simona - to confirm the details of our conversation, below are the 2 options for us to implement:

1. Remove "Air Transportation Charges" and remove "Airline Fuel

Surcharge"

2. Combine Air Transportation Charges" and "Airline Fuel

Surcharge" into a single line titled Remove "Air Transportation Charges"

[cid:image001.png@01CF83F6.060ECB20]

Steven de Blois

Sr Manager, Product Management, CA & LatAm o 416.202.8664 m

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</sdeblois@expedia.com</sdeblois@expedia.com

Paul Lynch

rom: Simona Sasova
Sent: July-28-14 9:35 AM
To: Paul Lynch
Subject: FW: Update

From: Steven de Blois [mailto:sdeblois@expedia.com]
Sent: July-28-14 9:32 AM
To: Simona Sasova
Subject: RE: Update

Hello Simona,

Per our conversation on Friday, we look forward to receiving screenshots of all pages within our Air booking path highlighting the specific required changes.
This will help to ensure we 100% understand your requested changes.

Thank you,
Steve

From: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]
ent: Friday, July 25, 2014 12:42 PM
To: Steven de Blois
Subject: Re: Update

Hi Steve,

Can we postpone to 1:15?

Thanks
Simona

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Steven de Blois
Sent: Friday, July 25, 2014 9:36 AM
To: Simona Sasova
Subject: RE: Update

Hi Simona,
I will have a target delivery date to share with you on this afternoon's call.

Thank you
Steve

rom: Simona Sasova [mailto:Simona.Sasova@otc-cta.gc.ca]
Sent: Wednesday, July 23, 2014 12:27 PM

To: Steven de Blois
Subject: Update

359

Hi Steve,

Is there any update that you can provide for me as a result of yesterday's meeting.

Thank you
Simona

Simona Sasova
Gestionnaire, Application de la loi | Manager, Enforcement
Approbations réglementaires et conformité, Regulatory Approvals and Compliance
819-953-9786 | télécopieur/facsimile 819-953-1972
Simona.Sasova@cta-otc.gc.ca
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9
Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9
Gouvernement du Canada | Government of Canada

Paul Lynch

From: Steven de Blois <sdeblois@expedia.com>
Sent: August-21-14 3:21 PM
To: Paul Lynch; Simona Sasova
Cc: Brian Flanagan
Subject: RE: Expedia.com - headings and breakdown

Hi Paul & Simona,

I am following up on action item #1 below. We have now confirmed a delivery date = **Sept 10th**
As agreed, this date is 6 weeks from our phone call meeting on July 25th.

1- **First Page Project:** we are still on target for completed change to expedia.ca per the update provided to Simona on July 25. The target is 6 weeks from July 25. We have not locked a delivery date but will continue to keep you updated.

Shortly, we will begin the work effort to finalize requirements on action item #2. I will be sure to keep you updated.

Thank you
Steve

From: Steven de Blois
Sent: Monday, August 11, 2014 2:46 PM
To: 'Paul Lynch'; Simona Sasova (Simona.Sasova@otc-cta.gc.ca)
Cc: Brian Flanagan
Subject: RE: Expedia.com - headings and breakdown

Hi Paul,

Thank you for the follow-up. I was on holiday out-of-office last week just returning to office today.

Summary:

1- **First Page Project:** we are still on target for completed change to expedia.ca per the update provided to Simona on July 25. The target is 6 weeks from July 25. We have not locked a delivery date but will continue to keep you updated.

2- **Subsequent Pages Project:** This work effort has not started. I will respond to your email below to confirm the scope/requirements. As discussed with Simona on July 25, this work effort is far more complex than #1 above as it involves multiple stakeholders spread out across a few countries. The team will work towards this change once above change is completed.

Thank you
Steve

From: Paul Lynch [mailto:Paul.Lynch@otc-cta.gc.ca]
Sent: Monday, August 11, 2014 2:37 PM
To: Steven de Blois
Subject: RE: Expedia.com - headings and breakdown

Hi Steve – Do you have a date to complete the fixes to the expedia.com web site?

Kind regards

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562
| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9
Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9
Gouvernement du Canada | Government of Canada

From: Paul Lynch
Sent: August-05-14 10:07 AM
To: 'sdeblois@expedia.com'
Subject: RE: Expedia.com - headings and breakdown

Hi Steve,

Just following up on my email of July 28 – do you have a date yet when the first page issues will be corrected?

Kind regards

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562
| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9
Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9
Gouvernement du Canada | Government of Canada

From: Paul Lynch
Sent: July-28-14 1:20 PM
To: 'sdeblois@expedia.com'
Cc: Simona Sasova
Subject: Expedia.com - headings and breakdown

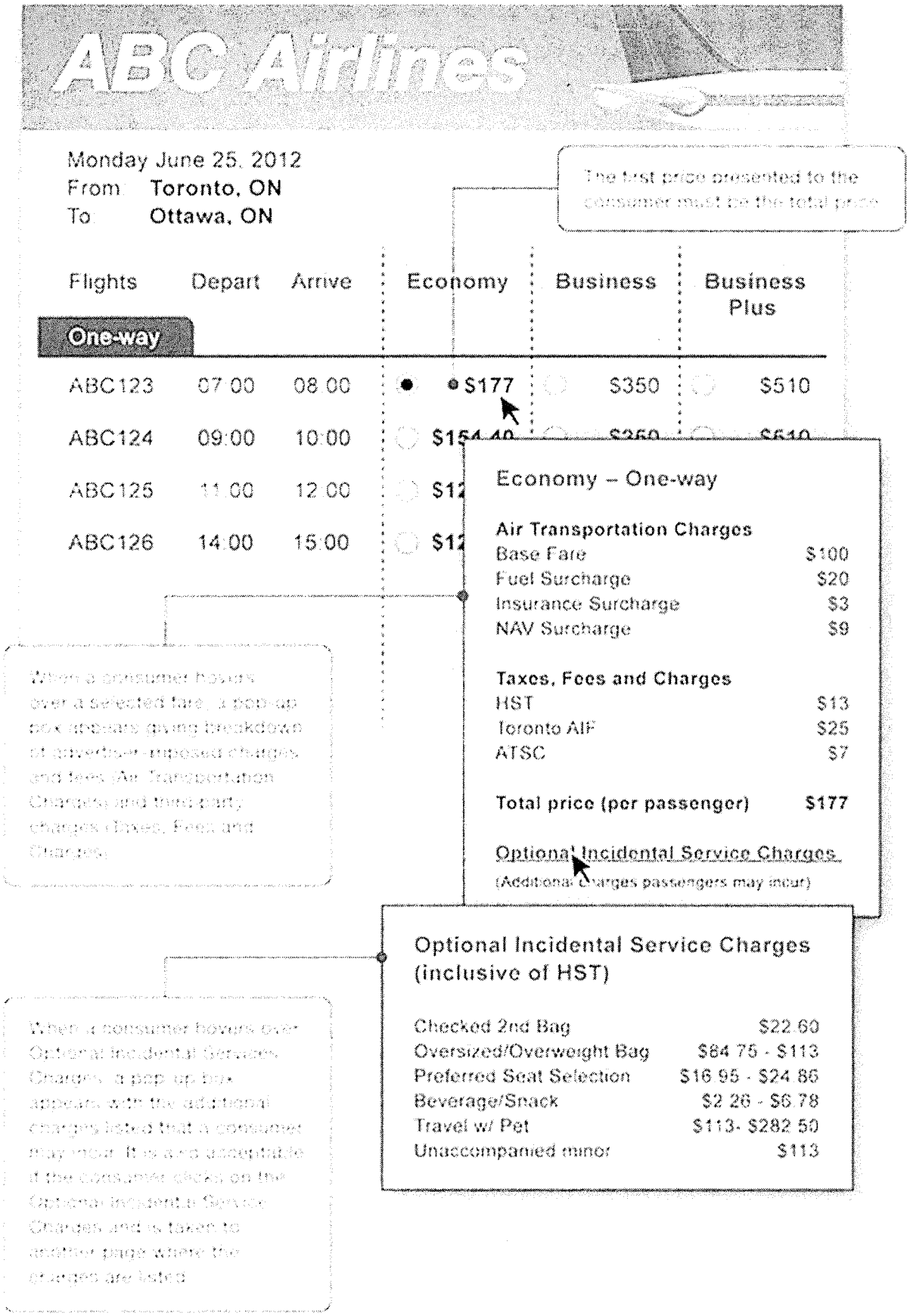
Hi Steven,

Please ignore any previous emails from me dated July 28 – sent in error.

The trip summary page requires a heading of 'Air Transportation Charges' under which all advertiser imposed charges should appear (base fare, fuel surcharge, booking fee etc) and another heading for 'Taxes, Fees and Charges' for all third party charges such as airport improvement fees and GST etc.

The current display appears to have a fuel surcharge (carrier charge) under 'Taxes and Fees' and this surcharge must form part of the Air Transportation Charge.

Below is an example from our interpretation note of price advertising for air services:



Please do not hesitate to contact me should you require further assistance.

Kind regards

Paul Lynch
Enforcement Support Officer
819-953-9764 | télécopieur/facsimile 819-953-5562
| ATS/TTY 800-669-5575
Paul.Lynch@cta-otc.gc.ca
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9
Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9
Gouvernement du Canada | Government of Canada

Court File No.: A-167-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

(Application under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7)

APPLICANT'S RECORD
VOLUME 2
(Memorandum of Fact and Law)

Dated: December 22, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

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

John Dodsworth

Tel: (819) 997 9324
Fax: (819) 953 9269

Solicitor for the Respondent,
Canadian Transportation Agency

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FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

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– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

OVERVIEW

1. The Applicant is seeking an order of *mandamus*, directing the Canadian Transportation Agency ("Agency") to render a decision in the Applicant's complaint, dated February 24, 2014, alleging that Expedia, Inc. has been advertising prices on its Canadian website contrary to the applicable regulations. Advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada is a matter under the jurisdiction of the Agency.

2. The *Canada Transportation Act*, S.C. 1996, c. 10, the enabling statute of the Agency, provides two separate and independent avenues for enforcing the rights of the travelling public:

(a) Members of the public may complain to the Agency. Such matters must be determined within 120 days by Members of the Agency, who exercise the quasi-judicial powers of the Agency to issue decisions, which can subsequently be registered and turned into an order of the Federal Court.

(b) Designated Enforcement Officers of the Agency may issue administrative monetary penalties for violations of certain statutory provisions so designated by the Agency; they cannot, however, exercise the Agency's quasi-judicial powers, and thus cannot issue decisions.

3. The present application concerns the novel question of whether the aforementioned two avenues are mutually exclusive. It is submitted that:

(a) the *Canada Transportation Act*, S.C. 1996, c. 10 imposes a statutory duty upon the Agency to hear and decide any complaint related to matters under its jurisdiction; and

(b) the *Canadian Transportation Agency Designated Provisions Regulations*, S.O.R./99-244 do not displace or alter this statutory duty.

PART I – STATEMENT OF FACTS

A. THE AGENCY

(i) Powers and duties of Members of the Agency

4. The Agency, established by the *Canada Transportation Act*, S.C. 1996, c. 10, consists of Members (including temporary members), who exercise the quasi-judicial and regulation-making powers conferred upon the Agency.

***Canada Transportation Act*, s. 7(2)** **Appendix "A": 401**

5. The Agency may order a person to do an act or refrain from an act related to any Act of Parliament that is administered in whole or in part by the Agency.

***Canada Transportation Act*, s. 26** **Appendix "A": 404**

6. A person may make an application to the Agency, and the Agency may grant the application in whole or in part, may dismiss it, or may grant any further or other relief that to the Agency seems just and proper.

***Canada Transportation Act*, s. 27** **Appendix "A": 404**

7. The Agency must make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation). The decision of the Agency can be turned into an order of the Federal Court, and enforced accordingly.

***Canada Transportation Act*, ss. 29 and 33** **Appendix "A": 405**

(ii) Designated provisions and enforcement officers

8. The Agency also has Staff, but they are not Members, and they cannot exercise the powers of the Agency.

***Canada Transportation Act*, s. 19** **Appendix "A": 402**

9. The Agency may designate:

(a) certain statutory provisions as ones that may be enforced through administrative monetary penalties ("**AMP**"); and

(b) persons as enforcement officers ("**DEO**") who are authorized to issue notices of violation with respect to designated provisions.

Since DEOs are not Members of the Agency, they cannot issue decisions or orders.

***Canada Transportation Act*, ss. 177-180** **Appendix "A": 411 - 413**

***Canadian Transportation Agency Designated Provisions Regulations*, S.O.R./99-244** **Appendix "A": 417**

Sasova Cross-Examination, p. 19, Q84-Q86 **Tab 3: 113**

(iii) Air services price advertising

10. Parliament required the Agency to make regulations with respect to advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada. Part V.1 of the *Air Transportation Regulations* ("*ATR*"), governing advertising prices and consisting of sections 135.5 to 135.92, was promulgated to fulfill this requirement.

> ***Canada Transportation Act*, s. 86.1** — **Appendix "A": 409**
>
> ***Air Transportation Regulations*, S.O.R./88-58, Part V.1, ss. 135.5-135.92** — **Appendix "A": 396**

11. Section 135.8 of the *ATR* requires advertisements to clearly distinguish air transportation charges from other fees and taxes, while section 135.91 of the *ATR* explicitly prohibits misrepresenting air transportation charges as if they were third party charges or taxes.

> ***Air Transportation Regulations*, S.O.R./88-58, Part V.1, ss. 135.8 and 135.91** — **Appendix "A": 397 , 398**

12. Sections 135.5 to 135.92 of the *ATR* are listed as items 96.1 to 96.92 in the Schedule to the *Canadian Transportation Agency Designated Provisions Regulations*.

> ***Canadian Transportation Agency Designated Provisions Regulations*, S.O.R./99-244** — **App. "A": 421 - 422**

13. According to page 12 of the "Air Transportation Regulations – Air Services Price Advertising Interpretation Note" published by the Agency:

> In addition, the Agency may order a person to make the changes necessary to conform to Part V.1 of the ATR to bring about compliance.
>
> **Sasova Affidavit (May 20, 2014), Exhibit "F", p. 12**

B. REFUSAL OF THE AGENCY TO RENDER A DECISION

14. The Applicant, Dr. Gábor Lukács, is a Canadian air passenger rights advocate and a frequent traveller. Dr. Lukács has a track record of approximately two dozen successful regulatory complaints with the Agency. The Consumers' Association of Canada awarded Lukács its Order of Merit in recognition of his work in the area of air passenger rights.

Lukács Affidavit (April 22, 2014), paras. 1-2 **Tab 2: 8**

15. On or around February 8, 2014, in the process of purchasing a ticket for his own travel, Lukács noticed that the Canadian website of Expedia, Inc. ("Expedia") advertises prices of air services in a manner that is contrary to Part V.1 of the *ATR* by:

(a) failing to include fuel surcharges in "Air Transportation Charges";

(b) improperly including and listing airline-imposed charges in "Taxes, Fees and Charges" under the name "YR - Service Charge."

Lukács's attempts to address these concerns with Expedia informally and to have Expedia change its Canadian website were unsuccessful.

Lukács Affidavit (April 22, 2014), paras. 3-4 **Tab 2: 8**

(i) Complaint concerning price advertising

16. On or around February 24, 2014, Lukács made a formal complaint with the Agency alleging that Expedia had been advertising prices of air services on its Canadian website, expedia.ca, in a manner contrary to sections 135.8 and 135.91 of the *ATR*. As a remedy, Lukács asked the Agency to order Expedia to amend its Canadian website to comply with the *ATR*.

Lukács Affidavit (April 22, 2014), Exhibit "A" **Tab 2A: 13**

(ii) Refusal to render a decision

17. On March 11, 2014, Ms. Cathy Murphy, the Secretary of the Agency, wrote to Lukács with respect to his complaint that:

> As this is an enforcement matter and not a matter that is subject to a formal complaint and adjudicative process, the Agency will not be commencing a formal pleadings process.

Lukács Affidavit (April 22, 2014), Exhibit "B" **Tab 2B: 34**

18. On March 15, 2014, Lukács wrote to Ms. Murphy and requested that:

(a) the Agency clarify whether Ms. Murphy's email was a decision of the Agency; and

(b) the complaint concerning Expedia, Inc. be placed before a Panel of the Agency.

Lukács Affidavit (April 22, 2014), Exhibit "C" **Tab 2C: 36**

19. On March 21, 2014, Ms. Murphy responded to Lukács that:

> The message I sent was a staff message simply setting out the process that is followed for alleged contraventions to the Air Service Price Advertising Regulations. A response with additional information will be provided to you next week.

Lukács Affidavit (April 22, 2014), Exhibit "D" **Tab 2D: 40**

20. On March 27, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, wrote in a letter addressed to Lukács, among other things, that:

> Enforcement of the air pricing advertising provisions of the ATR is being achieved by application of the administrative monetary penalty provisions of the *Canada Transportation Act* (CTA). [...]
>
> To be clear, no decision by an Agency Panel is required for the DEO to undertake an investigation of a potential contravention of a provision listed in the Designated Provisions Regulations. Therefore, the Agency will not be conducting an inquiry into the matter you have raised. Further, there is no role for the public to participate in an investigation, should the DEO decide that an investigation is warranted, except as requested by the DEO where the DEO determines that information relevant to the investigation is required. The role of the public is limited to apprising the DEO of concerns that they may have with respect to compliance. [...]
>
> [...] the General Rules do not require the Agency to conduct an inquiry into a matter filed by the public with respect to alleged non-compliance with Part V.1 of the ATR or of other provisions of the ATR or the CTA which do not specifically provide for a complaint mechanism.
>
> [Emphasis added.]

Lukács Affidavit (April 22, 2014), Exhibit "F" **Tab 2F: 45**

C. CONCESSIONS MADE BY THE AGENCY IN THE PRESENT PROCEEDING

21. The Agency tendered the affidavit of Ms. Simona Sasova, the manager of the Enforcement Division of the Agency, sworn on May 20, 2014, in opposition to the application. Ms. Sasova's affidavit created the incorrect impression that Expedia's website had become compliant with Part V.1 of the *Air Transportation Regulations* as a result of her enforcement efforts.

22. Following extensive cross-examination of Ms. Sasova on her affidavit, and in the course of a motion to compel Ms. Sasova to answer certain questions and produce documents, the Agency conceded as follows:

> 18. [...] the issue of whether Expedia's online advertisement is, or is not, in compliance with the ATR is not relevant to

> whether the CTA requires the Agency to render a decision in Mr. Lukacs' February 24 2014 complaint.
>
> ⋮
>
> 25. [...] neither Ms. Sasova's affidavit, nor the subsequent evidence provided in cross-examination establish that Expedia has come into full compliance with subsection 135.8(3) of the Regulations since Ms. Sasova's May 20 affidavit was sworn.
>
> ⋮
>
> 27. However, in the present circumstances, it establishes that Mr. Lukacs' concern expressed in his February 24, 2014 letter that Expedia failed to include fuel surcharges in "Air Transportation Charges" remains an outstanding issue – no further cross-examinations are required for that purpose.

Written Representations of the Canadian Transportation Agency (October 24, 2014), paras. 18, 25, and 27 — **Court Docket, Document No. 17**

D. LACK OF MEANINGFUL ENFORCEMENT

23. In light of the Agency's concessions, paragraphs 11-16 of the affidavit of Ms. Sasova, describing her alleged enforcement efforts, are not relevant to issues raised in the present application. As such, the following are provided only for the sake of completeness, should the Agency wish to rely on these portions of Ms. Sasova's evidence.

(i) No administrative monetary penalty was issued (AMP)

24. The violations identified by Lukács were not the first violations of Expedia of the price advertising regulations. A year earlier, in January 21, 2013, Ms. Sasova had already issued a warning letter to Expedia for a wealth of violations, including of sections 135.8 and 135.91 of the *ATR*.

Sasova Affidavit (May 20, 2014), Exhibit "H"

25. Ms. Sasova only issued a second warning letter to Expedia, dated March 27, 2014, in relation to the violations identified by Lukács, and at no point was an administrative monetary penalty issued.

Sasova Affidavit (May 20, 2014), Exhibit "J"

26. According to page 27 of the "Air Transportation Regulations – Air Service Price Advertising Interpretation Note" published by the Agency, an administrative monetary penalty should have been issued to Expedia in 2014, as it was a subsequent violation.

Sasova Affidavit (May 20, 2014), Exhibit "F", p. 30

(ii) Expedia did not become compliant

27. Ms. Sasova argued at great length in paragraph 15 of her affidavit why Expedia's website was "acceptable" to her.

Sasova Affidavit (May 20, 2014), para. 15

28. Moreover, on May 27, 2014, a subordinate of Ms. Sasova confirmed to Expedia, with a carbon copy to Ms. Sasova, that:

> A review of the attached and the expedia.ca web site confirm compliance.

Sasova Continued Cross-Examination, Exhibit No. 8, p. 61 — **Tab 4: 324**

29. On cross-examination, however, Ms. Sasova acknowledged that Expedia's website was not compliant even on June 9, 2014, and she produced subsequent email correspondence between Agency Staff and Expedia about what further changes were necessary to make the website compliant.

Sasova Continued Cross-Examination, p. 120, Q484 and Exhibit No. 9 — **Tab 4: 230**, **Tab 4E: 348**

30. Even though Expedia's website had remained non-compliant with Part V.1 of the *Air Transportation Regulations* and Ms. Sasova was fully aware that it was non-compliant, neither further warning letters nor administrative monetary penalties were issued to Expedia, because inexplicably, Ms. Sasova "was satisfied with how it was displayed."

Sasova Continued Cross-Examination, p. 121, Q489-Q490 — **Tab 4: 231**

(iii) Make-believe enforcement to make Lukács happy

31. Ms. Sasova's evidence was that her duty is to enforce the *Canada Transportation Act* and the regulations made under the Act.

Sasova Cross-Examination, p. 5, Q18 — **Tab 3: 99**

32. On her continued cross-examination, however, Ms. Sasova revealed that her actions were motivated by extraneous considerations having little to do with enforcing the law:

> Q. So you were speaking to Expedia and asking Expedia to make changes to make me, Gabor Lukacs, happy?
>
> A. Yes.

Sasova Continued Cross-Examination, p. 118, Q473 — **Tab 4: 228**

PART II – STATEMENT OF THE POINTS IN ISSUE

33. The questions to be determined are:

(a) whether this Honourable Court has jurisdiction to hear the application pursuant to s. 28 of the *Federal Courts Act*;

(b) whether the *Canada Transportation Act* imposes a statutory duty upon the Agency to hear and decide complaints related to matters under its jurisdiction;

(c) if so, whether the *Canadian Transportation Agency Designated Provisions Regulations*, S.O.R./99-244 displaces or alters this duty in any way;

(d) whether this Honourable Court should grant an order of *mandamus*, directing the Canadian Transportation Agency to render a decision in the complaint of Dr. Lukács dated February 24, 2014.

PART III – STATEMENT OF SUBMISSIONS

A. THIS HONOURABLE COURT HAS JURISDICTION

34. The statutory right of appeal pursuant to section 41 of the *Canada Transportation Act* offers no remedy in the present case, where the Agency failed to render a decision, and thus there is nothing to be appealed. Therefore, the only remedy available to Lukács is to apply for an order of *mandamus*, directing the Agency to render a decision.

***Canada Transportation Act*, s. 41** **Appendix "A": 408**

35. Pursuant to s. 28 of the *Federal Courts Act*, judicial review powers with respect to the Agency are assigned to this Honourable Court, which has jurisdiction to issue an order of *mandamus* directing the Agency to perform a statutory duty. Therefore, this Court has jurisdiction to hear the application.

***Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 28(1), 28(2), and 18.1(3)** **App. "A": 432 , 434 , 429**

B. THE STATUTORY DUTY TO RENDER DECISIONS

36. Lukács submits that the *Canada Transportation Act* imposes a statutory duty on the Agency to render decisions. Thus, at the heart of the present case is a question of statutory interpretation.

37. The interpretation of a statutory provision must be made according to a textual, contextual, and purposive analysis to find a meaning that is harmonious with the Act as a whole, and the intention of Parliament. In the present case, all of these considerations support the position of Lukács.

***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, paras. 22-25** **Tab 4: 519 - 520**

(i) Textual and contextual analysis

38. Section 29 of the *Canada Transportation Act* ("*CTA*") provides that:

> **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.
>
> [Emphasis added.]

***Canada Transportation Act*, s. 29** **Appendix "A": 405**

39. The *Interpretation Act* provides that the expression "shall" is to be construed as imperative. Thus, section 29 of the *CTA* imposes a statutory duty upon the Agency to render a decision in "any proceedings" within a period of 120 days, which starts on the day that the "originating documents are received." This begs the question of the meaning of "any proceedings."

***Interpretation Act*, R.S.C. 1985, c. I-21, s. 11** **Appendix "A": 436**

40. The phrase "any proceedings" also appears in s. 27 of the *CTA*:

> **27.** (1) On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.
>
> (4) The Agency may, on terms or otherwise, make or allow any amendments in any proceedings before it.
>
> [Emphasis added.]

***Canada Transportation Act*, s. 27** **Appendix "A": 404**

41. Thus, “any proceedings” include an application made to the Agency for any form of relief. The phrase “on an application” appearing in subsection 27(1) lends further support to the interpretation that the Agency is required to accept applications, and render decisions in respect to them.

42. This interpretation is also consistent with the *Canadian Transportation Agency General Rules* made by the Agency under the *CTA*, which defines “complaint” as a subset of “application,” and “proceeding” as including “complaint” and “any other matter commenced by application to the Agency”:

> “application” means an application, made to the Agency, that commences a proceeding under the Act, any Regulations made under the Act or any other Act of Parliament under which the Agency has authority, and includes a complaint, an application under section 3 of the *Railway Relocation and Crossing Act*, [...].
>
> “complaint” means a complaint made to the Agency that alleges anything to have been done or omitted to have been done in contravention of the Act, any Regulations made under the Act or any other Act of Parliament under which the Agency has authority, and includes [...].
>
> “proceeding” includes an inquiry, complaint, investigation, appeal, objection and any other matter commenced by application to the Agency, but does not include a matter submitted to the Agency for final offer arbitration under subsection 161(1) of the Act.
>
> [Emphasis added.]

***Canadian Transportation Agency General Rules*, S.O.R./2005-35, s. 1** **Appendix “A”: 426**

43. Therefore, to summarize, a “proceeding” before the Agency is commenced by way of an application, which may be in the form of a complaint alleging a contravention of the *CTA* or regulations made under it. In the case of a complaint, the “originating document” is the complaint itself, and the Agency must render a decision within 120 days from the receipt of the complaint.

(ii) Purposive analysis

44. Legislative history, parliamentary debates, and similar material may be properly considered to establish the background and purpose of legislation as long as they are relevant, reliable, and are not assigned undue weight.

***Castillo v. Castillo*, 2005 SCC 83, para. 23** **Tab 3: 503**

45. In the present case, Ms. Moya Green, the Assistant Deputy Minister of Transport, directly addressed the question of the duty to render decisions during the study of Bill C-101 by the Standing Committee on Transport:

> I think if you read the first part of the bill, you will want to ask yourself, well, in response to this claim that access to the agency has been given short shrift or curtailed, does that seem correct or accurate to you, when you consider that the agency, under part I, has all the powers of a superior court? Under part I the agency can subpoena witnesses, can inquire into any complaint that is laid before it. The agency "must" decide the matter. The agency does not have a discretion to say "well, that one I'm not going to look at". The agency must decide the matter, and must decide the matter with dispatch.
>
> ⋮
>
> Most importantly, under clause 38, the agency has to hear any complaint, on any matter or act that is the subject of this or other pieces of legislation under its jurisdiction, and the agency shall make a decision. Under clause 29 it is obliged to hear it, obliged to decide.
>
> ⋮
>
> There is a misconception that I think it is very important the committee get on its table early. Subclause 27(2) does not entitle the agency not to deal with the complaint. The agency is required by law to take complaints and required to make decisions.
>
> [Emphasis added.]

Lukács Affidavit, Exhibit "I": Study of Bill C-101 (October 5, 1995): *Evidence*, Standing Committee on Transport, Meeting No. 63, 35th Parliament, 1st Session, pp. 3, 6 **Tab 2I: 58 , 61**

46. Since Parliament was prorogued before the completion of the legislative process of Bill C-101, the same bill was reintroduced in the second session of Parliament as Bill C-14, and was deemed to have been studied and reported by the Standing Committee on Transport. Subsequently, Bill C-14 was passed, and became the *Canada Transportation Act*.

Lukács Affidavit, Exhibit "K" **Tab 2K: 91**

47. The statement of the Assistant Deputy Minister, and the explicit reference to "clause 29," which became section 29 of the *CTA*, confirms that this provision was enacted to address a specific concern, namely, access to the Agency. The purpose of this provision is to ensure that each and every complaint received by the Agency that falls within its jurisdiction is considered and decided as expeditiously as possible.

48. Therefore, the purposive analysis of the *CTA* leads to the same conclusion as the textual and contextual analysis: Parliament did intend to impose a statutory duty upon the Agency to hear and decide each and every complaint as long as the subject matter falls within the Agency's jurisdiction.

C. DESIGNATED PROVISIONS ARE NOT EXCLUDED FROM COMPLAINTS

49. The Agency's failure to render a decision reflects an erroneous belief that designating a legislative provision as one that can be enforced by administrative monetary penalties affects the right of the public to make a complaint to the Agency for violations of these provisions, to seek an order for rectifying the violations, and to have the complaint heard and determined by the Agency.

Lukács Affidavit (April 22, 2014), Exhibit "F" **Tab 2F: 45**

50. Sections 37 and 26 of the *CTA* leave no doubt that the Agency can hear, determine, and grant relief in complaints with respect to violations of any provisions that are within its jurisdiction, regardless of whether or not the provisions are "designated" ones:

> **37.** The Agency may inquire into, hear and determine a complaint concerning act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.
>
> **26.** The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

***Canada Transportation Act*, ss. 37 and 26** **Appendix "A": 407 , 404**

51. The powers conferred upon the Agency to enforce certain provisions via administrative monetary penalties are in addition to, and not in place of, the powers to hear and determine complaints. The purpose of having designated provisions is not to curtail the ability of the public to have certain types of complaints determined by the Agency, but rather to allow the Agency to enforce violations of these provisions on its own, even in the absence of a complaint.

52. Interpreting the "designated provisions" powers as being in addition, and not in place of, hearing and determining complaints is also supported by numerous decisions rendered by the Agency in complaints in relation to violations of provisions of the *ATR* that are listed in the *Canadian Transportation Agency Designated Provisions Regulations*. In *Witvoet*, the Agency explicitly cited s. 29(1) of the *CTA*, and acknowledged its duty to render a decision.

***Witvoet v. First Air et al.*, 378-C-A-2000** **Tab 7: 547**
***Lukács v. United Air Lines*, 335-C-A-2012** **Tab 5: 529**
***Brown v. Air Canada*, 38-C-A-2014, paras. 54-56** **Tab 2: 493 - 494**

53. Finally, the theory that the availability of administrative monetary penalties with respect to a violation excludes the possibility of the Agency making an order directing compliance with the provisions in issue is explicitly refuted on page 12 of the Agency's own publication, entitled "Air Transportation Regulations – Air Services Price Advertising Interpretation Note":

> In addition, the Agency may order a person to make the changes necessary to conform to Part V.1 of the ATR to bring about compliance.
>
> **Sasova Affidavit (May 20, 2014), Exhibit "F", p. 12**

54. Therefore, the availability of enforcement via administrative monetary penalties does not deprive the Agency of its powers to hear and determine a complaint for violations of designated provisions, nor does it relieve the Agency from the statutory duty to render decisions in such complaints. These are simply two coexisting avenues provided by the *CTA* to ensure compliance with the law, neither of which excludes the other.

Note

55. The Agency does hear and determine applications to review "warning letters" issued by Designated Enforcement Officers for violations of ss. 135.8 and 135.91 of the *ATR*; it is unclear what provision of the *CTA* confers upon the Agency the power to do so. If such a provision does exist, then it is even less clear how it operates only to the benefit of those who were issued a "warning letter" for contravening the *ATR*, but not those who wish to have a complaint heard and determined about such contraventions.

D. THE REMEDY: MANDAMUS

(i) Standard of review

56. The premise underlying an application for an order of *mandamus* is that a decision has not been made. While a decision may attract deference, the failure to decide provides nothing to which the Court could defer. Thus, it is submitted that no standard of review analysis is required on such an application. Indeed, in *Apotex Inc. v. Canada*, this Honourable Court performed no such analysis at all. The failure to render a decision is reviewed based on the test outlined below (effectively, on a standard of correctness).

***Apotex Inc. v. Canada (Attorney General) (C.A.)*, [1994] 1 F.C. 742** **Tab 1: 437**

(ii) The legal test for granting a *mandamus*

57. In *Apotex Inc. v. Canada*, this Honourable Court formulated eight requirements that must be met before a *mandamus* can be issued:

(a) there must be a public legal duty to act;

(b) the duty must be owed to the applicant;

(c) there is a clear right to performance of that duty;

(d) where the duty sought to be enforced is discretionary, certain additional principles apply;

(e) no other adequate remedy is available to the applicant;

(f) the order sought will have some practical value or effect;

(g) the Court finds no equitable bar to the relief sought; and

(h) on a "balance of convenience," an order of *mandamus* should be issued.

***Apotex Inc. v. Canada (Attorney General) (C.A.)*, [1994] 1 F.C. 742, para. 45** **Tab 1: 457 - 458**

(iii) The test is met in the case at bar

58. ***Public legal duty to act.*** As the foregoing analysis demonstrates, the *CTA* imposes a statutory duty upon the Agency to hear and render a decision, within 120 days, in every complaint that it receives in relation to matters within the Agency's jurisdiction.

59. ***Duty owed to the applicant.*** The aforementioned duty is triggered by the filing of a complaint, and is owed to the complainant, who is entitled to a determination of the matters raised in the complaint.

60. ***Clear right to performance of duty.*** It is common ground that Lukács submitted a complaint to the Agency on or around February 24, 2014, seeking an order directing Expedia to amend its Canadian website to conform to Part V.1 of the *ATR*. It is also common ground that Lukács demanded that the complaint be placed before a Panel of the Agency, and that on March 27, 2014, the Chief Executive Officer of the Agency advised Lukács that "the Agency will not be conducting an inquiry into the matter you have raised." Finally, it is common ground that the Agency has never issued a decision, even though more than 120 days had passed since the Agency received the complaint. Based on the foregoing, Lukács is entitled to performance of the Agency's statutory duty to hear and determine complaints it receives.

61. ***No discretion.*** The Agency has no discretion as to whether or not it issues a decision in a complaint that it receives (although it does have discretion about the content of the decision, and it may dismiss meritless complaints). The Agency cannot pick and choose which complaints it hears; it must hear and determine each and every one that it receives.

62. ***No other adequate remedy is available.*** The Agency is the only body having jurisdiction to order Expedia to change its Canadian website to comply with Part V.1 of the *ATR*.

63. ***Some practical value or effect.*** Granting a *mandamus* will bring the violations identified in the complaint of Lukács before a Panel of the Agency (consisting of one or more Members) for a hearing and determination. This, in turn, will have some practical value and effect, because (as the Agency conceded) these violations have remained outstanding even after many months of alleged enforcement efforts of the Designated Enforcement Officer.

64. ***No equitable bar and balance of convenience.*** Both of these considerations can be the basis for refusing to grant a *mandamus* even if all other conditions are met. The affidavit of Ms. Sasova, tendered by the Agency in opposition of the present application, contains no facts that would give rise to an equitable bar or a balance of convenience consideration for refusing the relief sought; however, Lukács reserves his right to reply to arguments of this nature should the Agency choose to raise them.

(iv) Conclusion

65. Based on the foregoing, it is submitted that this Honourable Court should exercise its discretion and grant an order of *mandamus* requiring the Agency to render a decision in the complaint of Lukács dated February 24, 2014.

E. COSTS

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

(i) Public interest

67. In *Lukács v. Canada (Transportation Agency)*, this Honourable Court awarded the appellant disbursements even though the appeal was dismissed:

> In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.
>
> ***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 62** **Tab 4: 528**

68. It is submitted that the same holds in the present case: the issue raised is not frivolous, and the application is in the nature of public interest litigation.

(ii) Increased costs caused by the Agency's conduct

69. The affidavit of Ms. Sasova, tendered by the Agency in opposition of the application, created the incorrect impression that Expedia's website had become compliant with Part V.1 of the *Air Transportation Regulations* as a result of her enforcement efforts. This state of affairs was further aggravated by counsel for the Agency advising Lukács on June 6, 2014 that:

> While the fact of Expedia's current compliance with the Air Transportation Regulations, a fact that is established in Ms. Sasova's affidavit, is relevant to your application, her communications during her investigation with Expedia are not.
>
> [Emphasis added.]
>
> **Motion Record (October 14, 2014), Tab 2M** **Court Docket, Doc. No. 14**

70. These circumstances necessitated a very extensive cross-examination of Ms. Sasova. Several months later, the Agency reversed its position and finally conceded that:

> 18. [...] the issue of whether Expedia's online advertisement is, or is not, in compliance with the ATR is not relevant to whether the CTA requires the Agency to render a decision in Mr. Lukacs' February 24 2014 complaint.
>
> ⋮
>
> 25. [...] neither Ms. Sasova's affidavit, nor the subsequent evidence provided in cross-examination establish that Expedia has come into full compliance with subsection 135.8(3) of the Regulations since Ms. Sasova's May 20 affidavit was sworn.
>
> ⋮
>
> 27. However, in the present circumstances, it establishes that Mr. Lukacs' concern expressed in his February 24, 2014 letter that Expedia failed to include fuel surcharges in "Air Transportation Charges" remains an outstanding issue – no further cross-examinations are required for that purpose.
>
> [Emphasis added.]

Written Representations of the Canadian Transportation Agency (October 24, 2014), paras. 18, 25, and 27 — **Court Docket, Document No. 17**

71. In these circumstances, it is submitted that the Agency should be required to bear the costs of the cross-examination of Ms. Sasova in any event of the cause.

PART IV – ORDER SOUGHT

72. The Applicant, Dr. Gábor Lukács, is seeking an Order:

(a) directing the Canadian Transportation Agency to render a decision in the complaint of Dr. Lukács dated February 24, 2014;

(b) granting Dr. Lukács costs and/or reasonable out-of-pocket expenses of this application; and

(c) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 22, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, S.O.R./88-58,
ss. 18, 107, 135.5-135.92

Canada Transportation Act, S.C. 1996, c. 10,
ss. 7, 19, 26, 27, 29, 33, 37, 41, 86.1, 176.1-181

Canadian Transportation Agency Designated Provisions Regulations, S.O.R./99-244

Canadian Transportation Agency General Rules,
S.O.R./2005-35,
s. 1

Federal Courts Act, R.S.C. 1985, c. F-7,
ss. 18, 18.1, 28

Interpretation Act, R.S.C. 1985, c. I-21,
s. 11

CASE LAW

Apotex Inc. v. Canada (Attorney General) (C.A.),
[1994] 1 F.C. 742

Brown v. Air Canada, Canadian Transportation Agency, Decision No. 38-C-A-2014

Castillo v. Castillo, 2005 SCC 83

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

Lukács v. United Air Lines, Canadian Transportation Agency, Decision No. 335-C-A-2012

Re: Scandinavian Airlines System, Canadian Transportation Agency, Decision No. 8-A-2014

CASE LAW (CONTINUED)

Witvoet v. First Air et al., Canadian Transportation Agency, Decision No. 378-C-A-2000

Appendix “A”

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

Current to February 6, 2014

À jour au 6 février 2014

Last amended on December 14, 2012

Dernière modification le 14 décembre 2012

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LICENCE CONDITIONS

18. Every scheduled international licence and non-scheduled international licence is subject to the following conditions:

(*a*) the licensee shall, on reasonable request therefor, provide transportation in accordance with the terms and conditions of the licence and shall furnish such services, equipment and facilities as are necessary for the purposes of that transportation;

(*b*) the licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto; and

(*c*) the licensee shall not operate an international service, or represent by advertisement or otherwise the licensee as operating such a service, under a name other than that specified in the licence.

SOR/96-335, s. 10.

19. Subject to sections 142 and 143, every scheduled international licence shall be subject to the condition that the licensee shall, subject to any delays due to weather, conditions affecting safety or abnormal operating conditions, operate every flight in accordance with its service schedule.

SOR/96-335, s. 10.

20. Every non-scheduled international licence is subject to the following conditions:

(*a*) the licensee shall not charter an aircraft to a person who obtains payment for traffic carried at a toll per unit, unless the licensee is providing a service pursuant to Part III, except Division III of that Part, or pursuant to Part IV, except Division III of that Part; and

(*b*) the licensee shall permit the Agency to inspect the records maintained by the licensee in respect of any advance payments received by the licensee in connection with a CPC, ABC/ITC, ITC, ABC or TPC.

SOR/92-709, s. 1; SOR/96-335, s. 10; SOR/98-197, s. 1.

CONDITIONS DES LICENCES

18. Les licences internationales service régulier et service à la demande sont subordonnées aux conditions suivantes :

a) le licencié répond aux demandes raisonnables de transport, conformément aux conditions de sa licence, et fournit les services, le matériel et les installations nécessaires à ce transport;

b) le licencié ne fait publiquement aucune déclaration fausse ou trompeuse concernant son service aérien ou tout service connexe;

c) le licencié n'exploite pas son service international sous un nom autre que celui inscrit sur sa licence, ni ne se présente comme exploitant un tel service sous un autre nom dans sa publicité ou autrement.

DORS/96-335, art. 10.

19. Sous réserve des articles 142 et 143, la licence internationale service régulier est subordonnée à la condition que le licencié effectue tous les vols conformément à son indicateur, sauf dans les cas de retards attribuables aux conditions météorologiques, aux situations compromettant la sécurité ou aux situations d'exploitation inhabituelles.

DORS/96-335, art. 10.

20. La licence internationale service à la demande est subordonnée aux conditions suivantes :

a) le licencié ne frète pas d'aéronef aux personnes qui se font rémunérer pour le transport selon une taxe unitaire, à moins qu'il ne fournisse un service aux termes de la partie III, sauf la section III, ou aux termes de la partie IV, sauf la section III;

b) le licencié permet à l'Office d'examiner les registres des paiements anticipés qu'il a reçus relativement à tout VABC, VARA/VAFO, VAFO, VARA ou VAP.

DORS/92-709, art. 1; DORS/96-335, art. 10; DORS/98-197, art. 1.

DIVISION I

DOMESTIC

Application

105. A tariff referred to in section 67 of the Act shall include the information required by this Division.

SOR/96-335, s. 53.

Exception

106. The holder of a domestic licence in respect of a domestic service that serves the transportation needs of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees or workers, is excluded, in respect of the service of those needs, from the requirements of section 67 of the Act.

SOR/96-335, s. 53.

Contents of Tariffs

107. (1) Every tariff shall contain

(*a*) the name of the issuing air carrier and the name, title and full address of the officer or agent issuing the tariff;

(*b*) the tariff number, and the title that describes the tariff contents;

(*c*) the dates of publication, coming into effect and expiration of the tariff, if it is to expire on a specific date;

(*d*) a description of the points or areas from and to which or between which the tariff applies;

(*e*) in the case of a joint tariff, a list of all participating air carriers;

(*f*) a table of contents showing the exact location where information under general headings is to be found;

(*g*) where applicable, an index of all goods for which commodity tolls are specified, with reference to each

SECTION I

SERVICE INTÉRIEUR

Application

105. Les tarifs visés à l'article 67 de la Loi doivent contenir les renseignements exigés par la présente section.

DORS/96-335, art. 53.

Exception

106. Le titulaire d'une licence intérieure pour l'exploitation d'un service intérieur servant à répondre aux besoins de transport des véritables clients, employés et travailleurs d'un hôtel pavillonnaire, y compris le transport de leurs bagages, matériel et fournitures, est exempté des exigences de l'article 67 de la Loi à l'égard de ce service.

DORS/96-335, art. 53.

Contenu des tarifs

107. (1) Tout tarif doit contenir :

a) le nom du transporteur aérien émetteur ainsi que le nom, le titre et l'adresse complète du dirigeant ou de l'agent responsable d'établir le tarif;

b) le numéro du tarif et son titre descriptif;

c) les dates de publication et d'entrée en vigueur ainsi que la date d'expiration s'il s'applique à une période donnée;

d) la description des points ou des régions en provenance et à destination desquels ou entre lesquels il s'applique;

e) s'il s'agit d'un tarif pluritransporteur, la liste des transporteurs aériens participants;

f) une table des matières donnant un renvoi précis aux rubriques générales;

g) s'il y a lieu, un index de toutes les marchandises pour lesquelles des taxes spécifiques sont prévues, avec renvoi aux pages ou aux articles pertinents du tarif;

item or page of the tariff in which any of the goods are shown;

(*h*) an index of points from, to or between which tolls apply, showing the province or territory in which the points are located;

(*i*) a list of the airports, aerodromes or other facilities used with respect to each point shown in the tariff;

(*j*) where applicable, information respecting prepayment requirements and restrictions and information respecting non-acceptance and non-delivery of goods, unless reference is given to another tariff number in which that information is contained;

(*k*) a full explanation of all abbreviations, notes, reference marks, symbols and technical terms used in the tariff and, where a reference mark or symbol is used on a page, an explanation of it on that page or a reference thereon to the page on which the explanation is given;

(*l*) the terms and conditions governing the tariff, generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

(*m*) any special terms and conditions that apply to a particular toll and, where the toll appears on a page, a reference on that page to the page on which those terms and conditions appear;

(*n*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(i) the carriage of persons with disabilities,

(ii) acceptance of children,

(iii) compensation for denial of boarding as a result of overbooking,

(iv) passenger re-routing,

(v) failure to operate the service or failure to operate on schedule,

(vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the

h) un index des points en provenance et à destination desquels ou entre lesquels s'appliquent les taxes, avec mention de la province ou du territoire où ils sont situés;

i) la liste des aérodromes, aéroports ou autres installations utilisés pour chaque point mentionné dans le tarif;

j) s'il y a lieu, les renseignements concernant les exigences et les restrictions de paiement à l'avance ainsi que le refus et la non-livraison des marchandises; toutefois, ces renseignements ne sont pas nécessaires si un renvoi est fait au numéro d'un autre tarif qui contient ces renseignements;

k) l'explication complète des abréviations, notes, appels de notes, symboles et termes techniques employés dans le tarif et, lorsque des appels de notes ou des symboles figurent sur une page, leur explication sur la page même ou un renvoi à la page qui en donne l'explication;

l) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

m) les conditions particulières qui s'appliquent à une taxe donnée et, sur la page où figure la taxe, un renvoi à la page où se trouvent les conditions;

n) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes ayant une déficience,

(ii) l'admission des enfants,

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

(iv) le réacheminement des passagers,

(v) l'inexécution du service et le non-respect de l'horaire,

(vi) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre

client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(vii) ticket reservation, cancellation, confirmation, validity and loss,

(viii) refusal to transport passengers or goods,

(ix) method of calculation of charges not specifically set out in the tariff,

(x) limits of liability respecting passengers and goods,

(xi) exclusions from liability respecting passengers and goods, and

(xii) procedures to be followed, and time limitations, respecting claims;

(*o*) the tolls, shown in Canadian currency, together with the names of the points from, to or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified;

(*p*) the routings related to the tolls unless reference is made in the tariff to another tariff in which the routings appear; and

(*q*) the official descriptive title of each type of passenger fare, together with any name or abbreviation thereof.

son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(vii) la réservation, l'annulation, la confirmation, la validité et la perte des billets,

(viii) le refus de transporter des passagers ou des marchandises,

(ix) la méthode de calcul des frais non précisés dans le tarif,

(x) les limites de responsabilité à l'égard des passagers et des marchandises,

(xi) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xii) la marche à suivre ainsi que les délais fixés pour les réclamations;

o) les taxes, exprimées en monnaie canadienne, et les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

p) les itinéraires visés par les taxes; toutefois, ces itinéraires n'ont pas à être indiqués si un renvoi est fait à un autre tarif qui les contient;

q) le titre descriptif officiel de chaque type de prix passagers, ainsi que tout nom ou abréviation servant à désigner ce prix.

(2) Every original tariff page shall be designated "Original Page", and changes in, or additions to, the material contained on the page shall be made by revising the page and renumbering it accordingly.

(3) Where an additional page is required within a series of pages in a tariff, that page shall be given the same number as the page it follows but a letter shall be added to the number.

(4) and (5) [Repealed, SOR/96-335, s. 54]

SOR/93-253, s. 2; SOR/93-449, s. 1; SOR/96-335, s. 54.

(2) Les pages originales du tarif doivent porter la mention «page originale» et, lorsque des changements ou des ajouts sont apportés, la page visée doit être révisée et numérotée en conséquence.

(3) S'il faut intercaler une page supplémentaire dans une série de pages d'un tarif, cette page doit porter le même numéro que la page qui la précède, auquel une lettre est ajoutée.

(4) et (5) [Abrogés, DORS/96-335, art. 54]

DORS/93-253, art. 2; DORS/93-449, art. 1; DORS/96-335, art. 54.

PART V.1

ADVERTISING PRICES

INTERPRETATION

135.5 The following definitions apply in this Part.

"air transportation charge" means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge. (*frais du transport aérien*)

"third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it. (*somme perçue pour un tiers*)

"total price" means

(*a*) in relation to an air service, the total of the air transportation charges and third party charges that must be paid to obtain the service; and

(*b*) in relation to an optional incidental service, the total of the amount that must be paid to obtain the service, including all third party charges. (*prix total*)

SOR/2012-298, s. 3.

135.6 For the purposes of subsection 86.1(2) of the Act and this Part, a prescribed fee or charge is one that is fixed on a per person or *ad valorem* basis.

SOR/2012-298, s. 3.

APPLICATION

135.7 (1) Subject to subsection (2), this Part applies to advertising in all media of prices for air services within, or originating in, Canada.

PARTIE V.1

PUBLICITÉ DES PRIX

DÉFINITIONS ET INTERPRÉTATION

135.5 Les définitions qui suivent s'appliquent à la présente partie.

« frais du transport aérien » S'entend, à l'égard d'un service aérien, de tout frais ou droit qui doit être payé lors de l'achat du service, y compris les coûts supportés par le transporteur aérien pour la fourniture du service, mais à l'exclusion des sommes perçues pour un tiers. (*air transportation charge*)

« prix total » S'entend :

a) à l'égard d'un service aérien, de la somme des frais du transport aérien et des sommes perçues pour un tiers à payer pour ce service;

b) à l'égard d'un service optionnel connexe, de la somme totale à payer pour ce service, y compris les sommes perçues pour un tiers. (*total price*)

« somme perçue pour un tiers » S'entend, à l'égard d'un service aérien ou d'un service optionnel connexe, d'une taxe ou d'un frais ou droit visé à l'article 135.6 établi par un gouvernement, une autorité publique, une autorité aéroportuaire ou un agent de ceux-ci et qui est, lors de l'achat du service, perçu par le transporteur aérien ou autre vendeur pour le compte de ce gouvernement, de cette autorité ou de cet agent afin de le lui être remis. (*third party charge*)

DORS/2012-298, art. 3.

135.6 Pour l'application du paragraphe 86.1(2) de la Loi, les frais et droits visés sont ceux établis par personne ou proportionnellement à une valeur de référence.

DORS/2012-298, art. 3.

CHAMP D'APPLICATION

135.7 (1) Sous réserve du paragraphe (2), la présente partie s'applique à toute publicité dans les médias relative aux prix de services aériens au Canada ou dont le point de départ est au Canada.

(2) This Part does not apply to an advertisement that relates to

(*a*) an air cargo service;

(*b*) a package travel service that includes an air service and any accommodation, surface transportation or entertainment activity that is not incidental to the air service; or

(*c*) a price that is not offered to the general public and is fixed through negotiation.

(3) This Part does not apply to a person who provides another person with a medium to advertise the price of an air service.

SOR/2012-298, s. 3.

(2) La présente partie ne s'applique pas à la publicité relative :

a) à un service aérien de transport de marchandises;

b) à un forfait comprenant un service aérien et tout logement, tout transport terrestre ou toute activité de divertissement qui ne constitue pas un service connexe au service aérien;

c) à un prix qui n'est pas offert au grand public et qui est fixé par voie de négociations.

(3) La présente partie ne s'applique pas à la personne qui fournit un média à une autre personne pour annoncer le prix d'un service aérien.

DORS/2012-298, art. 3.

Requirements and Prohibitions Relating to Advertising

135.8 (1) Any person who advertises the price of an air service must include in the advertisement the following information:

(*a*) the total price that must be paid to the advertiser to obtain the air service, expressed in Canadian dollars and, if it is also expressed in another currency, the name of that currency;

(*b*) the point of origin and point of destination of the service and whether the service is one way or round trip;

(*c*) any limitation on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at that price;

(*d*) the name and amount of each tax, fee or charge relating to the air service that is a third party charge;

(*e*) each optional incidental service offered for which a fee or charge is payable and its total price or range of total prices; and

(*f*) any published tax, fee or charge that is not collected by the advertiser but must be paid at the point of origin or departure by the person to whom the service is provided.

Exigences et interdictions relatives aux publicités

135.8 (1) Quiconque annonce le prix d'un service aérien dans une publicité doit y inclure les renseignements suivants :

a) le prix total à payer à l'annonceur pour le service, en dollars canadiens, et, si le prix total est également indiqué dans une autre devise, la devise en cause;

b) le point de départ et le point d'arrivée du service et s'il s'agit d'un aller simple ou d'un aller-retour;

c) toute restriction quant à la période pendant laquelle le prix annoncé sera offert et toute restriction quant à la période pour laquelle le service sera disponible à ce prix;

d) le nom et le montant de chacun des frais, droits et taxes qui constituent des sommes perçues pour un tiers pour ce service;

e) les services optionnels connexes offerts pour lesquels un frais ou un droit est à payer ainsi que leur prix total ou échelle de prix total;

f) les frais, droits ou taxes publiés qui ne sont pas perçus par lui mais qui doivent être payés au point de départ ou d'arrivée du service par la personne à qui celui-ci est fourni.

(2) A person who advertises the price of an air service must set out all third party charges under the heading "Taxes, Fees and Charges" unless that information is only provided orally.

(3) A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

(4) A person who advertises the price of one direction of a round trip air service is exempt from the application of paragraph (1)(*a*) if the following conditions are met:

(*a*) the advertised price is equal to 50% of the total price that must be paid to the advertiser to obtain the service;

(*b*) it is clearly indicated that the advertised price relates to only one direction of the service and applies only if both directions are purchased; and

(*c*) the advertised price is expressed in Canadian dollars and, if it is also expressed in another currency, the name of that other currency is specified.

(5) A person is exempt from the requirement to provide the information referred to in paragraphs (1)(*d*) to (*f*) in their advertisement if the following conditions are met:

(*a*) the advertisement is not interactive; and

(*b*) the advertisement mentions a location that is readily accessible where all the information referred to in subsection (1) can be readily obtained.

SOR/2012-298, s. 3.

135.9 A person must not provide information in an advertisement in a manner that could interfere with the ability of anyone to readily determine the total price that must be paid for an air service or for any optional incidental service.

SOR/2012-298, s. 3.

135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party

(2) Quiconque annonce le prix d'un service aérien dans une publicité doit y indiquer les sommes perçues pour un tiers pour ce service sous le titre « Taxes, frais et droits », à moins que ces sommes ne soient annoncées qu'oralement.

(3) Quiconque fait mention d'un frais du transport aérien dans une publicité doit l'indiquer sous le titre « Frais du transport aérien », à moins que le frais du transport ne soit annoncé qu'oralement.

(4) La personne qui annonce dans sa publicité le prix pour un aller simple d'un service aller-retour est exemptée de l'application de l'alinéa (1)*a*) si les conditions ci-après sont remplies :

a) le prix annoncé correspond à cinquante pour cent du prix total à payer à l'annonceur pour le service;

b) il est clairement indiqué que le prix annoncé n'est que pour un aller simple et qu'il ne s'applique qu'à l'achat d'un aller-retour;

c) le prix annoncé est en dollars canadiens et, s'il est également indiqué dans une autre devise, la devise est précisée.

(5) La personne est exemptée d'inclure dans sa publicité les renseignements visés aux alinéas (1)*d*) à *f*) si les conditions ci-après sont remplies :

a) la publicité n'est pas interactive;

b) la publicité renvoie à un endroit facilement accessible où tous les renseignements visés au paragraphe (1) peuvent être facilement obtenus.

DORS/2012-298, art. 3.

135.9 Il est interdit de présenter des renseignements dans une publicité d'une manière qui pourrait nuire à la capacité de toute personne de déterminer aisément le prix total à payer pour un service aérien ou pour les services optionnels connexes.

DORS/2012-298, art. 3.

135.91 Il est interdit de présenter dans une publicité un frais du transport aérien comme étant une somme per-

charge or use the term "tax" in an advertisement to describe an air transportation charge.

SOR/2012-298, s. 3.

135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

SOR/2012-298, s. 3.

çue pour un tiers ou d'y utiliser le terme « taxe » pour désigner un frais du transport aérien.

DORS/2012-298, art. 3.

135.92 Il est interdit de désigner dans une publicité une somme perçue pour un tiers sous un nom autre que celui sous lequel elle a été établie.

DORS/2012-298, art. 3.

PART VI

SERVICE SCHEDULES

Application

136. This Part applies in respect of any scheduled international service operated by an air carrier.

SOR/96-335, s. 78.

Validity of Service Schedules

136.1 (1) A service schedule is valid beginning on its effective date unless the Agency rejects or disallows it.

(2) The Agency shall reject a service schedule if the Agency determines that the service schedule has not been filed in accordance with the requirements of this Part.

(3) The Agency shall disallow a service schedule if the Agency determines that it is inconsistent with the licence of the air carrier that filed it.

SOR/96-335, s. 78.

Filing of Service Schedules

137. An air carrier or its agent shall file with the Agency a service schedule or an amendment to a service schedule that includes the information required by section 139 and, where the service schedule is on paper, a filing advice that includes the information required by subsection 140(3).

SOR/93-253, s. 2(E); SOR/96-335, s. 78.

138. (1) Every service schedule filed with the Agency shall be consecutively numbered with the prefix "CTA(A)GS".

PARTIE VI

INDICATEURS

Application

136. La présente partie s'applique à tout service international régulier exploité par un transporteur aérien.

DORS/96-335, art. 78.

Prise d'effet des indicateurs

136.1 (1) Sauf en cas de rejet ou de refus par l'Office, l'indicateur prend effet à la date de son entrée en vigueur.

(2) L'Office rejette un indicateur s'il détermine qu'il n'a pas été déposé conformément à la présente partie.

(3) L'Office refuse un indicateur s'il détermine qu'il n'est pas conforme à la licence du transporteur aérien qui l'a déposé.

DORS/96-335, art. 78.

Dépôt des indicateurs

137. Le transporteur aérien ou son agent doit déposer auprès de l'Office un indicateur, ou toute modification apportée à celui-ci, qui contient les renseignements exigés à l'article 139 et qui est accompagné, s'il est sur papier, d'un avis de dépôt renfermant les renseignements visés au paragraphe 140(3).

DORS/93-253, art. 2(A); DORS/96-335, art. 78.

138. (1) Les indicateurs déposés auprès de l'Office doivent être numérotés consécutivement, le numéro étant précédé de « OTC(A)IG ».

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to November 26, 2013

À jour au 26 novembre 2013

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"Vice-Chairperson" «*vice-président*»

"Vice-Chairperson" means the Vice-Chairperson of the Agency.

1996, c. 10, s. 6; 1998, c. 30, ss. 13(F), 15(E); 1999, c. 3, s. 20; 2002, c. 7, s. 114(E).

de transport assujetti à la compétence législative du Parlement.

«vice-président» Le vice-président de l'Office.

1996, ch. 10, art. 6; 1998, ch. 30, art. 13(F) et 15(A); 1999, ch. 3, art. 20; 2002, ch. 7, art. 114(A).

«vice-président» "*Vice-Chairperson*"

PART I

ADMINISTRATION

Canadian Transportation Agency

Continuation and Organization

PARTIE I

ADMINISTRATION

Office des transports du Canada

Maintien et composition

Agency continued

7. (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.

Maintien de l'Office

7. (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.

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*.

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*.

Chairperson and Vice-Chairperson

(3) The Governor in Council shall designate one of the members appointed under paragraph (2)(*a*) to be the Chairperson of the Agency and one of the other members appointed under that paragraph to be the Vice-Chairperson of the Agency.

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, c. 10, s. 7; 2001, c. 27, s. 221; 2007, c. 19, s. 3.

1996, ch. 10, art. 7; 2001, ch. 27, art. 221; 2007, ch. 19, art. 3.

Term of members

8. (1) Each member appointed under paragraph 7(2)(*a*) 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.

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.

Reappointment

(2) A member appointed under paragraph 7(2)(*a*) is eligible to be reappointed on the expiration of a first or subsequent term of office.

Renouvellement du mandat

(2) Les mandats sont renouvelables.

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).

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, c. 10, s. 8; 2007, c. 19, s. 4.

1996, ch. 10, art. 8; 2007, ch. 19, art. 4.

Chairperson may, with the consent of all the parties to the hearing,

(*a*) if the incapacity or death occurs during the hearing, authorize another member to continue the hearing and render a decision, or

(*b*) if the incapacity or death occurs after the conclusion of the hearing, authorize another member to examine the evidence presented at the hearing and render a decision,

and in either case, the quorum in respect of the matter is deemed never to have been lost.

ment des parties à l'audience, si le fait survient :

a) pendant l'audience, habiliter un autre membre à continuer l'audience et à rendre la décision;

b) après la fin de l'audience, habiliter un autre membre à examiner la preuve présentée à l'audience et à rendre la décision.

Dans l'une ou l'autre de ces éventualités, le quorum est réputé avoir toujours existé.

Quorum not lost because of incapacity of member

(3) Where a member who is conducting a hearing in respect of a matter becomes incapacitated or dies during the hearing and quorum is not lost as a result, another member may be assigned by the Chairperson to participate in the hearing and in the rendering of a decision.

Décès ou empêchement sans perte de quorum

(3) En cas de décès ou d'empêchement, pendant une audience, du membre qui en est chargé, sans perte de quorum résultant de ce fait, le président peut habiliter un autre membre à participer à l'audience et au prononcé de la décision.

Rules

Rules

17. The Agency may make rules respecting

(*a*) the sittings of the Agency and the carrying on of its work;

(*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and

(*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

Règles

Règles

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

Head Office

Head office

18. (1) The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Residence of members

(2) The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

Siège de l'Office

Siège

18. (1) Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

Lieu de résidence des membres

(2) Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

Staff

Secretary, officers and employees

19. The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the

Personnel

Secrétaire et personnel

19. Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci

Agency shall be appointed in accordance with the *Public Service Employment Act*.

sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

Technical experts

20. The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

Experts

20. L'Office peut nommer des experts ou autres spécialistes compétents pour le conseiller sur des questions dont il est saisi, et, sous réserve des instructions du Conseil du Trésor, fixer leur rémunération.

Records

Registre

Duties of Secretary

21. (1) The Secretary of the Agency shall

(*a*) maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

(*b*) keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

Attributions du secrétaire

21. (1) Le secrétaire est chargé :

a) de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;

b) de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

Entries in record

(2) The entry of a document in the record referred to in paragraph (1)(*a*) shall constitute the original record of the document.

Original

(2) Le document enregistré en application de l'alinéa (1)*a*) en constitue l'original.

Copies of documents obtainable

22. On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

Copies conformes

22. Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

Judicial notice of documents

23. (1) Judicial notice shall be taken of a document issued by the Agency under its seal without proof of the signature or official character of the person appearing to have signed it.

Admission d'office

23. (1) Les documents délivrés par l'Office sous son sceau sont admis d'office en justice sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Evidence of deposited documents

(2) A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

Preuve

(2) Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

Powers of Agency

Attributions de l'Office

Policy governs Agency

24. The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament

Directives

24. Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec

shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

les directives générales qui lui sont données en vertu de l'article 43.

Agency powers in general

25. The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

Pouvoirs généraux

25. L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

Power to award costs

25.1 (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.

Pouvoirs relatifs à l'adjudication des frais

25.1 (1) Sous réserve des paragraphes (2) à (4), l'Office a tous les pouvoirs de la Cour fédérale en ce qui a trait à l'adjudication des frais relativement à toute procédure prise devant lui.

Costs may be fixed or taxed

(2) Costs may be fixed in any case at a sum certain or may be taxed.

Frais fixés ou taxés

(2) Les frais peuvent être fixés à une somme déterminée, ou taxés.

Payment

(3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.

Paiement

(3) L'Office peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être taxés et alloués.

Scale

(4) The Agency may make rules specifying a scale under which costs are to be taxed.

Tarif

(4) L'Office peut, par règle, fixer un tarif de taxation des frais.

Compelling observance of obligations

26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

Pouvoir de contrainte

26. L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

Relief

27. (1) On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.

Réparation

27. (1) L'Office peut acquiescer à tout ou partie d'une demande ou prendre un arrêté, ou, s'il l'estime indiqué, accorder une réparation supplémentaire ou substitutive.

(2) and (3) [Repealed, 2008, c. 5, s. 1]

(2) et (3) [Abrogés, 2008, ch. 5, art. 1]

Amendments

(4) The Agency may, on terms or otherwise, make or allow any amendments in any proceedings before it.

Modification

(4) L'Office peut, notamment sous condition, apporter ou autoriser toute modification aux procédures prises devant lui.

(5) [Repealed, 2008, c. 5, s. 1]

1996, c. 10, s. 27; 2008, c. 5, s. 1.

(5) [Abrogé, 2008, ch. 5, art. 1]

1996, ch. 10, art. 27; 2008, ch. 5, art. 1.

Orders

28. (1) The Agency may in any order direct that the order or a portion or provision of it shall come into force

(*a*) at a future time,

(*b*) on the happening of any contingency, event or condition specified in the order, or

(*c*) on the performance, to the satisfaction of the Agency or a person named by it, of any

Arrêtés

28. (1) L'Office peut, dans ses arrêtés, prévoir une date déterminée pour leur entrée en vigueur totale ou partielle ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé; il peut en outre y prévoir une date déterminée pour leur cessation d'effet totale ou partielle ou

terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.

subordonner celle-ci à la survenance d'un événement.

Interim orders

(2) The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

Arrêtés provisoires

(2) L'Office peut prendre un arrêté provisoire et se réserver le droit de compléter sa décision lors d'une audience ultérieure ou d'une nouvelle demande.

Time for making decisions

29. (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

Délai

29. (1) Sauf indication contraire de la présente loi ou d'un règlement pris en vertu du paragraphe (2) ou accord entre les parties sur une prolongation du délai, l'Office rend sa décision sur toute affaire dont il est saisi avec toute la diligence possible dans les cent vingt jours suivant la réception de l'acte introductif d'instance.

Period for specified classes

(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

Délai plus court

(2) Le gouverneur en conseil peut, par règlement, imposer à l'Office un délai inférieur à cent vingt jours pour rendre une décision à l'égard des catégories d'affaires qu'il indique.

Pending proceedings

30. The fact that a suit, prosecution or proceeding involving a question of fact is pending in any court does not deprive the Agency of jurisdiction to hear and determine the same question of fact.

Affaire en instance

30. L'Office a compétence pour statuer sur une question de fait, peu importe que celle-ci fasse l'objet d'une poursuite ou autre instance en cours devant un tribunal.

Fact finding is conclusive

31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

Décision définitive

31. La décision de l'Office sur une question de fait relevant de sa compétence est définitive.

Review of decisions and orders

32. The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.

Révision, annulation ou modification de décisions

32. L'Office peut réviser, annuler ou modifier ses décisions ou arrêtés, ou entendre de nouveau une demande avant d'en décider, en raison de faits nouveaux ou en cas d'évolution, selon son appréciation, des circonstances de l'affaire visée par ces décisions, arrêtés ou audiences.

Enforcement of decision or order

33. (1) A decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as such an order.

Homologation

33. (1) Les décisions ou arrêtés de l'Office peuvent être homologués par la Cour fédérale ou une cour supérieure; le cas échéant, leur exécution s'effectue selon les mêmes modalités que les ordonnances de la cour saisie.

Procedure

(2) To make a decision or order an order of a court, either the usual practice and procedure of the court in such matters may be followed or the Secretary of the Agency may file with the

Procédure

(2) L'homologation peut se faire soit selon les règles de pratique et de procédure de la cour saisie applicables en l'occurrence, soit au moyen du dépôt, auprès du greffier de la cour

registrar of the court a certified copy of the decision or order, signed by the Chairperson and sealed with the Agency's seal, at which time the decision or order becomes an order of the court.

par le secrétaire de l'Office, d'une copie certifiée conforme de la décision ou de l'arrêté en cause, signée par le président et revêtue du sceau de l'Office.

Effect of variation or rescission

(3) Where a decision or order that has been made an order of a court is rescinded or varied by a subsequent decision or order of the Agency, the order of the court is deemed to have been cancelled and the subsequent decision or order may be made an order of the court.

(3) Les décisions ou arrêtés de l'Office qui annulent ou modifient des décisions ou arrêtés déjà homologués par une cour sont réputés annuler ces derniers et peuvent être homologués selon les mêmes modalités.

Annulation ou modification

Option to enforce

(4) The Agency may, before or after one of its decisions or orders is made an order of a court, enforce the decision or order by its own action.

(4) L'Office peut toujours faire exécuter lui-même ses décisions ou arrêtés, même s'ils ont été homologués par une cour.

Faculté d'exécution

1996, c. 10, s. 33; 2002, c. 8, s. 122; 2006, c. 11, s. 17; 2007, c. 19, s. 6.

1996, ch. 10, art. 33; 2002, ch. 8, art. 122; 2006, ch. 11, art. 17; 2007, ch. 19, art. 6.

Fees

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

34. (1) L'Office peut, par règle, établir les droits à lui verser relativement aux questions ou demandes dont il est saisi, notamment les demandes de licences ou de permis et les demandes de modification ou de renouvellement de ceux-ci.

Droits

Advance notice to Minister

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

(2) L'Office fait parvenir au ministre un avis relativement à toute règle qu'il entend prendre en vertu du paragraphe (1).

Préavis

Fees for witnesses

35. Every person summoned to attend before the Agency under this Part or before a person making an inquiry under this Part shall receive the fees and allowances for so doing that the Agency may, by regulation, prescribe.

35. Il est alloué à toute personne qui se rend à la convocation de l'Office ou d'un enquêteur, dans le cadre de la présente partie, les indemnités que l'Office peut fixer par règlement.

Indemnité des témoins

Approval of regulations required

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.

Agrément du gouverneur en conseil

Advance notice of regulations

(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

Préavis au ministre

Mediation

Médiation

Request by parties

36.1 (1) If there is a dispute concerning a matter within the Agency's jurisdiction, all the parties to the dispute may, by agreement, make a request to the Agency for mediation. On receipt of the request, the Agency shall refer the dispute for mediation.

36.1 (1) Les parties entre lesquelles survient un différend sur toute question relevant de la compétence de l'Office peuvent d'un commun accord faire appel à la médiation de celui-ci. Le cas échéant, l'Office renvoie sans délai le différend à la médiation.

Demande des parties

Appointment of mediator

(2) When a dispute is referred for mediation, the Chairperson shall appoint one or two persons to mediate the dispute.

(2) En cas de renvoi à la médiation par l'Office, le président nomme une ou deux personnes pour procéder à celle-ci.

Nomination d'un médiateur

Mediator not to act in other proceedings

(3) The person who acts as mediator or arbitrator may not act in any other proceedings before the Agency in relation to any matter that was at issue in the mediation or arbitration.

2007, c. 19, s. 7; 2008, c. 5, ss. 8, 9.

Impossibilité d'agir

(3) La personne qui agit à titre de médiateur ou d'arbitre ne peut agir dans le cadre d'autres procédures devant l'Office à l'égard des questions qui ont fait l'objet de la médiation ou de l'arbitrage.

2007, ch. 19, art. 7; 2008, ch. 5, art. 8 et 9.

Inquiries

Enquêtes

Inquiry into complaint

37. The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

Enquêtes sur les plaintes

37. L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

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.

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.

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.

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.

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.

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.

Review and Appeal

Révision et appel

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.

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.

Appeal from Agency

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Appel

41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Report of Agency

Rapport de l'Office

Agency's report

42. (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(*a*) applications to the Agency and the findings on them; and

(*b*) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Rapport de l'Office

42. (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Assessment of Act

(2) The Agency shall include in every report referred to in subsection (1) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act.

Évaluation de la loi

(2) L'Office joint à ce rapport son évaluation de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci.

Tabling of report

(3) The Minister shall have a copy of each report made under this section laid before each House of Parliament on any of the first thirty

Dépôt

(3) Dans les trente jours de séance de chaque chambre du Parlement suivant la réception du rapport par le ministre, celui-ci le fait déposer devant elle.

1996, ch. 10, art. 42; 2013, ch. 31, art. 2.

Advertising regulations

86.1 (1) The Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.

Contents of regulations

(2) Without limiting the generality of subsection (1), regulations shall be made under that subsection requiring a carrier who advertises a price for an air service to include in the price all costs to the carrier of providing the service and to indicate in the advertisement all fees, charges and taxes collected by the carrier on behalf of another person in respect of the service, so as to enable a purchaser of the service to readily determine the total amount to be paid for the service.

Regulations may prescribe

(3) Without limiting the generality of subsection (1), the regulations may prescribe what are costs, fees, charges and taxes for the purposes of subsection (2).

2007, c. 19, s. 27.

Regulations and orders

86.2 A regulation or order made under this Part may be conditional or unconditional or qualified or unqualified and may be general or restricted to a specific area, person or thing or group or class of persons or things.

2007, c. 19, s. 27.

Règlement concernant la publicité des prix

86.1 (1) L'Office régit, par règlement, la publicité dans les médias, y compris dans Internet, relative aux prix des services aériens au Canada ou dont le point de départ est au Canada.

Contenu des règlements

(2) Les règlements exigent notamment que le prix des services aériens mentionné dans toute publicité faite par le transporteur inclue les coûts supportés par celui-ci pour la fourniture des services et que la publicité indique les frais, droits et taxes perçus par lui pour le compte d'autres personnes, de façon à permettre à l'acheteur de déterminer aisément la somme à payer pour ces services.

Précisions

(3) Les règlements peuvent également préciser, pour l'application du paragraphe (2), les types de coûts, frais, droits et taxes visés à ce paragraphe.

2007, ch. 19, art. 27.

Textes d'application

86.2 Les textes d'application de la présente partie peuvent être conditionnels ou absolus, assortis ou non de réserves, et de portée générale ou limitée quant aux zones, personnes, objets ou catégories de personnes ou d'objets visés.

2007, ch. 19, art. 27.

PART III

RAILWAY TRANSPORTATION

DIVISION I

INTERPRETATION AND APPLICATION

Definitions

87. In this Part,

"land" «*terres*»

"land" includes an interest in land and, in relation to land in the Province of Quebec, includes the interest of a lessee;

"metropolitan area" «*région métropolitaine*»

"metropolitan area" means any area that is classified by Statistics Canada in its most recent census of Canada as a census metropolitan area;

"operate" «*exploitation*»

"operate" includes, with respect to a railway, any act necessary for the maintenance of the railway or the operation of a train;

"point of destination" «*point de destination*»

"point of destination" means, with respect to traffic on a railway line that is subject to a transfer described in subsection 128(4) or 129(2), the point where the traffic is transferred

PARTIE III

TRANSPORT FERROVIAIRE

SECTION I

DÉFINITIONS ET CHAMP D'APPLICATION

Définitions

87. Les définitions qui suivent s'appliquent à la présente partie.

«administration de transport de banlieue» "*urban transit authority*"

«administration de transport de banlieue» Entité qui est contrôlée par le gouvernement fédéral ou provincial ou une administration municipale, ou qui lui appartient, et qui fournit des services publics de transport de passagers.

«chemin de fer» "*railway*"

«chemin de fer» Chemin de fer relevant de l'autorité législative du Parlement. Sont également visés :

a) les embranchements et prolongements, les voies de garage et d'évitement, les ponts et tunnels, les gares et stations, les dépôts et quais, le matériel roulant, l'équipement et les

ities, 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.

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.

PART VI

GENERAL

Enforcement

False information, etc.

173. (1) No person shall knowingly make any false or misleading statement or knowingly provide false or misleading information to the Agency or the Minister or to any person acting on behalf of the Agency or the Minister in connection with any matter under this Act.

Obstruction and false statements

(2) No person shall knowingly obstruct or hinder, or make any false or misleading statement, either orally or in writing, to a person designated as an enforcement officer pursuant to paragraph 178(1)(*a*) who is engaged in carrying out functions under this Act.

Offence

174. Every person who contravenes a provision of this Act or a regulation or order made under this Act, other than an order made under section 47, is guilty of an offence punishable on summary conviction and liable

(*a*) in the case of an individual, to a fine not exceeding $5,000; and

(*b*) in the case of a corporation, to a fine not exceeding $25,000.

Officers, etc., of corporation re offences

175. Where a corporation commits an offence under this Act, every person who at the time of the commission of the offence was a director or officer of the corporation is guilty of the like offence unless the act or omission constituting the offence took place without the person's knowledge or consent or the person exercised all due diligence to prevent the commission of the offence.

Time limit for commencement of proceedings

176. Proceedings by way of summary conviction in respect of an offence under this Act may be instituted within but not later than twelve months after the time when the subject-matter of the proceedings arose.

Administrative Monetary Penalties

Definition of "Tribunal"

176.1 For the purposes of sections 180.1 to 180.7, "Tribunal" means the Transportation Appeal Tribunal of Canada established by sub-

PARTIE VI

DISPOSITIONS GÉNÉRALES

Mesures de contrainte

Déclarations fausses ou trompeuses

173. (1) Nul ne peut, sciemment, faire de déclaration fausse ou trompeuse ni fournir de renseignements faux ou trompeurs à l'Office, au ministre ou à toute personne agissant au nom de l'Office ou du ministre relativement à une question visée par la présente loi.

Entrave

(2) Il est interdit, sciemment, d'entraver l'action de l'agent verbalisateur désigné au titre du paragraphe 178(1) dans l'exercice de ses fonctions ou de lui faire, oralement ou par écrit, une déclaration fausse ou trompeuse.

Infraction et peines

174. Quiconque contrevient à la présente loi ou à un texte d'application de celle-ci, autre qu'un décret prévu à l'article 47, commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'une personne physique, d'une amende maximale de 5 000 $;

b) dans le cas d'une personne morale, d'une amende maximale de 25 000 $.

Dirigeants des personnes morales

175. En cas de perpétration par une personne morale d'une infraction à la présente loi, celui qui, au moment de l'infraction, en était administrateur ou dirigeant la commet également, sauf si l'action ou l'omission à l'origine de l'infraction a eu lieu à son insu ou sans son consentement ou qu'il a pris toutes les mesures nécessaires pour empêcher l'infraction.

Prescription

176. Les poursuites intentées sur déclaration de culpabilité par procédure sommaire sous le régime de la présente loi se prescrivent par douze mois à compter du fait générateur de l'action.

Sanctions administratives pécuniaires

Définition de « Tribunal »

176.1 Pour l'application des articles 180.1 à 180.7, « Tribunal » s'entend du Tribunal d'appel des transports du Canada, constitué par le

section 2(1) of the *Transportation Appeal Tribunal of Canada Act*.

2007, c. 19, s. 48.

Regulation-making powers

177. (1) The Agency may, by regulation,

(*a*) designate

(i) any provision of this Act or of any regulation, order or direction made pursuant to this Act,

(ii) the requirements of any provision referred to in subparagraph (i), or

(iii) any condition of a licence issued under this Act,

as a provision, requirement or condition the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180; and

(*b*) prescribe the maximum amount payable for each violation, but the amount shall not exceed

(i) $5,000, in the case of an individual, and

(ii) $25,000, in the case of a corporation.

Regulation-making powers — railway company's obligations

(1.1) The Agency may, by regulation,

(*a*) designate any requirement imposed on a railway company in an arbitrator's decision made under section 169.37 as a requirement the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180; and

(*b*) prescribe the maximum amount payable for each violation, but the amount shall not be more than $100,000.

Regulations by Minister

(2) The Minister may, by regulation,

(*a*) designate as a provision or requirement the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180 any provision of section 51 or of any regulation made under section 50 or 51, or any requirement of any of those provisions; and

(*b*) prescribe the maximum amount payable for each violation, but the amount shall not exceed

(i) $5,000, in the case of an individual, and

paragraphe 2(1) de la *Loi sur le Tribunal d'appel des transports du Canada*.

2007, ch. 19, art. 48.

Pouvoirs réglementaires de l'Office

177. (1) L'Office peut, par règlement :

a) désigner comme un texte dont la contravention est assujettie aux articles 179 et 180 :

(i) toute disposition de la présente loi ou de ses textes d'application,

(ii) toute obligation imposée par la présente loi ou ses textes d'application,

(iii) toute condition d'une licence délivrée au titre de la présente loi;

b) prévoir le montant maximal — plafonné, dans le cas des personnes physiques, à 5 000 $ et, dans le cas des personnes morales, à 25 000 $ — de la sanction applicable à chaque contravention à un texte ainsi désigné.

Règlements — compagnie de chemin de fer

(1.1) L'Office peut, par règlement :

a) désigner toute obligation imposée à une compagnie de chemin de fer par une décision arbitrale rendue en vertu de l'article 169.37 comme un texte dont la contravention est assujettie aux articles 179 et 180;

b) prévoir le montant maximal de la sanction applicable à chaque contravention à un texte ainsi désigné, plafonné à 100 000 $.

Pouvoirs réglementaires du ministre

(2) Le ministre peut, par règlement :

a) désigner comme texte dont la contravention est assujettie aux articles 179 et 180 toute disposition de l'article 51 ou des règlements pris en vertu des articles 50 ou 51, ou toute obligation imposée par l'article 51 ou ces règlements;

b) prévoir le montant maximal — plafonné, dans le cas des personnes physiques, à 5 000 $ et, dans le cas des personnes morales, à 25 000 $ — de la sanction applicable à

(ii) $25,000, in the case of a corporation.

1996, c. 10, s. 177; 2007, c. 19, s. 49; 2013, c. 31, s. 12.

chaque contravention à un texte ainsi désigné.

1996, ch. 10, art. 177; 2007, ch. 19, art. 49; 2013, ch. 31, art. 12.

Notices of violation

178. (1) The Agency, in respect of a violation referred to in subsection 177(1) or (1.1), or the Minister, in respect of a violation referred to in subsection 177(2), may

(*a*) designate persons, or classes of persons, as enforcement officers who are authorized to issue notices of violation; and

(*b*) establish the form and content of notices of violation.

Procès-verbaux

178. (1) L'Office ou le ministre, à l'égard d'une contravention à un texte désigné au titre des paragraphes 177(1), (1.1) ou (2), peut désigner, individuellement ou par catégorie, les agents verbalisateurs et déterminer la forme et la teneur des procès-verbaux de violation.

Powers of enforcement officers

(2) Every person designated as an enforcement officer pursuant to paragraph (1)(*a*) has the powers of entry and inspection referred to in paragraph 39(*a*).

Attributions des agents

(2) L'agent dispose, dans le cadre de ses fonctions, des pouvoirs de visite mentionnés à l'alinéa 39*a*).

Certification of designated persons

(3) Every person designated as an enforcement officer pursuant to paragraph (1)(*a*) shall receive an authorization in prescribed form attesting to the person's designation and shall, on demand, present the authorization to any person from whom the enforcement officer requests information in the course of the enforcement officer's duties.

Certificat

(3) Chaque agent reçoit un certificat établi en la forme fixée par l'Office ou le ministre, selon le cas, et attestant sa qualité, qu'il présente sur demande à la personne à qui il veut demander des renseignements.

Powers of designated persons

(4) For the purposes of determining whether a violation referred to in section 177 has been committed, a person designated as an enforcement officer pursuant to paragraph (1)(*a*) may require any person to produce for examination or reproduction all or part of any document or electronically stored data that the enforcement officer believes on reasonable grounds contain any information relevant to the enforcement of this Act.

Pouvoir

(4) En vue de déterminer si une violation a été commise, l'agent peut exiger la communication, pour examen ou reproduction totale ou partielle, de tout document ou données informatiques qui, à son avis, contient des renseignements utiles à l'application de la présente loi.

Assistance to enforcement officers

(5) Any person from whom documents or data are requested pursuant to subsection (4) shall provide all such reasonable assistance as is in their power to enable the enforcement officer making the request to carry out the enforcement officer's duties and shall furnish such information as the enforcement officer reasonably requires for the purposes of this Act.

1996, c. 10, s. 178; 2007, c. 19, s. 50; 2013, c. 31, s. 13.

Assistance

(5) La personne à qui l'agent demande la communication de documents ou données informatiques est tenue de lui prêter toute l'assistance possible dans l'exercice de ses fonctions et de lui donner les renseignements qu'il peut valablement exiger quant à l'application de la présente loi.

1996, ch. 10, art. 178; 2007, ch. 19, art. 50; 2013, ch. 31, art. 13.

Violations

179. (1) Every person who contravenes a provision, requirement or condition designated under section 177 commits a violation and is liable to a penalty fixed pursuant to that section.

Violation

179. (1) Toute contravention à un texte désigné au titre de l'article 177 constitue une violation pour laquelle le contrevenant s'expose à la sanction établie conformément à cet article.

How contraventions may be proceeded with

(2) Where any act or omission can be proceeded with as a violation or as an offence, proceedings may be commenced in respect of that act or omission as a violation or as an offence, but proceeding with it as a violation precludes proceeding with it as an offence, and proceeding with it as an offence precludes proceeding with it as a violation.

Précision

(2) Tout acte ou omission qualifiable à la fois de violation et d'infraction peut être réprimé soit comme violation, soit comme infraction, les poursuites pour violation et celles pour infraction s'excluant toutefois mutuellement.

Nature of violation

(3) For greater certainty, a violation is not an offence and, accordingly, section 126 of the *Criminal Code* does not apply.

1996, c. 10, s. 179; 2007, c. 19, s. 51(F).

Nature de la violation

(3) Les violations n'ont pas valeur d'infractions; en conséquence nul ne peut être poursuivi à ce titre sur le fondement de l'article 126 du *Code criminel*.

1996, ch. 10, art. 179; 2007, ch. 19, art. 51(F).

Issuance of notice of violation

180. If a person designated as an enforcement officer under paragraph 178(1)(*a*) believes that a person has committed a violation, the enforcement officer may issue and serve on the person a notice of violation that names the person, identifies the violation and sets out

(*a*) the penalty, established in accordance with the regulations made under section 177, for the violation that the person is liable to pay; and

(*b*) the particulars concerning the time for paying and the manner of paying the penalty.

1996, c. 10, s. 180; 2001, c. 29, s. 52; 2007, c. 19, s. 52.

Verbalisation

180. L'agent verbalisateur qui croit qu'une violation a été commise peut dresser un procès-verbal qu'il signifie au contrevenant. Le procès-verbal comporte, outre le nom du contrevenant et les faits reprochés, le montant, établi conformément aux règlements pris en vertu de l'article 177, de la sanction à payer, ainsi que le délai et les modalités de paiement.

1996, ch. 10, art. 180; 2001, ch. 29, art. 52; 2007, ch. 19, art. 52.

Option

180.1 A person who has been served with a notice of violation must either pay the amount of the penalty specified in the notice or file with the Tribunal a written request for a review of the facts of the alleged contravention or of the amount of the penalty.

2007, c. 19, s. 52.

Option

180.1 Le destinataire du procès-verbal doit soit payer la sanction, soit déposer auprès du Tribunal une requête en révision des faits reprochés ou du montant de la sanction.

2007, ch. 19, art. 52.

Payment of specified amount precludes further proceedings

180.2 If a person who is served with a notice of violation pays the amount specified in the notice in accordance with the particulars set out in it, the Minister shall accept the amount as and in complete satisfaction of the amount of the penalty for the contravention by that person of the designated provision and no further proceedings under this Part shall be taken against the person in respect of that contravention.

2007, c. 19, s. 52.

Paiement de la sanction

180.2 Lorsque le destinataire du procès-verbal paie la somme requise dans les délais et selon les modalités qui y sont prévues, le ministre accepte ce paiement en règlement de la sanction imposée; aucune poursuite ne peut être intentée par la suite au titre de la présente partie contre l'intéressé pour la même contravention.

2007, ch. 19, art. 52.

Request for review of determination

180.3 (1) A person who is served with a notice of violation and who wishes to have the facts of the alleged contravention or the amount of the penalty reviewed shall, on or before the date specified in the notice or within any further time that the Tribunal on application may

Requête en révision

180.3 (1) Le destinataire du procès-verbal qui veut faire réviser la décision du ministre à l'égard des faits reprochés ou du montant de la sanction dépose une requête auprès du Tribunal à l'adresse indiquée dans le procès-verbal, au plus tard à la date limite qui y est indiquée, ou

allow, file a written request for a review with the Tribunal at the address set out in the notice.

Time and place for review

(2) On receipt of a request filed under subsection (1), the Tribunal shall appoint a time and place for the review and shall notify the Minister and the person who filed the request of the time and place in writing.

Review procedure

(3) The member of the Tribunal assigned to conduct the review shall provide the Minister and the person who filed the request with an opportunity consistent with procedural fairness and natural justice to present evidence and make representations.

Burden of proof

(4) The burden of establishing that a person has contravened a designated provision is on the Minister.

Person not compelled to testify

(5) A person who is alleged to have contravened a designated provision is not required, and shall not be compelled, to give any evidence or testimony in the matter.

2007, c. 19, s. 52.

Certificate

180.4 If a person neither pays the amount of the penalty in accordance with the particulars set out in the notice of violation nor files a request for a review under subsection 180.3(1), the person is deemed to have committed the contravention alleged in the notice, and the Minister may obtain from the Tribunal a certificate in the form that may be established by the Governor in Council that indicates the amount of the penalty specified in the notice.

2007, c. 19, s. 52.

Determination by Tribunal member

180.5 If, at the conclusion of a review under section 180.3, the member of the Tribunal who conducts the review determines that

(*a*) the person has not contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall without delay inform the person and the Minister of the determination and, subject to section 180.6, no further proceedings under this Part shall be taken against the person in respect of the alleged contravention; or

(*b*) the person has contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall without delay inform the person and the Minister of the determination and,

dans le délai supérieur éventuellement accordé à sa demande par le Tribunal.

Audience

(2) Le Tribunal, sur réception de la requête, fixe la date, l'heure et le lieu de l'audience et en avise par écrit le ministre et l'intéressé.

Déroulement

(3) À l'audience, le membre du Tribunal commis à l'affaire accorde au ministre et à l'intéressé la possibilité de présenter leurs éléments de preuve et leurs observations, conformément aux principes de l'équité procédurale et de la justice naturelle.

Charge de la preuve

(4) S'agissant d'une requête portant sur les faits reprochés, il incombe au ministre d'établir que l'intéressé a contrevenu au texte désigné.

Intéressé non tenu de témoigner

(5) L'intéressé n'est pas tenu de témoigner à l'audience.

2007, ch. 19, art. 52.

Omission de payer la sanction ou de présenter une requête

180.4 L'omission, par l'intéressé, de payer la pénalité dans les délais et selon les modalités prévus dans le procès-verbal et de présenter une requête en révision vaut déclaration de responsabilité à l'égard de la contravention. Sur demande, le ministre peut alors obtenir du Tribunal un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52.

Décision

180.5 Après audition des parties, le membre du Tribunal informe sans délai l'intéressé et le ministre de sa décision. S'il décide :

a) qu'il n'y a pas eu contravention, sous réserve de l'article 180.6, nulle autre poursuite ne peut être intentée à cet égard sous le régime de la présente partie;

b) qu'il y a eu contravention, il les informe également, sous réserve des règlements pris en vertu de l'article 177, de la somme qu'il fixe et qui doit être payée au Tribunal. En outre, à défaut de paiement dans le délai imparti, il expédie au ministre un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52.

subject to any regulations made under section 177, of the amount determined by the member of the Tribunal to be payable by the person in respect of the contravention and, if the amount is not paid to the Tribunal by or on behalf of the person within the time that the member of the Tribunal may allow, the member of the Tribunal shall issue to the Minister a certificate in the form that may be established by the Governor in Council, setting out the amount required to be paid by the person.

2007, c. 19, s. 52.

Right of appeal

180.6 (1) The Minister or a person affected by a determination made under section 180.5 may, within 30 days after the determination, appeal it to the Tribunal.

Appel

180.6 (1) Le ministre ou toute personne concernée peut faire appel au Tribunal de la décision rendue au titre de l'article 180.5. Le délai d'appel est de trente jours.

Loss of right of appeal

(2) A party that does not appear at a review hearing is not entitled to appeal a determination, unless they establish that there was sufficient reason to justify their absence.

Perte du droit d'appel

(2) La partie qui ne se présente pas à l'audience portant sur la requête en révision perd le droit de porter la décision en appel, à moins qu'elle ne fasse valoir des motifs valables justifiant son absence.

Disposition of appeal

(3) The appeal panel of the Tribunal assigned to hear the appeal may dispose of the appeal by dismissing it or allowing it and, in allowing the appeal, the panel may substitute its decision for the determination appealed against.

Sort de l'appel

(3) Le comité du Tribunal peut rejeter l'appel ou y faire droit et substituer sa propre décision à celle en cause.

Certificate

(4) If the appeal panel finds that a person has contravened the designated provision, the panel shall without delay inform the person of the finding and, subject to any regulations made under section 177, of the amount determined by the panel to be payable by the person in respect of the contravention and, if the amount is not paid to the Tribunal by or on behalf of the person within the time allowed by the Tribunal, the Tribunal shall issue to the Minister a certificate in the form that may be established by the Governor in Council, setting out the amount required to be paid by the person.

2007, c. 19, s. 52.

Avis

(4) S'il statue qu'il y a eu contravention, le comité en informe sans délai l'intéressé. Sous réserve des règlements pris en vertu de l'article 177, il l'informe également de la somme qu'il fixe et qui doit être payée au Tribunal. En outre, à défaut de paiement dans le délai imparti, il expédie au ministre un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52.

Registration of certificate

180.7 (1) If the time limit for the payment of an amount determined by the Minister in a notice of violation has expired, the time limit for the request for a review has expired, the time limit for an appeal has expired, or an appeal has been disposed of, on production in any superior court, a certificate issued under section 180.4, paragraph 180.5(*b*) or subsection

Enregistrement du certificat

180.7 (1) Sur présentation à la juridiction supérieure, une fois le délai d'appel expiré, la décision sur l'appel rendue ou le délai pour payer la sanction ou déposer une requête en révision expiré, selon le cas, le certificat visé à l'article 180.4, à l'alinéa 180.5*b*) ou au paragraphe 180.6(4) est enregistré. Dès lors, il devient exécutoire et toute procédure d'exécution

180.6(4) shall be registered in the court. When it is registered, a certificate has the same force and effect, and proceedings may be taken in connection with it, as if it were a judgment in that court obtained by Her Majesty in right of Canada against the person named in the certificate for a debt of the amount set out in the certificate.

peut être engagée, le certificat étant assimilé à un jugement de cette juridiction obtenu par Sa Majesté du chef du Canada contre la personne désignée dans le certificat pour une dette dont le montant y est indiqué.

Recovery of costs and charges

(2) All reasonable costs and charges attendant on the registration of the certificate are recoverable in like manner as if they had been certified and the certificate had been registered under subsection (1).

Recouvrement des frais

(2) Tous les frais entraînés par l'enregistrement du certificat peuvent être recouvrés comme s'ils faisaient partie de la somme indiquée sur le certificat enregistré en application du paragraphe (1).

Amounts received deemed public moneys

(3) An amount received by the Minister or the Tribunal under this section is deemed to be public money within the meaning of the *Financial Administration Act*.

Fonds publics

(3) Les sommes reçues par le ministre ou le Tribunal au titre du présent article sont assimilées à des fonds publics au sens de la *Loi sur la gestion des finances publiques*.

2007, c. 19, s. 52.

2007, ch. 19, art. 52.

References to "Minister"

180.8 (1) In the case of a violation referred to in subsection 177(1) or (1.1), every reference to the "Minister" in sections 180.3 to 180.7 shall be read as a reference to the Agency or to a person designated by the Agency.

Mention du ministre

180.8 (1) S'il s'agit d'une contravention à un texte désigné au titre des paragraphes 177(1) ou (1.1), la mention du ministre aux articles 180.3 à 180.7 vaut mention de l'Office ou de la personne que l'Office peut désigner.

Delegation by Minister

(2) In the case of a violation referred to in subsection 177(2), the Minister may delegate to the Agency any power, duty or function conferred on the Minister under this Part.

Délégation ministérielle

(2) S'il s'agit d'une contravention à un texte désigné au titre du paragraphe 177(2), le ministre peut déléguer à l'Office les attributions que lui confère la présente partie.

2007, c. 19, s. 52; 2013, c. 31, s. 14.

2007, ch. 19, art. 52; 2013, ch. 31, art. 14.

Time limit for proceedings

181. Proceedings in respect of a violation may be instituted not later than twelve months after the time when the subject-matter of the proceedings arose.

Prescription

181. Les poursuites pour violation se prescrivent par douze mois à compter du fait générateur de l'action.

PART VII

REPEALS, TRANSITIONAL PROVISIONS, CONSEQUENTIAL AND CONDITIONAL AMENDMENTS AND COMING INTO FORCE

PARTIE VII

ABROGATIONS, DISPOSITIONS TRANSITOIRES, MODIFICATIONS CONNEXES, MODIFICATIONS CONDITIONNELLES ET ENTRÉE EN VIGUEUR

Repeals

182. to 184. [Repeals]

Abrogations

182. à 184. [Abrogations]

Repeal of R.S., c. R-3

185. (1) Subject to subsection (2), the *Railway Act* is repealed, except to the extent that subsection 14(1), except paragraph (*b*), and sections 15 to 80, 84 to 89, 96 to 98 and 109 of that Act continue to apply to a railway company that has authority to construct and operate a railway under a Special Act and has not been

Abrogation de L.R., ch. R-3

185. (1) Sous réserve du paragraphe (2), la *Loi sur les chemins de fer* est abrogée, sauf dans la mesure où le paragraphe 14(1), à l'exception de l'alinéa *b*), et les articles 15 à 80, 84 à 89, 96 à 98 et 109 de celle-ci continuent de s'appliquer à une compagnie de chemin de fer qui est autorisée à construire et à exploiter un chemin de fer en vertu d'une loi spéciale et n'a

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency Designated Provisions Regulations

Règlement sur les textes désignés (Office des transports du Canada)

SOR/99-244

DORS/99-244

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CANADIAN TRANSPORTATION AGENCY DESIGNATED PROVISIONS REGULATIONS

INTERPRETATION

[SOR/2014-71, s. 1(F)]

1. In these Regulations, "Act" means the *Canada Transportation Act*.

SOR/2014-71, s. 2.

DESIGNATION

2. The provisions, requirements and conditions set out in column 1 of the schedule are designated for the purposes of subsections 177(1) and (1.1) of the Act.

SOR/2014-71, s. 2.

MAXIMUM AMOUNT

3. The maximum amount payable in respect of a contravention of a provision, requirement or condition set out in column 1 of the schedule is the amount

(*a*) in respect of a corporation, set out in column 2; and

(*b*) in respect of an individual, set out in column 3.

SOR/2014-71, s. 3(E).

COMING INTO FORCE

4. These Regulations come into force on the day on which they are registered.

RÈGLEMENT SUR LES TEXTES DÉSIGNÉS (OFFICE DES TRANSPORTS DU CANADA)

DÉFINITION

[DORS/2014-71, art. 1(F)]

1. Dans le présent règlement « Loi » s'entend de la *Loi sur les transports au Canada*.

DORS/2014-71, art. 2.

DÉSIGNATION

2. Pour l'application des paragraphes 177(1) et (1.1) de la Loi, les dispositions, les obligations et les conditions mentionnées à la colonne 1 de l'annexe sont des textes désignés.

DORS/2014-71, art. 2.

MONTANT MAXIMAL DE LA SANCTION

3. Le montant maximal de la sanction prévue pour toute contravention d'un texte désigné visé à la colonne 1 de l'annexe est :

a) dans le cas d'une personne morale, le montant indiqué à la colonne 2;

b) dans le cas d'une personne physique, le montant indiqué à la colonne 3.

DORS/2014-71, art. 3(A).

ENTRÉE EN VIGUEUR

4. Le présent règlement entre en vigueur à la date de son enregistrement.

SCHEDULE
(Sections 2 and 3)

Item	Column 1 Provision, Requirement or Condition	Column 2 Maximum Amount Payable — Corporation ($)	Column 3 Maximum Amount Payable — Individual ($)
	Canada Transportation Act		
1.	Section 57	25,000	5,000
2	Section 59	25,000	5,000
2.1	Subsection 64(1)	10,000	2,000
2.2	Subsection 64(1.1)	10,000	2,000
3.	Subsection 64(2)	25,000	5,000
3.1	Paragraph 66(1)(*a*)	25,000	5,000
3.2	Paragraph 66(1)(*b*)	25,000	5,000
3.3	Paragraph 66(1)(*c*)	25,000	5,000
3.4	Subsection 66(2)	25,000	5,000
3.5 and 3.6	[Repealed, SOR/2009-28, s. 4]		
3.7	Subsection 66(8)	25,000	5,000
4.	Paragraph 67(1)(*a*)	10,000	2,000
4.1	Paragraph 67(1)(*a.1*)	10,000	2,000
5.	Paragraph 67(1)(*c*)	5,000	1,000
6.	Subsection 67(2)	5,000	1,000
7.	Subsection 67(3)	10,000	2,000
8.	Subsection 67(4)	5,000	1,000
8.1	Paragraph 67.1(*a*)	25,000	5,000
8.2	Paragraph 67.1(*b*)	25,000	5,000
8.3	Paragraph 67.1(*c*)	25,000	5,000
8.4	Subsection 67.2(2)	25,000	5,000
9.	Subsection 68(2)	25,000	5,000
9.1	Subsection 68(3)	10,000	2,000
10.	Subsection 71(2)	25,000	5,000
11.	Subsection 74(2)	25,000	5,000
12.	Section 82	25,000	5,000
13.	Section 83	10,000	2,000
13.01	Any requirement imposed under section 169.37	100,000	100,000
13.1	Subsection 172(3)	25,000	5,000
14.	Subsection 178(5)	5,000	1,000
	Air Transportation Regulations		
15.	Paragraph 7(1)(*a*)	25,000	5,000
16.	Paragraph 7(1)(*b*)	25,000	5,000
17.	Subsection 7(3)	25,000	5,000
18.	Subsection 7(4)	25,000	5,000
19.	Subsection 8(1)	10,000	2,000
20.	Subsection 8(2)	5,000	1,000

ANNEXE
(articles 2 et 3)

Article	Colonne 1 Texte désigné	Colonne 2 Montant maximal de la sanction — Personne morale ($)	Colonne 3 Montant maximal de la sanction — Personne physique ($)
	Loi sur les transports au Canada		
1.	Article 57	25 000	5 000
2.	Article 59	25 000	5 000
2.1	Paragraphe 64(1)	10 000	2 000
2.2	Paragraphe 64(1.1)	10 000	2 000
3.	Paragraphe 64(2)	25 000	5 000
3.1	Alinéa 66(1)*a*)	25 000	5 000
3.2	Alinéa 66(1)*b*)	25 000	5 000
3.3	Alinéa 66(1)*c*)	25 000	5 000
3.4	Paragraphe 66(2)	25 000	5 000
3.5 et 3.6	[Abrogés, DORS/2009-28, art. 4]		
3.7	Paragraphe 66(8)	25 000	5 000
4.	Alinéa 67(1)*a*)	10 000	2 000
4.1	Alinéa 67(1)*a.1*)	10 000	2 000
5.	Alinéa 67(1)*c*)	5 000	1 000
6.	Paragraphe 67(2)	5 000	1 000
7.	Paragraphe 67(3)	10 000	2 000
8.	Paragraphe 67(4)	5 000	1 000
8.1	Alinéa 67.1*a*)	25 000	5 000
8.2	Alinéa 67.1*b*)	25 000	5 000
8.3	Alinéa 67.1*c*)	25 000	5 000
8.4	Paragraphe 67.2(2)	25 000	5 000
9.	Paragraphe 68(2)	25 000	5 000
9.1	Paragraphe 68(3)	10 000	2 000
10.	Paragraphe 71(2)	25 000	5 000
11.	Paragraphe 74(2)	25 000	5 000
12.	Article 82	25 000	5 000
13.	Article 83	10 000	2 000
13.01	Toute obligation imposée en vertu de l’article 169.37	100 000	100 000
13.1	Paragraphe 172(3)	25 000	5 000
14.	Paragraphe 178(5)	5 000	1 000
	Règlement sur les transports aériens		
15.	Alinéa 7(1)*a*)	25 000	5 000
16.	Alinéa 7(1)*b*)	25 000	5 000
17.	Paragraphe 7(3)	25 000	5 000
18.	Paragraphe 7(4)	25 000	5 000
19.	Paragraphe 8(1)	10 000	2 000
20.	Paragraphe 8(2)	5 000	1 000

Item	Column 1 Provision, Requirement or Condition	Column 2 Maximum Amount Payable — Corporation ($)	Column 3 Maximum Amount Payable — Individual ($)
21.	Subsection 8.2(1)	10,000	2,000
22.	Subsection 8.2(4)	25,000	5,000
23.	Subsection 8.2(6)	25,000	5,000
24.	Subparagraph 8.3(1)(*b*)(ii)	25,000	5,000
25.	Subsection 8.5(1)	10,000	2,000
26.	Subsection 10(2)	5,000	1,000
27.	Subsection 14(1)	5,000	1,000
28.	Subsection 15(3)	5,000	1,000
29.	Paragraph 18(*a*)	25,000	5,000
30.	Paragraph 18(*b*)	25,000	5,000
31.	Paragraph 18(*c*)	10,000	2,000
32.	Section 19	5,000	1,000
33.	Paragraph 20(*a*)	10,000	2,000
34.	Paragraph 20(*b*)	10,000	2,000
35.	Section 80	25,000	5,000
36.	Section 81	5,000	1,000
37.	Section 82	10,000	2,000
38.	Section 83	5,000	1,000
39. to 42. [Repealed, SOR/2009-28, s. 6]			
43.	Subsection 84(2)	10,000	2,000
44.	Section 85	10,000	2,000
45.	Subsection 86(1)	10,000	2,000
46.	Subsection 86(2)	10,000	2,000
47.	Section 87	5,000	1,000
48.	Subsection 88(1)	10,000	2,000
49.	Paragraph 93(1)(*a*)	25,000	5,000
50.	Paragraph 93(1)(*b*)	25,000	5,000
51.	Paragraph 93(1)(*c*)	25,000	5,000
52.	Paragraph 93(1)(*d*)	25,000	5,000
53.	Paragraph 93(1)(*e*)	5,000	1,000
54.	Subsection 95(2)	25,000	5,000
55.	Paragraph 95(3)(*a*)	5,000	1,000
56.	Paragraph 95(3)(*c*)	25,000	5,000
57.	Paragraph 95(3)(*e*)	25,000	5,000
58.	Paragraph 95(3)(*f*)	5,000	1,000
59.	Section 96	5,000	1,000
60.	Section 97	10,000	2,000
61.	Paragraph 99(1)(*a*)	5,000	1,000
62.	Paragraph 99(1)(*b*)	10,000	2,000
63.	Subsection 99(3)	10,000	2,000
64.	Section 100	5,000	1,000

Article	Colonne 1 Texte désigné	Colonne 2 Montant maximal de la sanction — Personne morale ($)	Colonne 3 Montant maximal de la sanction — Personne physique ($)
21.	Paragraphe 8.2(1)	10 000	2 000
22.	Paragraphe 8.2(4)	25 000	5 000
23.	Paragraphe 8.2(6)	25 000	5 000
24.	Sous-alinéa 8.3(1)*b*)(ii)	25 000	5 000
25.	Paragraphe 8.5(1)	10 000	2 000
26.	Paragraphe 10(2)	5 000	1 000
27.	Paragraphe 14(1)	5 000	1 000
28.	Paragraphe 15(3)	5 000	1 000
29.	Alinéa 18*a*)	25 000	5 000
30.	Alinéa 18*b*)	25 000	5 000
31.	Alinéa 18*c*)	10 000	2 000
32.	Article 19	5 000	1 000
33.	Alinéa 20*a*)	10 000	2 000
34.	Alinéa 20*b*)	10 000	2 000
35.	Article 80	25 000	5 000
36.	Article 81	5 000	1 000
37.	Article 82	10 000	2 000
38.	Article 83	5 000	1 000
39. à 42. [Abrogés, DORS/2009-28, art. 6]			
43.	Paragraphe 84(2)	10 000	2 000
44.	Article 85	10 000	2 000
45.	Paragraphe 86(1)	10 000	2 000
46.	Paragraphe 86(2)	10 000	2 000
47.	Article 87	5 000	1 000
48.	Paragraphe 88(1)	10 000	2 000
49.	Alinéa 93(1)*a*)	25 000	5 000
50.	Alinéa 93(1)*b*)	25 000	5 000
51.	Alinéa 93(1)*c*)	25 000	5 000
52.	Alinéa 93(1)*d*)	25 000	5 000
53.	Alinéa 93(1)*e*)	5 000	1 000
54.	Paragraphe 95(2)	25 000	5 000
55.	Alinéa 95(3)*a*)	5 000	1 000
56.	Alinéa 95(3)*c*)	25 000	5 000
57.	Alinéa 95(3)*e*)	25 000	5 000
58.	Alinéa 95(3)*f*)	5 000	1 000
59.	Article 96	5 000	1 000
60.	Article 97	10 000	2 000
61.	Alinéa 99(1)*a*)	5 000	1 000
62.	Alinéa 99(1)*b*)	10 000	2 000
63.	Paragraphe 99(3)	10 000	2 000
64.	Article 100	5 000	1 000

Item	Column 1 Provision, Requirement or Condition	Column 2 Maximum Amount Payable — Corporation ($)	Column 3 Maximum Amount Payable — Individual ($)
65.	Subsection 101(1)	25,000	5,000
66.	Section 102	5,000	1,000
67.	Paragraph 103.2(1)(*a*)	25,000	5,000
68.	Subsection 103.2(2)	25,000	5,000
69.	Subsection 103.2(3)	10,000	2,000
70.	Section 103.3	10,000	2,000
71.	Paragraph 103.4(*a*)	10,000	2,000
72.	Paragraph 103.4(*b*)	10,000	2,000
73.	Paragraph 107(1)(*j*)	500	100
74.	Paragraph 107(1)(*l*)	500	100
75.	Paragraph 107(1)(*m*)	500	100
76.	Paragraph 107(1)(*n*)	500	100
77.	Paragraph 107(1)(*o*)	500	100
78.	Paragraph 107(1)(*p*)	500	100
79.	Subsection 110(1)	10,000	2,000
80.	Paragraph 110(3)(*a*)	10,000	2,000
81.	Paragraph 110(3)(*b*)	25,000	5,000
82.	Subsection 110(4)	10,000	2,000
83.	Subsection 110(5)	10,000	2,000
84.	Subsection 116(1)	10,000	2,000
84.1	Subsection 116(2)	10,000	2,000
85.	Subsection 116(3)	5,000	1,000
85.1	Section 116.1	10,000	2,000
86.	Subsection 127(4)	5,000	1,000
87.	Subsection 127.1(2)	5,000	1,000
88.	Subsection 129(1)	25,000	5,000
89.	Paragraph 135.3(1)(*a*)	10,000	2,000
90.	Paragraph 135.3(1)(*b*)	5,000	1,000
91.	Paragraph 135.3(1)(*c*)	5,000	1,000
92.	Paragraph 135.3(1)(*d*)	5,000	1,000
93.	Subsection 135.3(2)	10,000	2,000
94.	Subsection 135.3(3)	5,000	1,000
95.	Paragraph 135.3(4)(*b*)	500	100
96.	Paragraph 135.3(4)(*c*)	5,000	1,000
96.1	Paragraph 135.8(1)(*a*)	25,000	5,000
96.2	Paragraph 135.8(1)(*b*)	25,000	5,000
96.3	Paragraph 135.8(1)(*c*)	25,000	5,000
96.4	Paragraph 135.8(1)(*d*)	5,000	1,000
96.5	Paragraph 135.8(1)(*e*)	5,000	1,000
96.6	Paragraph 135.8(1)(*f*)	5,000	1,000
96.7	Subsection 135.8(2)	5,000	1,000
96.8	Subsection 135.8(3)	5,000	1,000

Article	Colonne 1 Texte désigné	Colonne 2 Montant maximal de la sanction — Personne morale ($)	Colonne 3 Montant maximal de la sanction — Personne physique ($)
65.	Paragraphe 101(1)	25 000	5 000
66.	Article 102	5 000	1 000
67.	Alinéa 103.2(1)*a*)	25 000	5 000
68.	Paragraphe 103.2(2)	25 000	5 000
69.	Paragraphe 103.2(3)	10 000	2 000
70.	Article 103.3	10 000	2 000
71.	Alinéa 103.4*a*)	10 000	2 000
72.	Alinéa 103.4*b*)	10 000	2 000
73.	Alinéa 107(1)*j*)	500	100
74.	Alinéa 107(1)*l*)	500	100
75.	Alinéa 107(1)*m*)	500	100
76.	Alinéa 107(1)*n*)	500	100
77.	Alinéa 107(1)*o*)	500	100
78.	Alinéa 107(1)*p*)	500	100
79.	Paragraphe 110(1)	10 000	2 000
80.	Alinéa 110(3)*a*)	10 000	2 000
81.	Alinéa 110(3)*b*)	25 000	5 000
82.	Paragraphe 110(4)	10 000	2 000
83.	Paragraphe 110(5)	10 000	2 000
84.	Paragraphe 116(1)	10 000	2 000
84.1	Paragraphe 116(2)	10 000	2 000
85.	Paragraphe 116(3)	5 000	1 000
85.1	Article 116.1	10 000	2 000
86.	Paragraphe 127(4)	5 000	1 000
87.	Paragraphe 127.1(2)	5 000	1 000
88.	Paragraphe 129(1)	25 000	5 000
89.	Alinéa 135.3(1)*a*)	10 000	2 000
90.	Alinéa 135.3(1)*b*)	5 000	1 000
91.	Alinéa 135.3(1)*c*)	5 000	1 000
92.	Alinéa 135.3(1)*d*)	5 000	1 000
93.	Paragraphe 135.3(2)	10 000	2 000
94.	Paragraphe 135.3(3)	5 000	1 000
95.	Alinéa 135.3(4)*b*)	500	100
96.	Alinéa 135.3(4)*c*)	5 000	1 000
96.1	Alinéa 135.8(1)*a*)	25 000	5 000
96.2	Alinéa 135.8(1)*b*)	25 000	5 000
96.3	Alinéa 135.8(1)*c*)	25 000	5 000
96.4	Alinéa 135.8(1)*d*)	5 000	1 000
96.5	Alinéa 135.8(1)*e*)	5 000	1 000
96.6	Alinéa 135.8(1)*f*)	5 000	1 000
96.7	Paragraphe 135.8(2)	5 000	1 000
96.8	Paragraphe 135.8(3)	5 000	1 000

Item	Column 1 Provision, Requirement or Condition	Column 2 Maximum Amount Payable — Corporation ($)	Column 3 Maximum Amount Payable — Individual ($)
96.9	Section 135.9	5,000	1,000
96.91	Section 135.91	5,000	1,000
96.92	Section 135.92	5,000	1,000
97.	Section 137	5,000	1,000
98.	Section 141	5,000	1,000
99.	Paragraph 144(*b*)	500	100
100.	Subsection 147(1)	10,000	2,000
101.	Subsection 147(2)	10,000	2,000
102.	Subsection 148(1)	10,000	2,000
103.	Paragraph 148(2)(*b*)	10,000	2,000
104.	Subsection 148(3)	10,000	2,000
105.	Subsection 148(4)	10,000	2,000
106.	Subsection 148(5)	10,000	2,000
107.	Subsection 149(1)	10,000	2,000
108.	Subsection 149(2)	10,000	2,000
109.	Section 150	10,000	2,000
110.	Subsection 151(1)	10,000	2,000
111.	Subsection 151(2)	10,000	2,000
112.	Section 153	10,000	2,000
113.	Section 154	10,000	2,000
114.	Subsection 155(1)	10,000	2,000
115.	Subsection 155(2)	10,000	2,000
116.	Subsection 155(3)	10,000	2,000
117.	Subsection 155(4)	10,000	2,000
	Personnel Training for the Assistance of Persons with Disabilities Regulations		
118.	Section 4	10,000	2,000
119.	Section 5	10,000	2,000
120.	Section 6	10,000	2,000
121.	Section 7	10,000	2,000
122.	Section 8	10,000	2,000
123.	Section 9	10,000	2,000
124.	Section 11	10,000	2,000

SOR/2001-72, s. 1; SOR/2009-28, ss. 4 to 8; SOR/2012-298, s. 4; SOR/2014-71, ss. 4(E), 5.

Article	Colonne 1 Texte désigné	Colonne 2 Montant maximal de la sanction — Personne morale ($)	Colonne 3 Montant maximal de la sanction — Personne physique ($)
96.9	Article 135.9	5 000	1 000
96.91	Article 135.91	5 000	1 000
96.92	Article 135.92	5 000	1 000
97.	Article 137	5 000	1 000
98.	Article 141	5 000	1 000
99.	Alinéa 144*b*)	500	100
100.	Paragraphe 147(1)	10 000	2 000
101.	Paragraphe 147(2)	10 000	2 000
102.	Paragraphe 148(1)	10 000	2 000
103.	Alinéa 148(2)*b*)	10 000	2 000
104.	Paragraphe 148(3)	10 000	2 000
105.	Paragraphe 148(4)	10 000	2 000
106.	Paragraphe 148(5)	10 000	2 000
107.	Paragraphe 149(1)	10 000	2 000
108.	Paragraphe 149(2)	10 000	2 000
109.	Article 150	10 000	2 000
110.	Paragraphe 151(1)	10 000	2 000
111.	Paragraphe 151(2)	10 000	2 000
112.	Article 153	10 000	2 000
113.	Article 154	10 000	2 000
114.	Paragraphe 155(1)	10 000	2 000
115.	Paragraphe 155(2)	10 000	2 000
116.	Paragraphe 155(3)	10 000	2 000
117.	Paragraphe 155(4)	10 000	2 000
	Règlement sur la formation du personnel en matière d'aide aux personnes ayant une déficience		
118.	Article 4	10 000	2 000
119.	Article 5	10 000	2 000
120.	Article 6	10 000	2 000
121.	Article 7	10 000	2 000
122.	Article 8	10 000	2 000
123.	Article 9	10 000	2 000
124.	Article 11	10 000	2 000

DORS/2001-72, art. 1; DORS/2009-28, art. 4 à 8; DORS/2012-298, art. 4; DORS/2014-71, art. 4(A) et 5.

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency General Rules

Règles générales de l’Office des transports du Canada

SOR/2005-35

DORS/2005-35

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CANADIAN TRANSPORTATION AGENCY GENERAL RULES

INTERPRETATION

Definitions

1. The definitions in this section apply in these Rules.

"Act" «*Loi*»

"Act" means the *Canada Transportation Act*. (*Loi*)

"address" «*adresse*»

"address" includes an address for electronic transmission. (*adresse*)

"affidavit" «*affidavit*»

"affidavit" means a written statement confirmed by oath or a solemn affirmation. (*affidavit*)

"application" «*demande*»

"application" means an application, made to the Agency, that commences a proceeding under the Act, any Regulations made under the Act or any other Act of Parliament under which the Agency has authority, and includes a complaint, an application under section 3 of the *Railway Relocation and Crossing Act*, an appeal under subsection 42(1) of the *Civil Air Navigation Services Commercialization Act*, a reference under sections 16 and 26 of the *Railway Safety Act* and a notice of objection under section 34 of the *Pilotage Act*. (*demande*)

"Authority" «*administration de pilotage*»

"Authority" means a Pilotage Authority established by section 3 of the *Pilotage Act*. (*administration de pilotage*)

"complaint" «*plainte*»

"complaint" means a complaint made to the Agency that alleges anything to have been done or omitted to have been done in contravention of the Act, any Regulations made under the Act or any other Act of Parliament under which the Agency has authority, and includes

(*a*) a complaint under section 52 or 94 of the *Canada Marine Act*; and

(*b*) a complaint under section 13 of the *Shipping Conferences Exemption Act, 1987*. (*plainte*)

RÈGLES GÉNÉRALES DE L'OFFICE DES TRANSPORTS DU CANADA

DÉFINITIONS

Définitions

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

«acte de procédure» "*pleading*"

«acte de procédure» Document, tel une demande, une réponse, une intervention ou une réplique, par lequel une instance est introduite, définie, justifiée, contestée ou défendue. (*pleading*)

«administration de pilotage» "*Authority*"

«administration de pilotage» Administration de pilotage constituée aux termes de l'article 3 de la *Loi sur le pilotage*. (*Authority*)

«adresse» "*address*"

«adresse» Vise également l'adresse électronique. (*address*)

«affidavit» "*affidavit*"

«affidavit» Déclaration écrite et certifiée sous serment ou affirmation solennelle. (*affidavit*)

«décision» "*decision*"

«décision» S'entend notamment d'une sanction ou d'une autorisation émanant de l'Office dans l'exercice de sa compétence. (*decision*)

«demande» "*application*"

«demande» Demande présentée à l'Office qui introduit une instance en vertu de la Loi, d'une autre loi fédérale ou de leurs règlements d'application conférant des pouvoirs à l'Office. Sont compris dans la présente définition une plainte, la demande visée à l'article 3 de la *Loi sur le déplacement des lignes de chemin de fer et les croisements de chemin de fer*, l'appel visé au paragraphe 42(1) de la *Loi sur la commercialisation des services de navigation aérienne civile*, l'avis de saisine visé aux articles 16 et 26 de la *Loi sur la sécurité ferroviaire* et l'avis d'opposition prévu à l'article 34 de la *Loi sur le pilotage*. (*application*)

«document» "*document*"

«document» Tous éléments d'information, quels que soient leur forme et leur support,

"day" «*jour*»
"day" means a period of 24 hours between 00:00 and 24:00. (*jour*)

"decision" «*décision*»
"decision" includes any ruling, leave, sanction, approval and other determination that the Agency has the authority to make. (*décision*)

"document" «*document*»
"document" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record and any other recorded material, regardless of its physical form or characteristics, and any copy of it. (*document*)

"electronic transmission" «*transmission électronique*»
"electronic transmission" includes the communication by facsimile, electronic mail or any other electronic means by which parties can communicate. (*transmission électronique*)

"holiday" «*jour férié*»
"holiday" includes a Saturday and any day defined as a holiday in subsection 35(1) of the *Interpretation Act*. (*jour férié*)

"interested person" «*personne intéressée*»
"interested person" means a person who has filed a submission under section 46. (*personne intéressée*)

"intervener" «*intervenant*»
"intervener" means a person who has filed an intervention under subsection 43(2) or 74(2) and whose intervention has not been refused by the Agency. (*intervenant*)

"objector" «*opposant*»
"objector" means a person who has filed a notice of objection under subsection 34(2) of the *Pilotage Act*. (*opposant*)

"party" «*partie*»
"party" means an applicant, a respondent, an intervener, a complainant, an appellant, an Authority or an objector. (*partie*)

"person to be served" or "person served" «*personne signifiée*»
"person to be served" or "person served" includes a person's representative. (*personne signifiée*)

notamment correspondance, note, livre, plan, carte, dessin, diagramme, illustration ou graphique, photographie, film, microfilm, enregistrement sonore, magnétoscopique ou informatisé, ou toute reproduction de ces éléments d'information. (*document*)

«instance» S'entend notamment d'un examen, d'une plainte, d'une enquête, d'un appel ou d'une opposition, ou de toute autre affaire introduite par une demande présentée à l'Office. Est exclue de la présente définition toute affaire portée devant l'Office pour l'arbitrage d'une dernière offre en application du paragraphe 161(1) de la Loi. (*proceeding*)
«instance» "*proceeding*"

«intervenant» Personne qui a déposé une intervention en vertu des paragraphes 43(2) ou 74(2) et dont la demande d'intervention n'a pas été rejetée par l'Office. (*intervener*)
«intervenant» "*intervener*"

«jour» Période de 24 heures entre 00 h 00 et 24 h 00. (*day*)
«jour» "*day*"

«jour férié» S'entend au sens du paragraphe 35(1) de la *Loi d'interprétation* et vise également le samedi. (*holiday*)
«jour férié» "*holiday*"

«jour ouvrable» S'agissant du dépôt d'un document auprès de l'Office, à son siège ou à un bureau régional, jour normal d'ouverture des bureaux de l'administration publique fédérale dans la province où se trouve l'administration centrale ou le bureau régional de l'Office. (*working day*)
«jour ouvrable» "*working day*"

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

«opposant» Personne qui dépose un avis d'opposition en vertu du paragraphe 34(2) de la *Loi sur le pilotage*. (*objector*)
«opposant» "*objector*"

«partie» Le demandeur, l'intimé, l'intervenant, le plaignant, l'appelant, l'administration de pilotage ou l'opposant. (*party*)
«partie» "*party*"

"pleading" «*acte de procédure*»

"pleading" means a document in which a proceeding is commenced, defined, supported, objected to or answered, and includes an application, answer, intervention or reply. (*acte de procédure*)

"proceeding" «*instance*»

"proceeding" includes an inquiry, complaint, investigation, appeal, objection and any other matter commenced by application to the Agency, but does not include a matter submitted to the Agency for final offer arbitration under subsection 161(1) of the Act. (*instance*)

"Secretary" «*secrétaire*»

"Secretary" means the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the Secretary's absence. (*secrétaire*)

"working day" «*jour ouvrable*»

"working day", in respect of the filing of a document with the Agency at its head office or a regional office, means a day on which offices of the Public Service of Canada are normally open in the province where the head office or regional office is situated. (*jour ouvrable*)

«personne intéressée» «*interested person*»

«personne intéressée» Personne ayant présenté un exposé en vertu de l'article 46. (*interested person*)

«personne signifiée» «*person to be served or person served*»

«personne signifiée» Est assimilé à la personne signifiée, son représentant. (*person to be served or person served*)

«plainte» «*complaint*»

«plainte» Plainte présentée à l'Office, alléguant la commission ou l'omission d'un acte en contravention des dispositions de la Loi, d'une autre loi fédérale ou de leurs règlements d'application conférant des pouvoirs à l'Office. Sont visées par la présente définition :

a) les plaintes prévues aux articles 52 ou 94 de la *Loi maritime du Canada*;

b) les plaintes prévues à l'article 13 de la *Loi dérogatoire de 1987 sur les conférences maritimes*. (*complaint*)

«secrétaire» «*Secretary*»

«secrétaire» Le secrétaire de l'Office ou, en son absence, la personne chargée par le président d'assurer l'intérim. (*Secretary*)

«transmission électronique» «*electronic transmission*»

«transmission électronique» S'entend notamment de la transmission par télécopieur, par courrier électronique ou par tout autre moyen électronique permettant aux parties de communiquer. (*electronic transmission*)

PART 1

RULES OF GENERAL APPLICATION

Application of This Part

Application to all proceedings

2. Except when otherwise provided in these Rules, this Part applies in respect of all proceedings before the Agency.

Quorum

Quorum

2.1 In all proceedings before the Agency, one member constitutes a quorum.

SOR/2013-133, s. 1.

PARTIE 1

RÈGLES D'APPLICATION GÉNÉRALE

Application de la présente partie

Application à toutes les instances

2. Sauf disposition contraire, la présente partie s'applique à toutes les instances devant l'Office.

Quorum

Quorum

2.1 Dans toute instance devant l'Office, le quorum est constitué de un membre.

DORS/2013-133, art. 1.

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

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eral Court — Trial Division or the Exchequer Court of Canada; and

(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

tion de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

Conflicting claims against Crown

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

Demandes contradictoires contre la Couronne

Relief in favour of Crown or against officer

(5) The Federal Court has concurrent original jurisdiction

(*a*) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

Actions en réparation

Federal Court has no jurisdiction

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

R.S., 1985, c. F-7, s. 17; 1990, c. 8, s. 3; 2002, c. 8, s. 25.

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

L.R. (1985), ch. F-7, art. 17; 1990, ch. 8, art. 3; 2002, ch. 8, art. 25.

Incompétence de la Cour fédérale

Extraordinary remedies, federal tribunals

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*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.

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

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.

Recours extraordinaires : offices fédéraux

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.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

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 proceeding of a federal board, commission or other tribunal.

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;

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.

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;

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*) 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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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

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.

Industrial property, exclusive jurisdiction

20. (1) The Federal Court has exclusive original jurisdiction, between subject and subject as well as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade-mark, industrial design or topography within the meaning of the *Integrated Circuit Topography Act*; and

(*b*) in all cases in which it is sought to impeach or annul any patent of invention or to have any entry in any register of copyrights, trade-marks, industrial designs or topographies referred to in paragraph (*a*) made, expunged, varied or rectified.

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.

Propriété industrielle : compétence exclusive

20. (1) La Cour fédérale a compétence exclusive, en première instance, dans les cas suivants opposant notamment des administrés :

a) conflit des demandes de brevet d'invention ou d'enregistrement d'un droit d'auteur, d'une marque de commerce, d'un dessin industriel ou d'une topographie au sens de la *Loi sur les topographies de circuits intégrés*;

b) tentative d'invalidation ou d'annulation d'un brevet d'invention, ou d'inscription, de radiation ou de modification dans un registre de droits d'auteur, de marques de commerce, de dessins industriels ou de topographies visées à l'alinéa *a*).

(*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.

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.

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.

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*) the Board of Arbitration established by the *Canada Agricultural Products Act*;

(*b*) the Review Tribunal established by the *Canada Agricultural Products Act*;

(*b.1*) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada 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) le conseil d'arbitrage constitué par la *Loi sur les produits agricoles au Canada*;

b) la commission de révision constituée par cette loi;

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

(*c*) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(*d*) the Pension Appeals Board established by the *Canada Pension Plan*;

(*e*) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(*f*) the National Energy Board established by the *National Energy Board Act*;

(*g*) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the *National Energy Board 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 Public Service Labour Relations Board established by the *Public Service 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*) umpires appointed under the *Employment Insurance Act*;

(*n*) the Competition Tribunal established by the *Competition Tribunal Act*;

(*o*) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(*p*) [Repealed, 2012, c. 19, s. 572]

Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes;

d) la Commission d'appel des pensions constituée par le *Régime de pensions du Canada*;

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 54(1) de la *Loi sur l'Office national 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 dans la fonction publique constituée par la *Loi sur les relations de travail dans la fonction publique*;

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) les juges-arbitres nommés en vertu de la *Loi sur l'assurance-emploi*;

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*) 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*.

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.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

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; 2013, c. 40, s. 236.

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; 2013, ch. 40, art. 236.

29. to 35. [Repealed, 1990, c. 8, s. 8]

29. à 35. [Abrogés, 1990, ch. 8, art. 8]

SUBSTANTIVE PROVISIONS

DISPOSITIONS DE FOND

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.

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.

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 in the order an award of interest on the payment at any rate that the Federal Court of Appeal or the Federal Court considers reasonable in the circumstances, calculated

(*a*) where the order is made on a liquidated claim, from the date or dates the cause of action or causes of action arose to the date of the order; or

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 jugement sont calculés au taux que la Cour d'appel fédérale ou la Cour fédérale, selon le cas, estime raisonnable dans les circonstances et :

a) s'il s'agit d'une créance d'une somme déterminée, depuis la ou les dates du ou des faits générateurs jusqu'à la date de l'ordonnance de paiement;

CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d'interprétation

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

L.R.C. (1985), ch. I-21

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in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

2001, c. 4, s. 8.

au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

2001, ch. 4, art. 8.

Terminology

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

2001, c. 4, s. 8.

Terminologie

8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

2001, ch. 4, art. 8.

Private Acts

Provisions in private Acts

9. No provision in a private Act affects the rights of any person, except as therein mentioned or referred to.

R.S., c. I-23, s. 9.

Lois d'intérêt privé

Effets

9. Les lois d'intérêt privé n'ont d'effet sur les droits subjectifs que dans la mesure qui y est prévue.

S.R., ch. I-23, art. 9.

Law Always Speaking

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

R.S., c. I-23, s. 10.

Permanence de la règle de droit

Principe général

10. La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

S.R., ch. I-23, art. 10.

Imperative and Permissive Construction

"Shall" and "may"

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.

R.S., c. I-23, s. 28.

Obligation et pouvoirs

Expression des notions

11. L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

S.R., ch. I-23, art. 28.

Enactments Remedial

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal

Solution de droit

Principe et interprétation

12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus

Court File No.: A-167-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

(Application under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7)

APPLICANT'S RECORD
VOLUME 3
(Appendix "B" – Book of Authorities)

Dated: December 22, 2014

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Canadian Transportation Agency

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Apotex Inc. v. Canada (Attorney General) (C.A.)

Merck & Co., Inc. and Merck Frosst Canada Inc. (Appellants) (Respondents)
v.
Apotex Inc. (Respondent) (Applicant)
and
Attorney General of Canada and The Minister of National Health and Welfare (Respondents) (Respondents)

[1994] 1 F.C. 742

[1993] F.C.J. No. 1098

Court File No. A-457-93

Federal Court of Canada - Court of Appeal

Mahoney, Robertson and McDonald JJ.A.

Heard: Ottawa, August 31 and September 1, 1993.
Judgment: October 22, 1993.

Food and drugs -- Appeal and cross-appeal from Trial Division decision granting mandamus and denying prohibition with respect to generic drug notice of compliance (NOC) -- Under Food and Drugs Act, "new drugs" must meet health and safety requirements -- NOC granted if drug found effective, safe -- Scientific safety and efficacy conditions met -- Apotex having vested right to NOC despite Minister's failure to render decision pending enactment of Patent Act Amendment Act, 1992 (Bill C-91) -- Narrow scope of ministerial discretion -- Pending legislative policy irrelevant consideration.

Patents -- Bill C-91 enacted to protect innovator pharmaceutical companies' distribution and sales rights to patented drugs -- Patented Medicines Regulations prohibiting issuance of NOCs in respect of patent-linked drugs -- NOCs, patent rights linked, not mutually dependent -- Mandamus not intended to facilitate patent infringement -- Regulations not procedural per se -- Generic drug manufacturer's vested right to NOC not divested by Bill C-91, Regulations, ss. 5(1),(2).

Judicial review -- Prerogative writs -- Mandamus -- Generic drug manufacturer seeking

mandamus to compel Minister to issue notice of compliance -- Case law on requirements for mandamus -- Available where duty to act not owing at time application filed -- Delay for seeking legal advice not bar to mandamus -- Court having discretion to invoke balance of convenience test as ground for refusing mandamus -- Criteria for exercise of discretion -- No legal basis to deny mandamus herein on ground of balance of convenience.

Federal Court jurisdiction -- Appeal Division -- Jurisdiction under Federal Court Act, s. 18 not ousted by paramountcy provision in Bill C-91 (Patent Act Amendment Act, 1992) -- Patent Act, s. 55.2(5) not privative clause insulating Minister, legislation from judicial review.

These were an appeal and a cross-appeal from a decision by Dubé J. allowing an application for mandamus to issue a notice of compliance (NOC) with respect to Apotex's generic version of the drug enalapril and denying the appellants' application for prohibition. The Patent Act Amendment Act, 1992 (Bill C-91), which was given Royal Assent on February 4, 1993, was enacted in order to protect innovator pharmaceutical companies' distribution and sales rights to patented drugs. Bill C-91 came into force on February 15, 1993 with the exception of the new section 55.2 of the Patent Act which, together with the Patented Medicines Regulations, were not brought into effect until March 12, 1993. Under the Food and Drugs Act (FDA), the Minister of National Health and Welfare must ensure that new drugs meet health and safety requirements. The manufacturer of a new drug must file a New Drug Submission (NDS) setting out the drug's qualities, ingredients and methods of manufacture and purification. The respondent, Apotex, after filing a NDS in respect of its generic drug Apo-Enalapril, sought an order of mandamus to compel the Minister to issue a notice of compliance with respect to that drug. Apotex's NDS was incomplete when it filed its mandamus application; nevertheless, by February 3, 1993, the new drug met all of the scientific safety and efficacy conditions required for a NOC to issue. Although the NDS had cleared the scientific and regulatory review process, the Department's ADM and DM decided to seek legal advice regarding the authority of the Minister or his ADM to issue the NOC in view of the impending passage of Bill C-91. The appellant, Merck, also forwarded a number of legal opinions to the Minister and then sought prohibition to prevent the Minister from issuing the notice of compliance. The Trial Judge ruled that the Minister did not possess the broad discretion to justify his refusal to issue the NOC and that the delay in issuing it was not warranted. He also rejected the argument that to issue mandamus when a new regulatory regime was pending would "frustrate the will of Parliament". This appeal raised a number of issues, namely: 1) the principles governing mandamus and the question of prematurity; 2) whether Apotex had a vested right to a NOC by March 12, 1993; 3) the balance of convenience; 4) whether Apotex's vested right to a NOC was divested by Bill C-91 and the Patented Medicines Regulations and 5) the jurisdiction of the Court. By cross-appeal, the Minister argued that the Trial Judge erred in finding the delay in issuing the NOC to be unwarranted.

Held, the appeal and cross-appeal should be dismissed.

1) Several principal requirements must be satisfied before mandamus will issue. First, there must be a public legal duty to act owed to the applicant. Generally, mandamus cannot issue with respect to a duty owed to the Crown. The Minister had a duty to act which was owed to Apotex. Merck's submission, that the Minister owed no duty to Apotex at the time it commenced its judicial review application on December 22, 1992 or on the hearing date, was partly correct. An order of mandamus will not lie to compel an officer to act in a specified manner if he is under no obligation to act as of the hearing date, but that rule was not valid if applied as of the date that the application for mandamus was filed. While it is open to a respondent to pursue dismissal of an application where the duty to perform has yet to arise, in the absence of compelling reasons, an application for mandamus should not be defeated on the ground that it was initiated prematurely. Provided that the conditions precedent to the exercise of the duty have been satisfied at the time of the hearing, the application should be assessed on its merits.

2) If a decision-maker has an unfettered discretion which he has not exercised as of the date a new law takes effect, the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision. A "vested right" must be distinguished from a "mere hope or expectation". The scope of a decision-maker's discretion is directly contingent upon the characterization of various considerations as "relevant or irrelevant" to its exercise. The Food and Drug Regulations restrict the factors to be considered by the Minister in the proper exercise of his discretion to those concerning a drug's safety and efficacy. They neither expressly nor implicitly contemplate the broad scope of ministerial discretion advocated by Merck. It cannot be said that the time needed to enable a decision-maker to seek and obtain legal advice in any decision-making process is of itself a basis for denying mandamus. That self-imposed obligation cannot of itself deprive Apotex of its right to mandamus. In the absence of intervening legislation, the "legal advice" issue would not have arisen. The legal advice sought herein had no bearing on the exercise of the Minister's narrowly circumscribed discretion. Moreover, to deny mandamus because of legal concerns generated by a party adverse in interest (Merck) would be to judicially condone what might be regarded as a tactical manoeuvre intended to obfuscate and delay the decision-making process. Pending legislative policy was not a consideration relevant to the exercise of the Minister's discretion. It could not be said that, in the exercise of his statutory power under the Food and Drug Regulations, the Minister was entitled to have regard to the provisions of Bill C-91 after enactment but prior to proclamation. Apotex had a vested right to the NOC notwithstanding the Minister's failure to render a decision by March 12, 1993.

3) The case law on mandamus reveals a number of techniques resorted to by courts in balancing competing interests. Any inclination to engage in a balancing of interests must be measured strictly against the rule of law. Having regard to the relevant jurisprudence, it had to be concluded that this Court possesses discretion to refuse mandamus on the ground of balance of convenience. The cases demonstrate three factual patterns in which the balance of convenience test has been implicitly acknowledged. First, there are those cases where the administrative cost or chaos that would result from granting such relief is obvious and unacceptable. The second ground for denying mandamus appears to arise in instances where potential public health and safety risks are perceived to outweigh

an individual's right to pursue personal or economic interests. In this case, there was no issue with respect to administrative chaos or public health and safety. The third line of authority attempts to establish a principle by which it can be determined whether a property owner has acquired a vested right to a building permit pending approval of a by-law amendment. That principle is of no relevance to this case nor to the issue of the Court's discretion to refuse mandamus on the ground of balance of convenience. There was no legal basis upon which the "balance of convenience" test could be applied to deny Apotex the relief sought.

4) The Patented Medicines Regulations prohibit the issuance of NOCs in respect of "patent-linked" drugs. Subsections 5(1) and (2) thereof refer to NDSs filed before March 12, 1993. While NOCs and patent rights are linked, they have never been mutually dependent. Practically speaking, Merck is seeking an interlocutory injunction against Apotex with respect to possible patent infringement without having to satisfy the conditions precedent imposed at law to the granting of such relief. An order in the nature of mandamus cannot be viewed as an instrument which "facilitates" patent infringement. The Patented Medicines Regulations are not procedural regulations per se. The imposition of a criterion that a NOC cannot issue with respect to a patent-linked NDS is clearly a substantive change in the law and hence subject to the rules of statutory construction applicable to legislation purporting to affect vested rights. Subsections 5(1) and (2) do not manifestly seek to divest persons of acquired rights; they are at best ambiguous. While Parliament has the authority to pass retroactive legislation, thereby divesting persons of an acquired right, vested rights could not be divested by the Patented Medicines Regulations unless the enabling legislation, that is the Patent Act or Bill C-91, implicitly or explicitly authorize such encroachments. Bill C-91 contains no provision specifically authorizing regulations to interfere with existing or vested rights except as to compulsory licences granted after December 20, 1991.

5) The jurisdiction of this Court was not "ousted" by the paramountcy provision in Bill C-91. Subsection 55.2(5) of the Patent Act could not be said to be paramount to section 18 of the Federal Court Act and could not be construed as a privative clause insulating the Minister and the relevant legislation from judicial review.

Statutes and Regulations Judicially Considered

Clean Water Act, R.S.A. 1980, c. C-13, s. 3.
Criminal Code, R.S.C. 1970, c. C-34.
Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53.
Federal Court Act, R.S.C., 1985, c. F-7, s. 18 (as am. by S.C. 1990, c. 8, s. 4).
Food and Drug Regulations, C.R.C., c. 870, ss. C.08.002 (as am. by SOR/85-143, s. 1), C.08.004 (as am. idem, s. 3, SOR/88-257, s. 1).
Food and Drugs Act, R.S.C., 1985, c. F-27.
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Interpretation Act, S.C. 1967-68, c. 7, ss. 36(c), 37(c).
Interpretation Act, R.S.C., 1985, c. I-21, s. 44(c).

Orders and Regulations respecting Patents of Invention made under The War Measures Act, 1914, (1914), 48 The Canada Gazette 1107.
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Patent Act Amendment Act, 1992, S.C. 1993, c. 2, ss. 3, 4, 12(1).
Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, ss. 5, 6, 7(1).
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Director of Public Works v. Ho Po Sang, [1961] A.C. 901 (P.C.);
A.G. for British Columbia et al. v. Parklane Private Hospital Ltd., [1975] 2 S.C.R. 47; (1974), 47 D.L.R. (3d) 57; [1974] 6 W.W.R. 72; 2 N.R. 305.

Distinguished:

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Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service, [1980] 1 W.L.R. 302 (H.L.);
Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment, Minister of the Environment and Province of Alberta (1983), 49 A.R. 360; 3 Admin. L.R. 247; 23 Alta. L.R. (2d) 193 (C.A.).

Considered:

Pfizer Canada Inc. v. Minister of National Health & Welfare et al. (1986), 12 C.P.R. (3d) 438 (F.C.A.); leave to appeal to S.C.C. refused (1987), 14 C.P.R. (3d) 447; 76 N.R. 397;
Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), [1988] 1 F.C. 422; (1987), 43 D.L.R. (4th) 273; 16 C.I.P.R. 55; 18 C.P.R. (3d) 206; 16 F.T.R. 81; additional reasons at (1988), 19 C.I.P.R. 120; 19 C.P.R. (3d) 374 (T.D.); affd (1990), 68 D.L.R. (4th) 761; 31 C.P.R. (3d) 29; 107 N.R. 195 (F.C.A.);
O'Grady v. Whyte, [1983] 1 F.C. 719; (1982), 138 D.L.R. (3d) 167; 42 N.R. 608 (C.A.);
Karavos v. Toronto & Gillies, [1948] 3 D.L.R. 294; [1948] O.W.N. 17 (Ont. C.A.);
Distribution Canada Inc. v. M.N.R., [1991] 1 F.C. 716; (1990), 46 Admin. L.R. 34; 39 F.T.R. 127 (T.D.); affd [1993] 2 F.C. 26 (C.A.);
Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. (1965), 113 C.L.R. 177 (Aust. H.C.);
Martinoff v. Gossen, [1979] 1 F.C. 327 (T.D.); Lemyre v. Trudel, [1978] 2 F.C. 453; (1978), 41 C.C.C. (2d) 373 (T.D.); affd [1979] 2 F.C. 362; (1979), 49 C.C.C. (2d) 188 (C.A.);

Abell v. Commissioner of Royal Canadian Mounted Police (1979), 49 C.C.C. (2d) 193; 3 Sask. R. 181 (C.A.);
Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources for Saskatchewan (1972), 30 D.L.R. (3d) 480; [1972] 6 W.W.R. 62 (Sask. Q.B.); affd (1973), 32 D.L.R. (3d) 107; [1973] 1 W.W.R. 193 (Sask. C.A.); appeal to S.C.C. dismissed (1973), 38 D.L.R. (3d) 317; [1973] 2 W.W.R. 672;
Fitzgerald v. Muldoon, [1976] 2 N.Z.L.R. 615 (S.C.).

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Apotex Inc. v. Canada (Attorney General) et al. (1993), 59 F.T.R. 85 (F.C.T.D.);
C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General), [1988] 1 F.C. 590; (1987), 46 D.L.R. (4th) 582; 37 C.C.C. (3d) 193; 12 F.T.R. 167 (T.D.);
Mensinger v. Canada (Minister of Employment and Immigration), [1987] 1 F.C. 59; (1986), 24 C.R.R. 260; 5 F.T.R. 64 (T.D.);
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Winegarden v. Public Service Commission and Canada (Minister of Transport) (1986), 5 F.T.R. 317 (F.C.T.D.);
Rossi v. The Queen, [1974] 1 F.C. 531; (1974), 17 C.C.C. (2d) 1 (T.D.);
Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment), [1989] 3 F.C. 309; [1989] 4 W.W.R. 526; (1989), 37 Admin. L.R. 39; 3 C.E.L.R. (N.S.) 287; 26 F.T.R. 245 (T.D.); affd [1990] 2 W.W.R. 69; (1989), 38 Admin. L.R. 138; 4 C.E.L.R. (N.S.) 1; 99 N.R. 245 (F.C.A.);
Bedard v. Correctional Service of Canada, [1984] 1 F.C. 193 (T.D.);
Carota v. Jamieson, [1979] 1 F.C. 735 (T.D.); affd [1980] 1 F.C. 790 (C.A.);
Nguyen v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 232 (C.A.);
Rothmans of Pall Mall Canada Limited v. Minister of National Revenue (No. 1), [1976] 2 F.C. 500; (1976), 67 D.L.R. (3d) 505; [1976] C.T.C. 339; 10 N.R. 153 (C.A.);
Secunda Marine Services Ltd. v. Canada (Minister of Supply & Services) (1989), 38 Admin. L.R. 287; 27 F.T.R. 161 (F.C.T.D.);
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Hutchins v. Canada (National Parole Board), [1993] 3 F.C. 505 (C.A.);
Thorson v. Attorney General of Canada et al., [1975] 1 S.C.R. 138; (1974), 43 D.L.R. (3d) 1; 1 N.R. 225;
Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265; (1975), 12 N.S.R. (2d) 85; 55 D.L.R. (3d) 632; 32 C.R.N.S. 376; 5 N.R. 43;
Minister of Justice of Canada et al. v. Borowski, [1981] 2 S.C.R. 575; (1981), 130 D.L.R. (3d) 588;

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Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607; (1986), 33 D.L.R. (4th) 321; [1987] 1 W.W.R. 603; 23 Admin. L.R. 197; 17 C.P.C. (2d) 289; 71 N.R. 338;
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Restrictive Trade Practices Commission v. Director of Investigation and Research, Combines Investigation Act, [1983] 2 F.C. 222; (1983), 145 D.L.R. (3d) 540; 70 C.P.R. (2d) 145; 48 N.R. 305 (C.A.); revg [1983] 1 F.C. 520; (1982), 142 D.L.R. (3d) 333; 67 C.P.R. (2d) 172 (T.D.);
Maple Lodge Farms Ltd. v. Government of Canada, [1980] 2 F.C. 458 (T.D.); affd Maple Lodge Farms Ltd. v. R., [1981] 1 F.C. 500; (1980), 114 D.L.R. (3d) 634; 42 N.R. 312 (C.A.); affd Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2; (1982), 137 D.L.R. (3d) 558; 44 N.R. 354;
Kahlon v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 386; (1986), 30 D.L.R. (4th) 157; 26 C.R.R. 152 (C.A.);
Harelkin v. University of Regina, [1979] 2 S.C.R. 561; (1979), 96 D.L.R. (3d) 14; [1979] 3 W.W.R. 676; 26 N.R. 364;
Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1987] 1 F.C. 406; (1987), 35 D.L.R. (4th) 693; 27 Admin. L.R. 79; 73 N.R. 241 (C.A.); appeal dismissed [1989] 2 S.C.R. 49; (1989), 61 D.L.R. (4th) 604; 97 N.R. 241;
Friends of the Oldman River Society v. Canada (Minister of Transport), [1990] 2 F.C. 18; (1990), 68 D.L.R. (4th) 375; [1991] 1 W.W.R. 352; 76 Alta. L.R. (2d) 289; 5 C.E.L.R. (N.S.) 1; 108 N.R. 241 (C.A.); affd [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321;
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D.L.R. (3d) 449; [1976] C.T.C. 1; 75 D.T.C. 5451; 7 N.R. 401;
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APPEAL and CROSS-APPEAL from a Trial Division decision ((1993), 49 C.P.R. (3d) 161; 66 F.T.R. 36 (F.C.T.D.)) allowing application for mandamus to compel the Minister of National Health and Welfare to issue a notice of compliance with respect to a generic drug, and dismissing appellant's application for prohibition. Appeal and Minister's cross-appeal dismissed.

Counsel:

W. Ian C. Binnie, Q.C., and William H. Richardson for appellants (respondents).
Harry B. Radomski and Richard Naiberg for respondent (applicant) Apotex Inc.
H. Lorne Murphy, Q.C., and Steve J. Tenai for respondents (respondents) Attorney General of Canada and the Minister of National Health and Welfare.

Solicitors:

McCarthy Tétrault, Toronto, for appellants (respondents).
Goodman & Goodman, Toronto, for respondent (applicant) Apotex Inc.
Deputy Attorney General of Canada for respondents (respondents) Attorney General of Canada and the Minister of National Health and Welfare.

The following are the reasons for judgment rendered in English by

1 ROBERTSON J.A.:-- The respondent, Apotex Inc. ("Apotex"), is a "generic" manufacturer and distributor of drugs. That is to say it manufactures and distributes drugs which were researched, developed and first brought to market by "innovator" companies. Apotex sought an order in the nature of mandamus to compel the Minister of National Health and Welfare (the "Minister") to issue a notice of compliance ("NOC") with respect to Apo-Enalapril, its generic version of the drug enalapril. Armed with a NOC, Apotex would have been in a position to market Apo-Enalapril in direct competition with "VASOTEC", the trade-mark under which the appellants, Merck & Co., Inc. and Merck Frosst Canada Inc. ("Merck"), manufacture and sell enalapril.

2 Merck, an "innovator" drug manufacturer, is the leading pharmaceutical company in Canada in terms of sales. Its drug "VASOTEC" is used for the treatment of congestive heart failure and hypertension and is the largest selling pharmaceutical in Canada, contributing approximately $140 million toward Merck's annual revenue of $400 million. It is thus not surprising that Merck sought an order prohibiting the Minister from issuing the NOC to Apotex. The mandamus and prohibition applications were consolidated by order of the Court and heard together. Apotex was the victor and hence the matter is before us for further consideration.

3 This is not the first time the competing economic interests of Canadian generic and innovator drug manufacturers have collided: e.g., Pfizer Canada Inc. v. Minister of National Health & Welfare et al. (1986), 12 C.P.R. (3d) 438 (F.C.A.); leave to appeal to Supreme Court refused (1987), 14 C.P.R. (3d) 447; Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), [1988] 1 F.C. 422 (T.D.), additional reasons at (1988), 19 C.I.P.R. 120 (F.C.T.D.); affd (1990), 68 D.L.R. (4th) 761 (F.C.A.); and Apotex Inc. v. Attorney General of Canada et al. (1986), 11 C.P.R. (3d) 43 (F.C.T.D.); application for reconsideration denied (1986), 11 C.P.R. (3d) 62; affirmed (1986), 12 C.P.R. (3d) 95 (F.C.A.); leave to appeal to Supreme Court of Canada refused (1987), 14 C.P.R. (3d) 447.

4 This appeal, however, represents more than a private law skirmish about the economic and health interests of Canadians. At least one aspect of that issue was supposedly resolved by Parliament when it enacted the Patent Act Amendment Act, 1992, S.C. 1993, c. 2, amending [Patent Act] R.S.C., 1985, c. P-4, ("Bill C-91") with the intent of thwarting the possible appropriation by generic drug companies, such as Apotex, of the research and development initiatives of innovators,

such as Merck. The principal issue we must address here is the effect of Bill C-91 on what Apotex argues is a vested right to the NOC. The enactment of Bill C-91 between the date that Apotex's mandamus application was filed and the date it was heard, together with the Minister's continuing failure to issue the Apo-Enalapril NOC, were the legal catalysts which propelled both Apotex and Merck into the courtrooms of the Trial and Appeal Divisions of this Court.

5 Aside from reviewing the traditional requirements for mandamus, this Court must determine whether the Minister could withhold the NOC on the basis of the then unproclaimed provisions of Bill C-91. Alternatively, it is asked whether the delay occasioned by the need to obtain legal advice with respect to the legality of issuing the NOC prevented Apotex from acquiring a vested right to the NOC. Now that Bill C-91 is law, Merck argues that Apotex must comply with its provisions which, if applicable, clearly deny Apotex that which it seeks. Moreover, Merck submits that this Court has the discretion to refuse mandamus where the effect would be to "frustrate the will of Parliament." That argument essentially invites this Court to consider what has been labelled the "balance of convenience" test in evaluating Apotex's mandamus application. These issues, among others, may only be addressed against the legislative framework in place at the time Apotex submitted its NOC application and that currently in effect.

LEGISLATIVE FRAMEWORK

6 In part, this appeal hinges on the scope of ministerial discretion as set out in the Food and Drugs Act, R.S.C., 1985, c. F-27, (the "FDA") and the regulations enacted pursuant to that Act (the "FDA Regulations") [Food and Drug Regulations, C.R.C., c. 870]. The responsibility for administering the FDA rests principally with the Health Protection Branch of the Department of National Health and Welfare (the "HPB").

7 Under the FDA, the Minister must ensure that "new drugs" meet health and safety requirements. A "new drug" is defined in section C.08.001 of the FDA Regulations as a drug which contains a substance which has not been sold in Canada for a sufficient time and in sufficient quantity to establish its safety and effectiveness.

8 A "new drug" must undergo rigorous testing before it may be sold. The manufacturer of the drug must file a New Drug Submission ("NDS") with the HPB setting out, inter alia, the drug's qualities, ingredients and methods of manufacture and purification. The NDS also includes the results of the manufacturer's clinical studies supporting the drug's safety and effectiveness. All aspects of the NDS are examined by multidisciplinary teams of the Drugs Directorate of the HPB. A NOC will only issue if the drug is found to be both effective and safe for human use. The relevant provisions [C.08.002 (as am. by SOR/85-143, s. 1), C.08.004 (as am. idem, s. 3, SOR/88-257, s. 1)] of the FDA Regulations state:

> C.08.002. (1) No person shall sell or advertise for sale a new drug unless

> (a) the manufacturer of the new drug has filed with the Minister, in duplicate, a new drug submission relating to that new drug, having a content satisfactory to the Minister;
> (b) the Minister has issued a notice of compliance to the manufacturer of the new drug in respect of that new drug submission pursuant to section C.08.004;
> (c) that notice of compliance is not suspended pursuant to section C.08.006 . . .
>
> . . .
>
> C.08.004. (1) The Minister shall, after completing an examination of a new drug submission or supplement thereto,
>
> (a) if that submission or supplement complies with the requirements of section C.08.002 or C.08.003, as the case may be, and section C.08.005.1, issue a notice of compliance . . . . [Emphasis added.]

9 Prior to the proclamation of Bill C-91, a generic drug company could obtain a compulsory licence from the Commissioner of Patents authorizing it to advertise, manufacture and sell any drug in respect of which a NOC had been issued. Although the generic drug company was required to pay royalties to the drug's innovator, it could sell the drug notwithstanding the innovator's patent rights. This arrangement was governed by subsection 39(4) of the Patent Act, R.S.C., 1985, c. P-4, (the "Patent Act"):

> 39. . . .
>
> (4) Where, in the case of any patent for an invention intended or capable of being used for medicine or for the preparation or production of medicine, an application is made by any person for a licence to do one or more of the following things as specified in the application, namely,
>
> (a) where the invention is a process, to use the invention for the preparation or production of medicine, import any medicine in the preparation or production of which the invention has been used or sell any medicine in the preparation or production of which the invention has been used, or
> (b) where the invention is other than a process, to import, make, use or sell the invention for medicine or for the preparation or production of medicine,

> the Commissioner shall grant to the applicant a licence to do the things specified in the application except such, if any, of those things in respect of which he sees good reason not to grant a licence.

10 Subsection 39(14) of the Patent Act required the Commissioner of Patents to notify the Department of National Health and Welfare of all compulsory licence applications. To this extent, there was a "linkage" between NOCs and patent rights.

11 Bill C-91 was drafted in order to protect innovator pharmaceutical companies' distribution and sales rights to patented drugs and represents a reversal of government policy adopted by Parliament in 1923: see The Patent Act, S.C. 1923, c. 23, section 17; but compare Order in Council respecting patents of invention held by alien enemies [Orders and Regulations respecting Patents of Invention made under The War Measures Act, 1914], P.C. 1914-2436, The Canada Gazette, October 10, 1914, enacted pursuant to the War Measures Act, 1914 (The), S.C. 1914, (2nd Sess.), c. 2. Bill C-91 was introduced in the House of Commons on June 23, 1992 and passed its third reading on December 10, 1992. It was given Royal Assent on February 4, 1993.[1]

12 The immediate effects of Bill C-91 are well known. Section 3 of the Bill repealed the compulsory licensing provisions of the Patent Act, while subsection 12(1) extinguished all compulsory licences issued on or after December 20, 1991, as follows:

> 12. (1) Every licence granted under section 39 of the former Act on or after December 20, 1991 shall cease to have effect on the expiration of the day preceding the commencement day, and all rights or privileges acquired or accrued under that licence or under the former Act in relation to that licence shall thereupon be extinguished.

13 Section 4 of the Bill adds section 55.2 to the Patent Act. Subsection 55.2(4) authorizes the Governor in Council to make regulations concerning, inter alia, the issuance of NOCs, as follows:

55.2 . . .

> (4) The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) or (2) including, without limiting the generality of the foregoing, regulations
>
> (a) respecting the conditions that must be fulfilled before a notice, certificate,

permit or other document concerning any product to which a patent may relate may be issued to a patentee or other person under any Act of Parliament that regulates the manufacture, construction, use or sale of that product, in addition to any conditions provided for by or under that Act;

(b) respecting the earliest date on which a notice, certificate, permit or other document referred to in paragraph (a) that is issued or to be issued to a person other than the patentee may take effect and respecting the manner in which that date is to be determined;

(c) governing the resolution of disputes between a patentee or former patentee and any person who applies for a notice, certificate, permit or other document referred to in paragraph (a) as to the date on which that notice, certificate, permit or other document may be issued or take effect;

(d) conferring rights of action in any court of competent jurisdiction with respect to any disputes referred to in paragraph (c) and respecting the remedies that may be sought in the court, the procedure of the court in the matter and the decisions and orders it may make; and

(e) generally governing the issue of a notice, certificate, permit or other document referred to in paragraph (a) in circumstances where the issue of that notice, certificate, permit or other document might result directly or indirectly in the infringement of a patent.

14 On February 12, 1993, the Governor in Council fixed February 15 as the date Bill C-91, with the exception of section 55.2, would come into force. On March 12, 1993, that section and the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, (the "Patented Medicines Regulations") were brought into effect.

15 The Patented Medicines Regulations prohibit the issuance of NOCs in respect of "patent-linked" drugs. A "patent-linked" drug is one in respect of which both a NOC and an unexpired patent have been issued. The patent may relate to either the medicine itself or the method of using the drug to treat an illness.

16 Subsections 5(1) and (2) of the Patented Medicines Regulations refer to NDSs filed before March 12, 1993 (the date the Regulations were brought into effect) and read as follows:

> 5. (1) Where a person files or, before the coming into force of these Regulations, has filed a submission for a notice of compliance in respect of a drug and wishes to compare that drug with, or make reference to, a drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the patent list,

(a) state that the person accepts that the notice of compliance will not issue until the patent expires; or
(b) allege that

(i) the statement made by the first person pursuant to paragraph 4(2)(b) is false,
(ii) the patent has expired,
(iii) the patent is not valid, or
(iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

(2) Where, after a second person files a submission for a notice of compliance, but before the notice of compliance is issued, a patent list is submitted or amended in respect of a patent pursuant to subsection 4(5), the second person shall amend the submission to include, in respect of that patent, the statement or allegation that is required by subsection (1).

Subsection 7(1) of the Patented Medicines Regulations prohibits the Minister from issuing a NOC to generic drug companies who have not complied with section 5 of the Regulations.

17 One of the principal issues on appeal is whether the above provisions apply to Apotex's NDS. In this regard, Merck notes that Parliament specifically introduced a special paramountcy rule in subsection 55.2(5) of the Patent Act to explicitly reinforce the objective of Bill C-91:

55.2 . . .

(5) In the event of any inconsistency or conflict between

(a) this section or any regulations made under this section, and
(b) any Act of Parliament or any regulations made thereunder,

this section or the regulations made under this section shall prevail to the extent of the inconsistency or conflict. [Emphasis added.]

FACTS

18 There are two factual matters in dispute. In addition, one factual matter-the precise reason or reasons underlying the Minister's failure to issue the NOC-has apparently eluded the parties' consideration. The import of this gap will be evaluated following an outline of the commonly-held facts giving rise to this appeal.

(a) Common Ground

19 On July 3, 1989, the Minister delegated the authority to sign NOCs to persons occupying the positions of Assistant Deputy Minister ("ADM") and Director General of the Drugs Directorate. Throughout the relevant period in this appeal, Kent Foster was the ADM and the only person to whom the Minister's authority to sign NOCs had devolved.

20 Apotex submitted a NDS in respect of Apo-Enalapril on February 15, 1990.[2] Eight months later, on October 16, 1990, Merck was granted a seventeen-year patent in respect of enalapril to expire on October 16, 2007.

21 Bill C-91 received third reading on December 10, 1992. On December 22, thirty-four months after filing its NDS, Apotex initiated an application for judicial review against the Minister in which it sought an order in the nature of mandamus in respect of the Apo-Enalapril NOC.

22 Apotex's NDS was incomplete when it filed its mandamus application. The HPB had notified Apotex in writing of the deficiencies in the bio-equivalence portion of the Apo-Enalapril NDS on July 20, 1992 and did not receive all of the required information from Apotex until January 11, 1993. Additional information concerning the chemistry and manufacturing portion of the NDS was also requested and received from Apotex. Finally, on February 2, 1993, the HPB requested clean product monographs, which were provided on February 3, 1993. As of that date Apotex's NDS satisfied both the clinical and the chemistry and manufacturing requirements prescribed in the FDA Regulations. In other words, by February 3, 1993, Apo-Enalapril met all of the scientific safety and efficacy conditions required for a NOC to issue.

23 Two events relevant to this appeal transpired on February 4, 1993: Bill C-91 received Royal Assent and the Apo-Enalapril NOC was placed on Foster's desk for signature. Foster admitted that the NDS had "cleared the scientific and regulatory review process" and that he and the ADM of National Pharmaceutical Strategy were of the view that the NOC ought to issue. However, Foster had been advised by the Minister's Chief of Staff on January 21, 1993 that he should keep the Minister apprised of any "patent-linked" NDSs in view of the impending passage of Bill C-91. In a note accompanying the Apo-Enalapril NOC, the ADM of National Pharmaceutical Strategy intimated that the Apo-Enalapril NOC was one in respect of which Foster's signing authority had been effectively fettered.

24 Foster did not see the NOC-related documents until approximately 6:00 p.m. on February 4.

On the next day, because of the fetter placed on his authority and aware of Apotex's court application, he contacted his Deputy Minister. Together they decided to seek legal advice regarding the authority of the Minister or Foster to issue the Apo-Enalapril NOC in light of the passage of Bill C-91. Later that day, the president of Merck telephoned Foster, indicating that Foster was obligated to refrain from issuing the NOC. On February 8, 1993, the Department of National Health and Welfare sought and obtained legal opinions from outside counsel and the Department of Justice regarding the Minister's authority to issue the NOC. The substance of these opinions has not been released on the ground of privilege.[3]

25 Between February 12 and February 23, 1993, Merck forwarded eight legal opinions obtained from private law firms to the Minister. Those opinions supported Merck's position that it would be inappropriate and even unlawful for the Minister or Foster to issue a NOC in respect of Apo-Enalapril. To make sense of this flurry of unsolicited opinions, Foster sought further legal advice on February 24, 1993. He stated:

> My concern was that whatever action I took or did not take might have the Minister, by virtue of my delegated authority, contravening the law. I didn't know the answer to that and I wanted the answer to that.

26 To dispel any doubt harboured by the Minister and his staff, Merck submitted additional legal opinions which substantively reiterated those previously sent. Between February 12 and March 5, 1993, Merck provided the Government with a total of seventeen legal opinions. All were placed before the Trial Judge and this Court. None support Apotex's position that the Minister did not have the right to consider impending government policy in denying Apotex its NOC.

27 On February 22, 1993, Merck commenced an application for judicial review seeking, inter alia, a prohibition order preventing the Minister from issuing the Apo-Enalapril NOC. Apotex brought a motion for judgment directing the Minister to issue this NOC on March 4, 1993. On March 9, 1993, the Minister sought and received an adjournment of the Apotex application until March 16, 1993.[4] On March 12, 1993, subsection 55.2(4) of the Patent Act and the Patented Medicines Regulations came into effect.

28 On March 18, 1993, the applications of Merck and Apotex were consolidated by order of a Trial Judge. They were heard on June 21, 1993. On July 16, 1993, Dubé J. allowed Apotex's application for mandamus and denied Merck's application for prohibition [Apotex Inc. v. Canada (Attorney-General) (1993), 49 C.P.R. (3d) 161].

(b) Disputed Facts

29 In oral argument, Merck sought to establish that the Minister was still investigating allegations that Apo-Enalapril was unsafe after February 4, 1993. The HPB has apparently determined these allegations to be unfounded and, in any event, they are contrary to the Minister's position at trial that Apo-Enalapril had met all the criteria and conditions prescribed by the existing FDA

Regulations by February 3, 1993 (Apotex, supra, at page 176).

30 By counter-offensive, Apotex suggested that the Minister did not fairly consider the NDS. It alleged that other "patent-linked" generic NDSs were being approved while Apotex's NOC was being delayed. (From the appeal record, I note that Merck had accused the Minister of "accelerating" the processing of Apotex's NDS.) The Trial Judge acknowledged the issue but did not address it, either because it was unnecessary or because it was not deserving of attention (at page 170). Apotex did not launch a cross-appeal with respect to this issue.

(c) The Factual Lacuna

31 Only the Minister possessed the discretionary power to issue a NOC to Apotex once the NDS review was completed. Neither he nor Foster signed the NOC. However, the Minister's reasons for failing to issue the NOC are unclear.

32 Merck first maintains that there is no evidence the NOC had been formally presented to the Minister for his consideration, a fact acknowledged by the Trial Judge (appellants' memorandum of fact and law, paragraph 42, Apotex, supra, at pages 167-168). It also seeks to establish that the Minister was entitled to have regard to pending legislative policy in issuing the NOC (appellants' memorandum of fact and law, paragraph 67). The former submission implies that the Minister had not yet had the opportunity to review Apotex's application. The inference to be drawn from the latter is that, not only did the Minister review the NDS, but his lawful consideration of pending government legislation was one reason why the NOC did not issue. There is no evidence that the Minister received, much less acted upon, the legal advice sought on February 24, 1993.

33 Regrettably, no one has sought to elicit from the Minister the very reason or reasons underlying his failure to authorize the NOC prior to March 12, 1993.[5] Upon reflection, we are left with the following possibilities (there are others): Was the Minister still in search of the "definitive" legal opinion? Did he not have the opportunity to review the NDS? Or did the Minister conclude that as a matter of law the NOC could not issue? Since Apotex has neither impeached the motives of the Minister nor argued unreasonable delay, I am left with the legal arguments pursued by the parties.

DECISION UNDER APPEAL

34 At trial, Dubé J. perceived the central issue to be whether the Minister, prior to March 12, 1993, possessed the discretionary power to decline to issue the NOC to Apotex on the basis of anticipated changes to the Patent Act. He concluded (at page 177):

> In my view, there can be no doubt that the FDR did entitle the Minister to exercise his discretion in the Apotex NDS approval process. However, this discretion, like all discretionary authority, was not unfettered. The scope of the Minister's discretion was limited strictly to a consideration of factors relevant to

> the purposes of the FDR as they relate to the process for approval of new drugs to be marketed in Canada. . . . It was limited to a decision as to whether the HPB review of the Apotex NDS established that Apo-enalapril was safe and effective. Once that question had been answered in the affirmative, as it was in this case, any other extraneous consideration was irrelevant to the issuance of a NOC under the FDR.
>
> The Minister was not entitled to refuse to issue a NOC to Apotex on the basis of anticipated changes to the patent statute and regulations thereunder, an area within the authority of his colleague, the Minister of Consumer and Corporate Affairs.

35 The learned Judge found support for his position in three decisions of the Trial Division of this Court. First, he applied the reasoning of MacKay J. in Apotex Inc. v. Canada (Attorney General) et al. (1993), 59 F.T.R. 85, where it was held (at pages 108-109):

> [T]he words "having a content satisfactory to the Minister" qualify the words "new drug submission" so that in every case the content of a submission is a matter within the discretion of the Minister and those acting on his or her behalf to determine.
>
> . . .
>
> [T]he Regulations vest complete and exclusive discretion in the respondent Minister and the Director of HPB to determine the requirements of a new drug submission in terms of the information or evidence to be provided by the manufacturer. [Emphasis not in original.]

36 The second decision is Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), supra, where Rouleau J. concluded (at page 426):

> The central purpose of the Regulations is to ensure that any new drug meets rigorous safety profile standards in order to protect the Canadian public. If, upon review, the Minister finds the new drug submission to be satisfactory, he is compelled to issue a notice of compliance . . . .

37 Finally, Dubé J. turned to the decision of Muldoon J. in C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General), [1988] 1 F.C. 590 (T.D.), in which the Trial Judge held (at page 651):

> [W]hatever discretion is accorded by these clear and detailed Regulations is quite restricted . . . . Under regulation C.08.004 the Minister is bound either to issue a notice of compliance or to notify the manufacturer why the submission . . . does

> not comply . . . . The Minister is subject to the Court's supervising power to order mandamus in that regard . . . . These delegated powers do not permit the Minister or the Director to do as they please: they have no unfettered discretions.

38 Dubé J. had little difficulty in deciding that the Minister did not possess the broad discretion to justify his refusal to issue the NOC. It remained to be determined whether the Minister and his delegate, Foster, were entitled to seek legal advice and otherwise delay issuing the NOC. Dubé J. observed that the Minister did not know, either when Bill C-91 was passed or when it was proclaimed, that the Patented Medicines Regulations would come into force on March 12, 1993. In other words, the delay in determining whether the NOC could issue may have been considerably protracted. Acceding to Foster's pragmatic observation that "either the law is in effect or it isn't" the Trial Judge concluded "that the Minister's delay in issuing the Apotex NOC was not warranted" (at page 181).

39 Dubé J. went on to reject the argument that issuing mandamus in cases where new regulatory regimes are clearly pending would "frustrate the will of Parliament." He cautioned that the line of municipal law cases commencing with the Supreme Court's decision in Ottawa, City of v. Boyd Builders Ltd., [1965] S.C.R. 408 should not be "transported facilely to an entirely unrelated legal context" (at page 181).

40 Finally, the learned Trial Judge rejected the argument that Apotex's claim for mandamus was premature because its NDS was incomplete when the application was filed. He reasoned (at page 182):

> Before closing, I take the opportunity to dispose of a "preliminary" matter raised by Merck, that Apotex' December 22, 1992 originating notice of motion was premature because, as of that date, the Apo-enalapril NDS was incomplete. According to the terms of the notice of motion, Apotex sought an order directing the Minister to disclose the status of a number of NDS filed by Apotex, including that for Apo-enalapril; to complete the reviews of these submissions, should they not have been completed; and to issue NOCs "if the results of the reviews are satisfactory". Thus, Apotex was not requesting relief divorced from the normal requirements of the FDR, or "jumping the gun". And, as of February 3, 1993, long before this matter came on for hearing, the results of the Apo-enalapril NDS has been recommended for issuance of a NOC. The argument based on prematurity must therefore fail.

41 For the above reasons, the application for mandamus was allowed and the application for prohibition denied.

ISSUES RAISED ON APPEAL

42 An appeal provides both parties with the opportunity to reflect on, refine and reformulate

substantive arguments which may or may not have been pursued below. The following issues were identified by Merck in its memorandum of fact and law and addressed on appeal:

(1) Does mandamus lie against the Minister on the facts of this case?

(2) Was the Minister entitled to seek advice after February 4, 1993 about the legality of what Apotex was asking him to do, plus any other relevant information that may have occurred to him?

(3) In the exercise of his statutory power under the Food and Drug Regulations, was the Minister entitled to have regard to the provisions of Bill C-91 after they were enacted but before they were proclaimed in effect?

(4) Was the Minister acting unlawfully when he failed to reach a decision on the NOC application by March 12, 1993?

(5) If so, was the effect to give Apotex a "vested right" to the issuance of an NOC prior to March 12, 1993?

(6) If Apotex had acquired a "vested" right prior to March 12, 1993, was such right nevertheless divested by the Patented Medicines (Notice of Compliance) Regulations?

(7) Did the rights and remedies created by Bill C -91 and the Patented Medicines (Notice of Compliance) Regulations oust the jurisdiction of this Court from and after March 12, 1993 to grant judicial review in the circumstances of this case to compel issuance of the notice of compliance?

(8) Do the principles set out in Ottawa, City of v. Boyd Builders Ltd., [1965] S.C.R. 408 apply to the exercise of the Court's discretion in mandamus cases generally, or are they confined to building permit cases?

(9) If Apotex is otherwise entitled to the issuance of mandamus, is this a case in which the Court ought to have exercised its discretion (which Dubé J. believed he did not possess) against Apotex in light of the public policy enunciated in Bill C-91 and the Regulations?

(10) Does prohibition lie against the Minister on the facts of this case?

43 By cross-appeal, the Minister argues that the Trial Judge erred in finding the delay in issuing the NOC to be unwarranted. Like Merck he remains convinced that as a matter of law the NOC cannot issue.

ANALYSIS

44 Most issues raised by counsel concern the availability of orders in the nature of mandamus. I propose to outline in general terms the principles governing such orders before clarifying those issues central to this appeal.

(1) Mandamus-The Principles

45 Several principal requirements must be satisfied before mandamus will issue. The following general framework finds support in the extant jurisprudence of this Court (see generally O'Grady v. Whyte, [1983] 1 F.C. 719 (C.A.), at pages 722-723, citing Karavos v. Toronto & Gillies, [1948] 3 D.L.R. 294 (Ont. C.A.), at page 297; and Mensinger v. Canada (Minister of Employment and Immigration), [1987] 1 F.C. 59 (T.D.), at page 66.

1. There must be a public legal duty to act: Minister of Employment and Immigration v. Hudnik, [1980] 1 F.C. 180 (C.A.); Jefford v. Canada, [1988] 2 F.C. 189 (C.A.); Winegarden v. Public Service Commission and Canada (Minister of Transport) (1986), 5 F.T.R. 317 (F.C.T.D.); Rossi v. The Queen, [1974] 1 F.C. 531 (T.D.); Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment), [1989] 3 F.C. 309 (T.D.); affd [1990] 2 W.W.R. 69 (F.C.A.); Bedard v. Correctional Service of Canada, [1984] 1 F.C. 193 (T.D.); Carota v. Jamieson, [1979] 1 F.C. 735 (T.D.); affd [1980] 1 F.C. 790 (C.A.); and Nguyen v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 232 (C.A.).
2. The duty must be owed to the applicant:[6] Rothmans of Pall Mall Canada v. Minister of National Revenue (No. 1), [1976] 2 F.C. 500 (C.A.); Distribution Canada Inc. v. M.N.R., [1991] 1 F.C. 716 (T.D.); affd [1993] 2 F.C. 26 (C.A.); Secunda Marine Services Ltd. v. Canada (Minister of Supply & Services) (1989), 38 Admin. L.R. 287 (F.C.T.D.); and Szoboszloi v. Chief Returning Officer of Canada, [1972] F.C. 1020 (T.D.); see also Jefford v. Canada, supra.
3. There is a clear right to performance of that duty, in particular:
    (a) the applicant has satisfied all conditions precedent giving rise to the duty; O'Grady v. Whyte, supra; Hutchins v. Canada (National Parole Board), [1993] 3 F.C. 505 (C.A.); and see Nguyen v. Canada (Minister of Employment and Immigration), supra;
    (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; see O'Grady v. Whyte, supra, citing Karavos v. Toronto & Gillies, supra; Bhatnager v. Minister of Employment and Immigration, [1985] 2 F.C. 315 (T.D.); and Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment), supra.
4. Where the duty sought to be enforced is discretionary, the following rules apply:

(a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
(b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
(c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
(d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
(e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

See Restrictive Trade Practices Commission v. Director of Investigation and Research, Combines Investigation Act, [1983] 2 F.C. 222 (C.A); revg [1983] 1 F.C. 520 (T.D.); Carota v. Jamieson, supra; Apotex Inc. v. Canada (Attorney General) et al., supra; Maple Lodge Farms Ltd. v. Government of Canada, [1980] 2 F.C. 458 (T.D.); affd [1981] 1 F.C. 500 (C.A.); affd [1982] 2 S.C.R. 2; Jefford v. Canada, supra; Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant (1971), 65 C.P.R. 1 (Ex. Ct.); appeal dismissed [1972] S.C.R. vi; Distribution Canada Inc. v. M.N.R., supra; and Kahlon v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 386 (C.A.).

5. No other adequate remedy is available to the applicant: Carota v. Jamieson, supra; Maple Lodge Farms Ltd. v. Government of Canada, supra; Jefford v. Canada, supra; Harelkin v. University of Regina, [1979] 2 S.C.R. 561; and see Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1987] 1 F.C. 406 (C.A.); appeal dismissed [1989] 2 S.C.R. 49.
6. The order sought will be of some practical value or effect: Friends of the Oldman River Society v. Canada (Minister of Transport), [1990] 2 F.C. 18 (C.A.), per Stone J.A., at pages 48-52; affd [1992] 1 S.C.R. 3, per La Forest J., at pages 76-80; Landreville v. The Queen, [1973] F.C. 1223 (T.D.); and Beauchemin v. Employment and Immigration Commission of Canada (1987), 15 F.T.R. 83 (F.C.T.D.).
7. The Court in the exercise of its discretion finds no equitable bar to the relief sought: Penner v. Electoral Boundaries Commission (Ont.), [1976] 2 F.C. 614 (T.D.); Friends of the Oldman River Society v. Canada (Minister of Transport), supra.
8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

46 In this appeal, it is understood that the Minister had a duty to act which was owed to Apotex and not the Crown. Merck has not sought to show that Apotex is disentitled in equity to the relief sought. Nor has it sought to establish that an order of mandamus would be ineffectual. On the other hand, it argues that Apotex's application was premature to the extent that not all conditions precedent had been satisfied at the time the application was initiated. As well, it contends that an alternative and adequate remedy is available to Apotex. Aside from the balance of convenience issue noted earlier, the remaining issues central to this appeal may be stated as follows: Did Apotex have a vested right to the NOC as of March 12, 1993? If Apotex did have such a right, was that right divested by the Patented Medicines Regulations? Does the paramountcy provision in Bill C-91 oust the jurisdiction of this Court to grant the order sought by Apotex?

(2) An Alternative and Adequate Remedy

47 Bill C-91 authorizes Apotex to challenge the validity of Merck's patent. If successful, not only would Apotex be entitled to the NOC but Merck would be liable in damages for wrongfully delaying its issue (see section 6, Patented Medicines Regulations). Accordingly, Merck argues that compliance with the existing legislation is of itself an adequate remedy. This reasoning, of course, merely begs the question. I would note that Merck has not sought to establish that an order of mandamus would itself be ineffectual. Conversely, Apotex has not sought to show that Merck has a more adequate remedy-an action for patent infringement-as an alternative to its application for prohibition.

(3) Prematurity

48 Merck takes the position that the Minister owed no duty to Apotex at the time it commenced its judicial review application on December 22, 1992 or on the hearing date. This submission is certainly correct in part. The Minister owed no duty to Apotex on December 22; the HPB's review of Apotex's NDS was ongoing at that time. Merck maintains that filing an application before a duty is owed constitutes a bar to mandamus. It relies on Karavos v. Toronto & Gillies, supra, a decision of the Ontario Court of Appeal which has been cited with approval by this Court in O'Grady v. Whyte, supra, per Urie J.A., at page 722. In Karavos, Laidlaw J.A. stated (at page 297):

> I do not attempt an exhaustive summary of the principles upon which the Court proceeds on an application for mandamus, but I shall briefly state certain of them bearing particularly on the case presently under consideration. Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced": High op. cit., p. 13, art. 9; p. 15, art 10. (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform"; ibid., supra, p. 44, art. 36. (3) That duty must be purely ministerial in

> nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers": ibid., supra, p. 92, art. 80. (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy: ibid., supra, p. 18, art. 13. [Emphasis added.]

49 Merck seeks to extract from the phrase "at the time of seeking the relief" a rule of law to the effect that mandamus must be denied if a duty to act is not owing at the time the application for mandamus is filed. In my view, such a rule would be extremely short-sighted and finds no support in the facts of either Karavos or O'Grady.

50 In Karavos, the applicant sought an order of mandamus compelling the issue of a building permit even though he had not submitted his permit application as of the hearing date. Similarly in O'Grady, the applicant failed to submit an application for "landing" as of the date when an immigration officer was required to decide upon his sponsorship application. In both cases, it was held that the absence of the required application was fatal to the granting of mandamus.

51 The legal principle derived from these two cases is simply stated. An order of mandamus will not lie to compel an officer to act in a specified manner if he or she is not under an obligation to act as of the hearing date. The question remains whether the rule retains its validity if applied as of the date that the application for mandamus was filed. In my opinion, it cannot.

52 In its application Apotex requested the Court to issue two directives. First, it asked that the Minister process the NDS which had been submitted some thirty-four months prior to the mandamus application. Second, it sought an order directing the issuance of the NOC once the NDS review process was complete.

53 Whether or not the application for mandamus had the effect of propelling the HPB into action is a matter for speculation. We do know that safety and efficacy requirements for the Apo-Enalapril NOC had been met by February 3. We also know that an application to strike the mandamus application was made on January 27, 1993 by the Minister and the Attorney General of Canada. That application was apparently dismissed from the Bench for reasons which are not apparent on the face of the record (see Appeal Book, Vol. I, Tabs 4 & 5).

54 As a general proposition, it is not difficult to accept a rule which seeks to eliminate premature applications for mandamus. It is certainly open to a respondent to pursue dismissal of an application where the duty to perform has yet to arise. However, unless compelling reasons are offered, an application for an order in the nature of mandamus should not be defeated on the ground that it was initiated prematurely. Provided that the conditions precedent to the exercise of the duty have been satisfied at the time of the hearing, the application should be assessed on its merits. Those who unnecessarily complicate the proceedings may expose themselves to costs even if successful. For the foregoing reasons this submission must fail.

(4) Discretion Spent-Vested Rights

55 Simply stated, this Court must decide whether Apotex is entitled to the advantages of the "old" law or bound to accept the disadvantages arising from the "new". The traditional approach to this issue focusses on whether the decision-maker reached a decision before the intervening legislation came into effect. In other words, did Apotex acquire a vested right to the NOC by March 12, 1993?

56 If a decision-maker has an unfettered discretion which he or she has not exercised as of the date a new law takes effect, then the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision. This is the ratio of the Judicial Committee of the Privy Council in Director of Public Works v. Ho Po Sang, [1961] A.C. 901. In that case, the Court distinguished a "vested right" from a "mere hope or expectation" and determined that an applicant for a rebuilding permit had only a mere hope or expectation that the permit would be granted at the time that repealing legislation came into force. Ho Po Sang has been applied by the Exchequer Court in Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra. These cases provide the necessary background for an appreciation of the principles underlying the "vested rights" issue.

57 In Ho Po Sang, the lessee of Crown lands in Hong Kong was entitled by Ordinance to vacant possession of buildings occupied by sub-lessees on the condition that he erect new buildings and receive approval from the Director of Public Works. The legislation also exempted the lessee from compensating the sub- lessees with respect to termination of their tenancies. On July 20, 1956, the Director purported to give the lessee the required certificate. Upon receipt of their notices to quit the premises, the sub-lessees launched an appeal to the Governor in Council. The lessee immediately cross-appealed. On April 9, 1957, after the appeal had been initiated, the relevant provisions of the Ordinance were repealed to provide tenants with the right to compensation. As of that date the Governor in Council had not reached a decision.

58 The issue on appeal was whether on April 9, 1957, the lessee possessed "rights" under the Ordinance which remained unaffected by the repeal. The Privy Council based its conclusion on the "absolute" discretion which the Ordinance accorded the Governor in Council: "[The lessee] had no more than a hope that the Governor in Council would give a favourable decision" (at pages 920-921). The lessee's argument that he had an accrued right unaffected by the repeal to have the matter considered by the Governor in Council was rejected on the same grounds.

59 The decision of Thurlow J. (as he then was) in Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra, provides guidance in determining whether Apotex had a vested right to the NOC rather than a mere hope or expectation. The issue in that case was whether the Commissioner of Patents erred in fixing the royalty payable to Merck by Sherman under a compulsory licence. Sherman had submitted its patent specifications and the Commissioner had assessed the royalty on the basis of subsection 41(3) of the Patent Act, R.S.C. 1952, c. 203. That subsection was subsequently repealed and replaced with subsection 41(4) (S.C. 1968-69, c. 49, s. 1). The Commissioner did not hear the parties' oral arguments or receive their written submissions until after these amendments came into effect. The issue before the Trial Judge was

straightforward: Which statutory provision was applicable when fixing the royalty-the old or the new? After a careful analysis of competing provisions of the Interpretation Act, R.S.C. 1952, c. 158, Thurlow J. concluded that the "new" subsection 41(4) prevailed. His reasoning bears directly on the "vested rights" issue.

60 Paragraph 37(c) of the Interpretation Act, S.C. 1967-68, c. 7 (now Interpretation Act, R.S.C., 1985, c. I-21, paragraph 44(c)) considered the effect of proceedings commenced under a "former enactment" and was relied upon by Merck to sustain its argument that the proceedings could only be continued in accordance with the new provision. That section read as follows:

> 37. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor
>
> . . .
>
> (c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;

61 The respondent Sherman relied on paragraph 36(c) (now paragraph 43(c)) of the Interpretation Act in support of its argument that it had an "accrued" or "accruing" right as of the date of its application for the compulsory licence.[7] Paragraph 36(c) read:

> 36. Where an enactment is repealed in whole or in part, the repeal does not
>
> . . .
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;
>
> . . .
>
> and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.[8]

62 Following an extensive analysis of Ho Po Sang, Thurlow J. concluded (at page 12):

> Here when s. 41(3) was repealed the procedure which the Commissioner had prescribed had not reached the stage where the matter was ready for decision, since the respondent's reply to the counterstatement had not been filed and had indeed been delayed at the respondent's request. But even if it had reached that stage and had been simply awaiting decision I do not think the

> respondent could properly be said to have had an accrued right either to a licence or to have the matter dealt with on the law as it had been. The Commissioner's authority, as I see it, is not merely to deprive an applicant of a licence where he sees good reason to do so but is an authority to decide whether or not a licence should be granted to which is coupled a direction that the licence is to be granted in the absence of good reason for refusing it. The distinction is perhaps a fine or narrow one but it is for the Commissioner rather than the applicant to say whether or not there will be a licence and the applicant has no control over the decision which the Commissioner may make on the question. As in the Ho Po Sang case the question itself was unresolved and the issue rested in the future. I agree with the submission of counsel for the appellant that at the stage which the proceeding had reached what the respondent had (whether it was stronger or not, by reason of the statutory direction for reaching a decision which s. 41(3) prescribed, than what the respondent had in the Ho Po Sang case) was nothing more than a hope. Nor do I think what the respondent had at that stage can be regarded as an "accruing" right (or privilege) within the meaning of s. 36(c) since the difficulty lies not with the words "accrued" or "accruing" but with the lack of anything that answers to the description of the words "right" or "privilege" in s. 36(c).
>
> In my opinion therefore s. 36(c) does not apply and the authority for continuing the proceeding commenced before the repeal is that contained in s. 37(c) of the Interpretation Act.

63 This analytical framework focusses the determination of whether Apotex had an "accrued" or "vested" right to the NOC. It is common ground that by February 4, 1993, "the matter was ready for decision". The question is whether the Minister's discretion with respect to the NOC had been spent as of that date.

64 Four issues are relevant to the determination of whether Apotex had a vested right to the NOC: (a) the scope of the Minister's discretion; (b) the relevance of legal advice; (c) the relevance of "pending legislative policy"; and (d) whether the matter had reached the Minister for his consideration.

(a) Ministerial Discretion-Narrow or Broad

65 The scope of a decision-maker's discretion is directly contingent upon the characterization of various considerations as "relevant" or irrelevant to its exercise: see generally, R. A. Macdonald and M. Paskell-Mede, "Annual Survey of Canadian Law: Administrative Law" (1981), 13 Ottawa L. Rev. 671, at page 720. Merck argues that the Minister's discretion under subsection C.08.002(1) of the FDA Regulations ("no person shall sell . . . a new drug unless . . . [the drug has] a content

satisfactory to the Minister") is, as a matter of statutory construction, sufficiently broad to embrace considerations other than those dealing with safety and efficacy. In my view, there is no merit in the submission. The law on this issue was carefully and extensively reviewed by the learned Trial Judge and three other judges of the Trial Division; see Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), supra; C.E. Jamieson & Co. (Dominion) v. Canada (Attorney-General), supra; and Apotex Inc. v. Canada (Attorney-General) et al., supra.

66 I am in agreement with the Trial Judge that the FDA Regulations restrict the factors to be considered by the Minister in the proper exercise of his discretion to those concerning a drug's safety and efficacy. In reaching this conclusion, I am mindful of the two authorities cited by Merck. In Glaxo Canada Inc., supra, Rouleau J. stated that the "Minister's determination is one made in contemplation of public health and represents the implementation of social and economic policy" (at page 439). This Court made similar observations in Pfizer Canada Inc. v. Minister of National Health & Welfare et al., supra, where MacGuigan J.A. stated that "the Minister's determination was a decision made in contemplation of public health, and so amounted to an implementation of social and economic policy in a broad sense,' rather than application of substantive rules' to an individual case" (at page 440).

67 The above statements do not suggest that the Court was willing to overlook rudimentary canons of statutory construction. The matter to be resolved in Pfizer and on the Glaxo Canada appeal was the standing of the respective applicants.[9] In both cases, the drug in question had fulfilled the safety and efficacy requirements under the FDA Regulations. In both cases, the Court held that the NOC could issue. Viewed in this context, these cases do not detract from the reasoning of Dubé J. that the FDA Regulations neither expressly nor implicitly contemplate the broad scope of ministerial discretion advocated by Merck.

68 Apotex submits that the narrow scope of the Minister's discretion necessarily implies that its right to the NOC crystallized as of February 4, 1993, or in any event, prior to March 12, 1993, when the Patented Medicines Regulations came into force. Merck contends that irrespective of how the discretion is construed, the Minister is residually entitled as a matter of law to have regard to considerations other than those touching on the safety and efficacy of Apo-Enalapril. Merck has identified the need to obtain legal advice and the pending changes to the Patent Act found within Bill C-91 ("pending legislative policy") to be considerations relevant to the exercise of even a narrowly circumscribed discretion.

(b) Legal Advice

69 Merck has essentially asked this Court to find that the time needed to enable a decision-maker to seek and obtain legal advice in any decision-making process is of itself a basis for denying mandamus. It also implies that confessed ignorance of a law upon which divergent judicial legal opinions have been expressed affects the public's right to performance of a statutory duty. In my opinion, both submissions must be denied.

70 Merck's only support for its argument is the House of Lords' decision in Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service, [1980] 1 W.L.R. 302 (H.L.). In that case, the House of Lords determined that a labour relations board had the power to suspend, for a period of over two years, its process relating to conflicting accreditation applications. The Board felt compelled to await the outcome of indirectly related court proceedings before reaching a decision. Merck would apply this decision to maintain that as the Minister was entitled to seek legal advice, he was under no obligation to issue the NOC prior to March 12, 1993. I do not agree.

71 First, the relevant statute in Engineers' conferred upon the tribunal a significantly broader discretion than that accorded the Minister under the Patented Medicines Regulations. Second, the proceedings in that case were at a preliminary stage rather than at the final stage reached with Apotex's NDS (both reasons were offered by Dubé J.: at page 180). Finally, unlike the case before us, in Engineers' the delay caused by the need for legal clarification did not and could not automatically divest the parties of rights established under the relevant legislation.

72 The right of a decision-maker to obtain legal advice with respect to the legality of the performance of a duty is not in issue. Indeed, in light of the overwhelming opinion evidence with respect to the "legality" of issuing Apotex's NOC, the Minister's failure to seek departmental or outside opinions could have been perceived as an abdication of responsibility. But that self-imposed obligation cannot of itself deprive Apotex of its right to mandamus. In the absence of intervening legislation, the "legal advice" issue would not have arisen. It cannot now be invoked to argue that the Patented Medicines Regulations governed the ongoing decision-making process the moment they became law.

73 I am in agreement with Dubé J. that the legal advice justification is potentially endless and would almost necessarily result in allegations of abuse of discretion or unreasonable delay. Furthermore, the legal advice sought in this case had no bearing on the exercise of the Minister's narrowly circumscribed discretion. Its relevance transcends the principal question to be answered by the Minister: Is Apo-Enalapril a safe drug? This is not to suggest that once that question was answered the Minister can be said to have acted unlawfully by seeking legal advice. But the inevitable delay arising from the solicitation of legal advice (as opposed to unreasonable delay) cannot prejudice the right to performance of a statutory duty. The guiding principle is well known-equity deems to be done what should have been done. Moreover, to deny mandamus because of legal concerns generated by a party adverse in interest (Merck) is to judicially condone what might be regarded as a tactical manoeuvre intended to obfuscate and delay the decision-making process.

74 In light of the foregoing, it is unnecessary to deal with the learned Trial Judge's conclusion that [at page 181], "the Minister's delay in issuing the Apotex NOC was not warranted." Whether or not the delay was reasonable is not an issue upon which we can adjudicate as the necessary facts are not before us. Unless the Minister can establish another basis upon which to justify the decision to

withhold performance of a duty otherwise owed, Merck's argument must fail.

(c) Pending Legislative Policy-Relevant or Irrelevant Consideration

75 In support of its submission that pending legislative policy is a consideration relevant to the exercise of the Minister's discretion, counsel for Merck has referred us to three cases. In my opinion, none support the proposition stated. Nonetheless, I shall deal with each case and then turn to the more general question: As a matter of law, should the Minister be entitled to refrain from issuing the NOC on the basis of pending legislative policy?

76 The first of the decisions is Distribution Canada Inc. v. M.N.R., supra. In that case, the applicant sought mandamus to compel the Minister of National Revenue to enforce strictly the collection of duties on non-exempt groceries being purchased in the United States. At that time it was departmental policy not to collect duties of less than $1 or even higher amounts if other factors such as traffic volumes dictated. The Trial Judge drew a distinction between a total abdication of responsibility and conflicting views regarding how the law should be enforced and found that mandamus is only available in respect of the former. On appeal, this Court held that the Minister must take all reasonable measures to enforce the customs legislation; "[t]he reasonableness of [which] requires the assessment of policy considerations which are outside the domain of the courts since they deal with the manner in which the law ought to be enforced" (at page 40).

77 In Distribution Canada, the exercise of a ministerial discretion by reference to government policy did not have as its principal objective the divestiture of acquired rights. The Court simply concluded that the Minister enjoyed a discretion with which the law would not interfere. In any event, the precedential value of this decision has been misplaced. Its relevance arises in the context of the "balance of convenience" issue and accordingly will be addressed below.

78 The second case is Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment, Minister of the Environment and Province of Alberta (1983), 49 A.R. 360 (C.A.).[10] Here, the Alberta Court of Appeal was required to determine whether a Minister's policy views were relevant to the exercise of a discretion. The relevant subsection of the Clean Water Act, R.S.A. 1980, c. C-13, provides:

3 . . .

> (4) The Director of Standards and Approvals may issue or refuse to issue a permit or may require a change in location of the water facility or a change in the plans and specifications as a condition precedent to giving a permit under this section.

79 In Wimpey Western, the respondent denied the appellant a permit to construct its own waste water treatment facility on an industrial development site because it was felt that the erection of such treatment facilities should be deferred until a regional sewage plant was operational. That justification was in accord with the policy of the Minister of the Environment. The Court of Appeal held that the respondent's discretion was not limited to considerations of technical matters. The panel was unanimous in its analysis of the basis on which ministerial policy was deemed a relevant consideration (at pages 368-369):

> The purpose of the permit granting process in s. 3 is to give the Department power to control or limit potential sources of water contaminants before they are constructed. In my view, it is consistent with this purpose and with the wording of the section to allow the Director to consider a policy of his Minister aimed at limiting the number of points of discharge of contaminants into a waterway. It would seriously hamper the permit-granting system if the director could only look at applicants individually, but could not consider water quality objectives for the total river system.

80 The rather expansive view of relevant considerations advocated in Wimpey Western must be read in light of the broad discretionary power granted to the decision-maker. As well, the environmental aspects in Wimpey Western suggest a judicial predisposition, framed in terms of statutory construction, to recognize the promotion of public health concerns over a developer's self-interest. The Minister's discretion is carefully circumscribed in the case before us and specifically addresses health and efficacy concerns.

81 The last of the three cases cited, in my view, severely undermines Merck's position. In Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. (1965), 113 C.L.R. 177 (Aust. H.C.), the applicant sought an order of mandamus directing the respondent to allow it to import an aircraft and to issue the licence necessary for it to carry freight between cities. The legislation provided (at page 177):

> Regulation 199 of the Regulations provides:-" . . . (2) Where the proposed service is an interstate service, the Director-General shall issue an aerial work, charter or airline licence, as the case requires, unless the applicant has not complied with, or has not established that he is capable of complying during the currency of the licence with, the provisions of these Regulations, or of any direction or order given or made under these Regulations, relating to the safety of the operations." [Emphasis added.]

The respondent had refused both requests on the grounds of governmental policy against increasing the number of companies engaged in inter-State airfreight services.

82 On the issue of whether the charter licence should issue, a majority of the High Court of Australia held that mandamus was available as the respondent did not possess an unfettered discretion when deciding to issue a charter licence. The Court's rejection of government policy as a

relevant consideration is antithetical to Merck's submission. At pages 187-188, the High Court stated:

> The evidence, and particularly the Director-General's own statements, make it clear that his refusal of the charter licence had nothing whatever to do with any question of safety, and that in truth the prosecutor has established to the satisfaction of the Director-General that it is capable of complying with any and all provisions relating to the safety of the proposed operations. I read the Director-General's letter refusing the charter licence as acknowledging, even if unintentionally, that it was in spite of, and not because of, the concluding words of reg. 199(2) that the charter licence was being refused. I think the truth of the matter should be faced: the refusal of the licence was based upon nothing whatever but a policy against allowing anyone to participate in the relevant form of inter-State trade other than those already engaged in it. However wise and well-grounded in reason that policy may be, if the Regulations on their true construction authorize a refusal so based I should find great difficulty in avoiding the conclusion that reg. 197, in so far as it requires a charter licence for charter operations in inter-State air navigation, is invalid as being in conflict with s. 92 of the Constitution. In my opinion, however, such a refusal is contrary to the direct command of reg. 199(2).
>
> I regard this as a clear case for a writ of mandamus; and since on the view I take of the facts the Director-General is now under an absolute duty to issue a charter licence, a duty which is unqualified by any discretionary judgment still remaining to be exercised, I am of opinion that the tenor of the writ should be to command that that duty be performed. [Emphasis added.]

83 With respect to the application to import aircraft, the majority held that mandamus should not issue. Two of the three Judges held that this matter was within the ambit of the respondent's discretion. In a concurring judgment, the third Judge opined that the respondent was under an obligation to consider and act upon government policy (at pages 204-206). I should point out that the reasoning of the minority with respect to the first issue was premised on the reality that an order directing the respondent to issue a charter licence would be a practical nullity in light of the applicant's inability to obtain aircraft.

84 Anderson stands for the proposition that decision-makers vested with an unfettered discretion may have regard to existing government policy. What constitutes government policy (versus ministerial policy) is another matter. As the Minister's discretion in the instant case was narrowly circumscribed, it is evident that this case advances Apotex's position rather than Merck's.

85 Ultimately, the question before this Court is whether pending legislative policy can be a

relevant consideration notwithstanding the narrow scope of the Minister's discretion. As a matter of first impression, I am of the view that the law should not preclude the possibility of recognizing the Minister's right to refuse to perform a public duty on the basis of policy rationales underscoring impending legislation. Assuming that the Minister's discretion does not embrace health and safety criteria, it is conceivable that mandamus would not or should not issue where, for example, a person is entitled to a permit authorizing importation and sale of a product which the Minister, acting in good faith, believes poses an unacceptable health risk to Canadians. In this situation, a court may well adjourn a mandamus hearing if it could be shown that amending legislation is about to be brought into effect. In so doing, it would be effectively acknowledging and applying the "balance of convenience" test as a ground for refusing mandamus. It is thus not a question of whether the Minister has the power to refuse to perform a duty on the basis of pending changes to the legislation but whether the Court is willing to exercise its discretion to grant mandamus in light of the potential consequences.

86 Returning to the facts before us, in my view it cannot be said that in the exercise of his statutory power under the FDA Regulations the Minister was entitled to have regard to the provisions of Bill C-91 after they were enacted but before they were proclaimed in effect. In the circumstances of this case, pending legislative policy is not a relevant consideration which can be unilaterally invoked by the Minister.

(d) De Facto-Decision Never Made

87 Merck argues that the reason that the NOC did not issue before March 12, 1993, was because the Minister never considered Apotex's application. Since the Minister did not exercise his discretion, the learned Trial Judge erred in purporting to dictate the outcome of the Minister's deliberations. In the absence of a finding of bad faith on the part of the Minister Merck argues that Apotex could not have acquired a vested right to the NOC. Both parties support their arguments on this issue with reference to court decisions generated by the tightening of gun control measures in the late 1970s.

88 In 1977, Parliament introduced various amendments to the Criminal Code [R.S.C. 1970, c. C-34] (Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53) with a view to further restricting the use and sale of firearms in Canada. The legislation came into effect on January 1, 1978 and as a result, orders of mandamus were sought in a number of reported instances.[11] In each case the applicant had applied for a permit and had fulfilled all conditions precedent prior to January 1.

89 In Martinoff v. Gossen, [1979] 1 F.C. 327 (T.D.), the Trial Judge found that the applicant did not have an accrued right as of January 1 to a restricted weapons business permit. The Judge based his decision upon the fact that the respondent's authority to issue the permit had been revoked and that therefore there was no one who could issue the permit. Interestingly, he does not appear to have been influenced by the fact that the application was still being processed at the time the law came into effect.

90 In Lemyre v. Trudel, [1978] 2 F.C. 453 (T.D.); affd on other grounds, [1979] 2 F.C. 362 (C.A.), the applicant sought mandamus ordering the respondent to issue a registration certificate with respect to a fully automatic Walther MPL 9mm. At the time of the application the gun was classified as a restricted weapon which was required to be registered with the Commissioner of the RCMP. The amended Criminal Code prohibited possession of such a weapon unless [at page 363] "on the day on which this paragraph comes into force, [it] was registered as a restricted weapon." The applicant's registration was not approved by January 1. At trial, the Judge held that the applicant had no "acquired right to possess his weapon, since without the permit and certificate such possession was quite simply prohibited" (at page 457). In brief oral reasons, the Court of Appeal concluded that the only basis on which the appellant could succeed was by establishing that: "his weapon fell within this exception, namely that it was registered (not that it might or should have been) on January 1, 1978." (at page 364).

91 Lemyre contrasts sharply with the decision of the Saskatchewan Court of Appeal in Abell v. Commissioner of Royal Canadian Mounted Police (1979), 49 C.C.C. (2d) 193 (Sask. C.A.). In Abell, the applicant was successful in obtaining a registration permit for a "F.A. Mark II (1944) Sten gun". After canvassing the decisions in Ho Po Sang and Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra., the Saskatchewan Court of Appeal concluded that the applicant had complied with the requisite Criminal Code provisions as fully as possible prior to January 1, 1978 and therefore had acquired a right to have the weapon registered.

92 One commentator has noted that the decisions of this Court are "hard to reconcile" with Abell; see P.-A. Côté, supra, at pages 149-150. Yet it is not a question of choosing between Lemyre and Abell. Stare decisis dictates that the reasoning in Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra prevails. This is not to suggest that Lemyre or Martinoff would be decided any differently today; certainly, it is arguable that the "balance of convenience" would favour the same result.

93 In the end, I must conclude that Apotex had a vested right to the NOC notwithstanding the Minister's failure to render a decision by March 12, 1993.

(5) Balance of Convenience

94 If Apotex were found to be entitled to mandamus, Merck submits that this Court ought to exercise its discretion to refuse the order sought. It argues that mandamus should be denied where the effect would be to frustrate legislative change. Merck maintains that the principle established in Ottawa, City of v. Boyd Builders Ltd., supra, is persuasive authority for the proposition that this Court should not enforce the old legislation as Bill C-91 and the Patented Medicines Regulations were in place at the time of the hearing.

95 It is true that in Boyd Builders the Supreme Court acknowledged the relevance of pending legislative change when deciding whether to grant an order of mandamus. Unlike the Trial Judge, and with respect, I do not believe the argument can be side-stepped. Merck has touched upon what

has been described as a "controversial ground" upon which some courts have been prepared to deny mandamus. The decision in Boyd Builders has been cited as but one case in which courts have employed what has been labelled the "balance of convenience" test by weighing competing interests in determining the proper exercise of discretionary power: see J. M. Evans et al., Administrative Law: Cases, Text, and Materials, 3rd ed. (Toronto: Emond Montgomery, 1989), at page 1083.

96 Despite the way in which the issue was originally framed, three separate questions must be raised: (1) does the Court have the discretion to invoke the "balance of convenience" test as a ground for refusing mandamus? (2) if so, what are the criteria for its exercise? and (3) is this a case in which mandamus should be refused? I shall deal with each of the questions as required.

(a) The Ambit of the Court's Discretion-Balance of Convenience

97 The case law governing mandamus reveals a number of legal techniques by which courts have, on occasion, balanced competing interests. For example, when determining the relevancy or irrelevancy of considerations influencing the decision-maker, a Court may construe either broadly or narrowly the statutory discretion imposed by apparently clearly worded legislation. The same is true of provisions which seek to encroach upon vested rights. Indeed, a discussion of vested rights can be found to be underscored by policy considerations implicit in the formal reasons for judgment. Professor Côté offers a penetrating analysis of this process in The Interpretation of Legislation in Canada, supra, at page 143:

> It seems that judges, in ruling on the recognition of vested rights, silently weigh individual and social consequences. The greater the prejudice suffered by the individual, the greater are the chances that vested rights will be recognized. If the individual prejudice is relatively limited (for example, when the law simply determines a "procedure"), the court is more likely to apply the new law immediately. If the judge perceives the social consequences of delays in the application of the new statute to be significant (for example, if the health or safety of the public is endangered), there will be considerable hesitation to recognize vested rights. Where survival of the earlier statute is not viewed as a threat to the interests of society, the courts find it easier to admit the existence of vested rights.

98 The Court's discretion must be exercised discriminantly. One commentator cautions that as the scope of the Court's discretion can intrude upon the rule of law, it must be exercised with the greatest of care: see Sir W. Wade, Administrative Law, 6th ed. (Oxford: Clarendon, 1988), at page 709. Another has observed that the Court has no discretion to refuse mandamus when it is the only means of securing performance of a ministerial duty, while assuming at the same time that it is not available as of right: see S. A. de Smith, Judicial Review of Administrative Action, 4th ed. by J. M. Evans (London: Stevens, 1980), at page 558.

99 Merck has asked this Court to decline to interfere with the Minister's discretion even though

his failure to perform a statutory duty has been found to be unjustified, in effect rendering lawful that which has been deemed unlawful. It is perhaps with these concerns in mind that Dubé J. implied that the decision in Boyd Builders prohibited the Court from exercising its discretion to deny mandamus (at page 181). Certainly, the introduction of the "balance of convenience" variable into the mandamus equation ultimately leads to the question of whether there are any limits to the considerations upon which a Court may exercise its discretion.

100 Despite obvious concerns, the law reports yield a thread of cases which may collectively lead one to conclude that the courts have all but formally recognized another guiding principle in law of mandamus.[12] In Distribution Canada Inc. v. M.N.R., supra, discussed earlier, it could be argued that the Court effectively balanced the benefits of strict enforcement of a duty against the interests of the enforcers and the general public. Arguably, a similar balancing technique was adopted in the gun control decisions.

101 By contrast, the "balance of convenience" test was effectively recognized in Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources for Saskatchewan (1972), 30 D.L.R. (3d) 480 (Sask. Q.B.); affd (1973), 32 D.L.R. (3d) 107 (Sask C.A.); appeal to Supreme Court dismissed (1973), 38 D.L.R. (3d) 317. The Minister's discretion in that case was unfettered and mandamus could have been denied on that ground alone. However, both the trial and appeal Courts supported an alternative ground for refusing mandamus: such an order "would lead to confusion and disorder in the potash industry." At the Court of Appeal, Chief Justice Culliton stated (at page 115):

> The learned Chambers Judge also held that even if mandamus lay he would not, in the exercise of his discretion, grant it in any event. There can be no doubt that mandamus is above all a discretionary remedy. While it would be difficult to state, with certainty, all of the grounds upon which a Judge would be justified in refusing the writ in the exercise of his discretionary right, such grounds are indeed broad and extensive. No doubt the learned Chambers Judge felt that to grant mandamus in this case would lead to confusion and disorder in the potash industry. That this conclusion is sound is evident from the fact that all other potash producers opposed the application for mandamus. In my opinion, such a reason would be a valid one for the exercise of the learned Chambers Judge's discretion.

102 Other courts have presumed that the Court retains an inherent discretion to refuse mandatory relief in certain circumstances. In Fitzgerald v. Muldoon, [1976] 2 N.Z.L.R. 615 (S.C.) the then recently elected Prime Minister of New Zealand announced the abolition of a superannuation scheme as promised during the election campaign. After the announcement, the Board stopped enforcing payment under the superannuation legislation on the assurance of the Prime Minister that repealing legislation would be forthcoming. Although the Court granted a declaration that the actions of the Prime Minister were illegal, it refused to grant a mandatory injunction compelling the

Board to collect the required contributions. Instead it adjourned the proceedings for six months with a view to seeing whether the Government fulfilled its promise to repeal the superannuation scheme.

103 On the one hand, Fitzgerald ostensively supports the principle that the executive branch of government has no power to suspend the operation of a law. To quote Marceau J.A. in Carrier-Sekani Tribal Council v. Canada (Minister of the Environment), [1992] 3 F.C. 316 (C.A.), at page 347: "It is obvious that the will of Parliament is paramount and no administrative or executive authority is entitled to contravene it, whether directly or indirectly." However, by adjourning the mandamus hearing, the Court effectively suspended the operation of the law in any case.

104 In Fitzgerald, the Trial Judge was clearly motivated by the practical consequences of granting the order. Even if the superannuation scheme were reinstated immediately, it would have taken six weeks before its operation became effective while the recovery of contributions in arrears would take considerably longer. The Trial Judge concluded (at page 623):

> [I]t would be an altogether unwarranted step to require the machinery of the New Zealand Superannuation Act 1974 now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months.

105 It should be noted that the evidence before the Trial Judge supported the belief that Parliament was in a position to pass such legislation within the time frame envisaged by the adjournment.

106 Having regard to the above jurisprudence, I conclude that this Court possesses the discretion to refuse mandamus on the ground of "balance of convenience". The more difficult task is to identify the criteria to be applied in determining whether to exercise this discretionary power.

(b) Criteria for the Exercise of the Discretion

107 The jurisprudence reveals three factual patterns in which the balance of convenience test has been implicitly acknowledged. First, there are those cases where the administrative cost or chaos that would follow upon the order's issue is obvious and unacceptable; see Distribution Canada Inc. v. M.N.R., supra; Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources for Saskatchewan, supra; and Fitzgerald v. Muldoon, supra. It is noteworthy that in most of these cases the duty in question was owed to the public at large rather than the individual applicant. In this sense, the law of mandamus and the law of standing may be said to intersect. This relationship was implicitly acknowledged by Desjardins J.A. in Distribution Canada v. M.N.R., supra, at page 39:

> I am, for my part, inclined to think that with the addition of the Finlay case, the jurisprudence does not clearly exclude the possibility of extending standing to a proceeding in mandamus where there is public interest to be expressed and there is no other reasonable way for it to be brought to court.

Whether the "balance of convenience" test may be employed as an ostensive vehicle by which standing requirements may be further relaxed I leave for another day.

108 The second, if more speculative, ground for denying mandamus appears to arise in instances where potential health and safety risks to the public are perceived to outweigh an individual's right to pursue personal or economic interests; see Martinoff v. Gossen, supra; Lemyre v. Trudel, supra; and Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment Minister of the Environment and Province of Alberta, supra.

109 In this case, there is no issue that an order of mandamus would precipitate administrative chaos. It is true that such an order may well have the effect of encouraging other generic drug manufacturers who submitted NDSs before Bill C-91 and the Patented Medicines Regulations came into effect to file for mandamus. However, as only those manufacturers who meet the traditional mandamus requirements will be successful, this is not a case in which arguments in favour of administrative efficiency are particularly persuasive. Further, as Apo-Enalapril has met the safety and efficacy requirements under the FDA Regulations, no issue with respect to public health and safety arises. This leaves us with the line of authority as represented by Boyd Builders.

(c) Boyd Builders

110 Merck argues that the Boyd Builders principle enables this Court to exercise its discretion to deny mandamus since in that case the Court adjourned a mandamus hearing to allow a new regulatory regime to be implemented. In my view, this principle is misconceived. Indeed, even the interpretation forwarded by Merck does not advance its case.

111 Boyd Builders applied for a building permit at a time when the extant zoning by-law would have allowed for the proposed development. News of the proposed development generated adverse public reaction in response to which the city initiated the passage of a by-law amendment to thwart the developer's project. Prior to Boyd Builders, an application for a building permit could be defeated by the passage of a by-law amendment by the Municipal Council any time up to the issuing of the permit; see Toronto Corporation v. Roman Catholic Separate Schools Trustees, [1926] A.C. 81 (P.C.). On application for mandamus the city of Ottawa sought an adjournment until such time as the Ontario Municipal Board had the opportunity to approve or reject the by-law amendment. The Supreme Court set out a tri-partite test in determining whether to grant the adjournment: (1) the municipality must establish a pre-existing intent to rezone the property prior to the application for a permit; (2) the municipality must have acted in good faith; and (3) the municipality must have acted with dispatch in seeking passage and approval of the amending by-law.

112 It is now well established that the prima facie right of a property owner to utilize his or her property in accordance with existing zoning regulations is not to be disturbed unless an intent to rezone is shown to exist prior to the application for the permit. Of course, strict application of the Boyd Builders principle does not advance Merck's case. Apotex's application for a NOC preceded

Parliament's intent to introduce amending legislation by a period exceeding two years. Leaving that aside, it is my opinion that the Supreme Court was not inviting courts to become embroiled in the daily political skirmishes surrounding land use planning decisions by balancing the so-called "equities": it merely sought to establish a principle by which it could be determined whether a property owner had acquired a vested right to a building permit pending approval of a by-law amendment.

113 The current state of municipal law is that if a prior intent to rezone cannot be established, then the property owner can make claim to a vested right to a building permit. This principle cannot be invoked to support the exercise of the Court's discretion in issuing mandamus by balancing competing interests. Admittedly, there are those who argue that the judiciary should play a greater role in "balancing the equities", even in planning law (see Makuch, Canadian Municipal and Planning Law, (Toronto: Carswell, 1983), at pages 251-261), and undoubtedly cases in which courts have been willing to become embroiled in the politics of land use can be found in the reports; e.g., Re Hall and City of Toronto et al. (1979), 23 O.R. (2d) 86 (C.A.). But that, in my view, does not undermine the proper application of Boyd Builders.

114 In effect, the balance of convenience test authorizes the Court to use its discretion to displace the law of relevant considerations and the doctrine of vested rights. It should therefore be used only in the clearest of circumstances and not be perceived as a panacea for bridging legislative gaps. Unless courts are prepared to be drawn into the forum reserved for those elected to office, any inclination to engage in a balancing of interests must be measured strictly against the rule of law.

115 The argument that social or economic costs outweigh the rights of Apotex obfuscates what is essentially a private law issue. In the end, I conclude that the principle set out in Boyd Builders is of no relevance to the case before us, nor to the issue of the Court's discretion to refuse mandamus in this case on the ground of "balance of convenience." Accordingly, there is no legal basis upon which the "balance of convenience" test can be applied to deny Apotex the order which it seeks. I turn now to consider whether Apotex's vested right to the NOC was divested by BilI C-91 and the Patented Medicines Regulations.

(6) Retroactive or Retrospective

116 Merck argued that if Apotex acquired a vested right prior to March 12, 1993, such right was divested by subsections 5(1) and (2) of the Patented Medicines Regulations:

> 5. (1) Where a person files or, before the coming into force of these Regulations, has filed a submission for a notice of compliance in respect of a drug and wishes to compare that drug with, or make reference to, a drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the patent list,

. . .

(2) Where, after a second person files a submission for a notice of compliance, but before the notice of compliance is issued, a patent list is submitted or amended in respect of a patent pursuant to subsection 4(5), the second person shall amend the submission to include, in respect of that patent, the statement or allegation that is required by subsection (1). [Emphasis added.]

117 Leaving aside the question of the impact of the "balance of convenience" arguments on retrospective legislation, Merck proffers three distinct submissions.

118 Merck's first submission is policy-based. It asserts that Apotex created a "window of opportunity" for itself by obtaining a NOC notwithstanding the current legislation. Merck also maintains that Apotex is in effect seeking the assistance of this Court to facilitate patent infringement. (Illegality was not raised as an equitable bar to granting relief.) The relevant paragraphs from Merck's Memorandum state (appellants' memorandum of fact and law, paragraphs 87-89):

87. The Courts were not oblivious to patent rights when dealing with NOCs even under the former law. NOCs and patent rights have never occupied unrelated juristic solitudes. Under the former law, the Courts constantly emphasized that it was the compulsory license that affected the patent owners rights, and that the NOC merely enabled the generic drug company to exercise its rights under the compulsory license. The Court is now clearly confronted with a situation where Parliament has linked NOCs to protection of patent rights and the Court's assistance is being invoked to facilitate patent infringement.

. . .

88. Neither the Minister (nor the Court) should turn a blind eye to the fact that from and after February 4, 1993 the "compulsory license" provisions had been repealed, and the "property interests" of patent owners such as Merck were directly and expressly referenced in Bill C-91 and the Patented Medicines (Notice of Compliance) Regulations. Parliament could hardly make clearer the mischief it intended to address in these enactments.

89. Apotex seeks to create a "window of opportunity" for itself between the former statutory regime (where patent rights were dealt with under the compulsory licence provisions) and the present statutory regime (where issuance of an NOC is tied to patent protection). The President, CEO and COO of Apotex, Bernard Sherman, has repeatedly testified in these proceedings that he intends to market enalapril across Canada as soon as possible, notwithstanding the fact that the Merck patent does not expire until October 16, 2007.

119 While NOCs and patent rights are linked, they have never been mutually dependent. One of the purposes of the compulsory licensing scheme was to avoid costly and protracted litigation surrounding possible patent infringement provided that the generic was willing to pay royalties. This reality, however, does not lead inevitably to the conclusion that all generic products infringe patents. In my view all that can be said is that Apo-Enalapril is a "safe" drug. To refuse mandamus on the basis of Merck's argument would be to essentially prejudge the patent issue.

120 Practically speaking, Merck is seeking an interlocutory injunction against Apotex with respect to possible patent infringement without having to satisfy the conditions precedent imposed at law to the granting of such relief. (How section 6 of the Patented Medicines Regulations will be interpreted is another matter.) In the circumstances, an order in the nature of mandamus cannot reasonably be viewed as an instrument which "facilitates" patent infringement. This Court should not close the window of opportunity by ignoring the fact that Parliament had at its disposal an effective legislative tool for divesting Apotex of what the law holds to be an acquired right. Nor can this Court turn a blind eye to the availability of conventional legal procedures to thwart patent infringement.

121 Merck's second submission is premised on the Patented Medicines Regulations being "procedural" in nature. Unquestionably, if those regulations are so characterized then it is clear that Apotex's NDS would be subject to the new statutory regime; see Howard Smith Paper Mills Ltd. et al. v. The Queen, [1957] S.C.R. 403, per Cartwright J., at pages 419-420, quoting with approval Lord Blackburn in Gardner v. Lucas (1878), 3 App. Cas. 582 (H.L.), at page 603. However, the question we must address "is not simply whether the enactment is one affecting procedure but whether it affects procedure only and does not affect substantial rights of the parties": DeRoussy v. Nesbitt (1920), 53 D.L.R. 514 (Alta. C.A.), at page 516, per Harvey C.J., cited with approval in Angus v. Sun Alliance Insurance Co., [1988] 2 S.C.R. 256, at page 265, per La Forest J.

122 In the instant case, we are not dealing with procedural regulations per se. The imposition of a criterion that a NOC cannot issue with respect to a patent-linked NDS is clearly a substantive change in the law and hence subject to the rules of statutory construction applicable to legislation purporting to affect vested rights.

123 Merck's third submission is that the intended scope of subsection 5(1) is unambiguous. If that premise is valid then it necessarily follows that there is no room to invoke the canons of statutory construction designed to assist in the interpretation of ambiguous enactments. Merck seeks to avoid the application of the presumption against retroactive operation of statutes and the presumption of non-interference with vested rights, which: "only appl[y] where the legislation is in some way ambiguous and reasonably susceptible of two constructions"; Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271, at page 282, per Dickson J. (as he then was). In my view, subsections 5(1) and (2) do not manifestly seek to divest persons of acquired rights. They are at best ambiguous.

124 At this juncture the issue can be tackled in one of two ways. The first invokes an extensive analysis of the law dealing with retroactivity and retrospectivity. Critical to that analysis is the need to distinguish between the principle of non-retroactivity of statutes and the principle of non-interference with vested rights. Today, it is well recognized that a statutory enactment which is forward looking but which also impairs or affects vested rights is not necessarily retroactive. The distinctions are addressed in three Supreme Court decisions:[13] Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, supra; Attorney General of Quebec v. Expropriation Tribunal et al., [1986] 1 S.C.R. 732; and Venne v. Quebec (Commission de protection du territoire agricole), [1989] 1 S.C.R. 880 (see also Lorac Transport Ltd. v. Atra (The), [1987] 1 F.C. 108 (C.A.), per Hugessen J.A., at page 117). The second approach is much simpler and reinforces my opinion that in the circumstances of this case both interpretative presumptions are applicable and that Parliament had not intended subsections 5(1) and (2) of the Patented Medicines Regulations to intrude upon vested rights.

125 For the sake of argument, assume that subsection 5(1) expressly applies to all NOCs "in the pipeline", including those to which applicants have a vested right. No one can question the fact that Parliament has the authority to pass retroactive legislation, thereby divesting persons of an acquired right. It is equally clear, however, that vested rights cannot be divested by the Patented Medicines Regulations unless the enabling legislation, that is the Patent Act or Bill C-91, implicitly or explicitly authorize such encroachments; see generally Côté, supra, at page 152. The Supreme Court endorsed this approach to regulatory interpretation in A.G. for British Columbia et al. v. Parklane Private Hospital Ltd., [1975] 2 S.C.R. 47, at page 60, per Dickson J. (as he then was):

> If intra vires, Order in Council 4400 would serve to extinguish retrospectively the entire claim of Parklane, but in my view it fails to have that effect. The Lieutenant Governor in Council is empowered to enact regulations for the purposes of carrying into effect the provisions of the Act, but nothing expressly or by necessary implication contained in the Act authorizes the retrospective impairment by regulation of existing rights and obligations. [Emphasis added.]

126 It is one thing for a provision of an Act of Parliament to attempt to affect vested rights and quite another for a subsection of a regulation to do the same. With one exception, I could find no provision in the Bill C-91 specifically authorizing regulations to interfere with existing or vested rights. Certainly, subsection 55.2(4) of the Patent Act, the regulation-making provision, does not expressly or implicitly authorize regulations of a retroactive nature. This explains why the legislative draftsperson did not craft subsection 5(1) of the Patented Medicines Regulations so as to embrace all NDSs "in the pipeline" by referring specifically to those in which the applicant had acquired a vested right. In my estimation, the draftsperson knew that such formulation would be ultra vires the Governor in Council.

127 By contrast, subsection 12(1) of Bill C-91 expressly extinguishes all compulsory licences granted after December 20, 1991. Like the learned Trial Judge, I am driven to the conclusion that

Parliament could have done the same for NOCs "in the pipeline". A purposive interpretation of subsection 5(1) of the Patented Medicines Regulations and an appreciation of the ejusdem generis canon of statutory interpretation reveal that it only applies to NDSs which had not reached the point where the Minister's discretion was spent as of March 12, 1993.

(7) Jurisdiction of the Court

128 The final issue is whether the jurisdiction of this Court to grant judicial review has been "ousted" by the paramountcy provision in Bill C-91. Subsection 55.2(5) [of the Patent Act] reads:

55.2 . . .

(5) In the event of any inconsistency or conflict between

(a) this section or any regulations made under this section, and
(b) any Act of Parliament or any regulations made thereunder,

this section or the regulations made under this section shall prevail to the extent of the inconsistency or conflict. [Emphasis added.]

129 Merck's novel argument is succinctly outlined in its memorandum (at paragraphs 91-95 inclusive):

91. As previously discussed, the Patented Medicines (Notice of Compliance) Regulations on their face expressly apply to NOC applications pending before the Minister on March 12, 1993.
92. As of March 12, 1993 accordingly, Parliament had put in place a new procedure to govern disputes about the issuance or non-issuance of NOCs. The new procedure is set out in Sections 6 and 8 of the Patented Medicines (Notice of Compliance) Regulations.
93. The constitutional basis for the Federal Court Act is s. 101 of the Constitution Act 1867 which is directed to "the better Administration of the Laws of Canada".
94. The prohibition against issuance of an NOC in s. 7 of the Regulations until the procedure set out in ss. 6 and 8 of the Regulations has been complied with is as much "a law of Canada" as is s. 18 of the Federal Court Act. Indeed, and more importantly, Parliament has declared in s. 55.2(5) of the Regulations that the prohibition in the Regulations is paramount to s. 18 of the Federal Court Act and every other federal statute.

95. Accordingly, when this matter came on for a hearing on June 21, 1993, the Court had no more jurisdiction to issue mandamus to the Minister to issue an NOC than the Minister had jurisdiction on his own behalf to issue an NOC in the face of the prohibition in s. 7 of the Regulations.

130 I fail to see how subsection 55.2(5) or any other regulation thereunder can be said to be paramount to section 18 of the Federal Court Act [R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 4)]: see generally Friends of the Oldman River Society v. Canada (Minister of Transport), supra, per La Forest J., at pages 38-39. Am I to assume that as the Supreme Court of Canada is a statutory Court, it too lacks jurisdiction in this matter? The answer to this submission is self-evident. There is no paramountcy issue. We have been asked to determine whether the Patented Medicines Regulations are applicable. Subsection 55.2(5) cannot be construed as a privative clause insulating the Minister and the relevant legislation from judicial review. This submission is without merit.

CONCLUSION

131 The appeal and cross-appeal should be dismissed with costs.

132 Mahoney J.A.:-- I agree.

133 McDonald J.A.:-- I agree.

1 On January 5, 1993, Apotex attempted unsuccessfully to cause the Federal Court of Canada to enjoin Parliament from enacting the Bill.

2 On September 20, 1991, Merck sued Apotex for exporting enalapril to the United States and the Caribbean. Those patent infringement proceedings are still pending.

3 On appeal, Apotex encouraged this Court to infer from the Minister's refusal to disclose the substance of these opinions that they must support Apotex's legal position. I wish only to point out that I can think of a number of valid reasons why the Minister might not want a legal opinion, either favourable or unfavourable to the respective litigants, released.

4 I think it important to note that when counsel for the Minister sought the adjournment, he was not aware that the Patented Medicines Regulations would come into effect on March 12, 1993. No one, including counsel for Apotex, implied otherwise.

5 I am aware, however, that Apotex did allude to this matter; see memorandum by cross-appeal, Apotex, at p. 6, subparas. 8(c)(vi) and (vii).

6 Generally, the rule is that mandamus cannot issue with respect to a duty owed to the Crown. Historically, this issue has been framed as one concerning standing to bring a mandamus application. The Supreme Court has considerably loosened the requirements for standing over the decades; see Thorson v. Attorney General of Canada et al., [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265; Minister of Justice of Canada et al. v. Borowski, [1981] 2 S.C.R. 575; Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607. For a discussion of the application of these cases to mandamus proceedings, see Distribution Canada Inc. v. M.N.R., supra, per Desjardins J.A. at pp. 38-39.

7 These paragraphs of the Interpretation Act are narrower in scope than the common law principles which they essentially codify: see P.-A. Côté, The Interpretation of Legislation in Canada, 2nd ed. (Cowansville, Que.: Yvon Blais, 1991), at p. 94.

8 Merck vigorously disputed the application of ss. 43(c) and 44(c) of the Interpretation Act to this appeal. It argued that since the Patented Medicines Regulations constitute a legislative enactment rather than a repeal, the provisions of the Interpretation Act which ostensibly concern the repeal of an enactment are irrelevant. In my view a change in the law effected by the addition of a further criterion is equivalent to the repeal and replacement of the previous criteria. S. 10 of the Interpretation Act directs that substance prevail over form.

9 It is arguable that Pfizer undermines Merck's legal standing to seek an order of prohibition. In that case, Pfizer, an innovator drug manufacturer, sought to have this Court set aside a decision of the Minister to issue a NOC to Apotex for the drug Piroxicam. Apotex successfully had the application quashed since, inter alia, Pfizer was not a person directly affected by the decision of the Minister. Similarly, in Glaxo Canada, supra, Glaxo's application for an interlocutory injunction to restrain the Minister from issuing Apotex a NOC for the drug Ranitidine was dismissed for lack of standing. It follows that what one cannot do directly cannot be done indirectly. In this case, the issue of standing may have been subject to one of the numerous applications preceding the appeal. In the circumstances, I assume that Merck has the requisite standing.

10 See also case annotation, Peter P. Mercer, at pp. 248-251 [of (1983), 3 Admin. L.R. 248].

11 The only other case I am aware of is Haines v. Attorney General of Canada (1979), 32 N.S.R. (2d) 271 (C.A.). The facts of that case are too singular to be of use in this appeal.

12 Under English law it is said that mandamus may not issue where it would cause administrative chaos and public inconvenience despite conflicting authorities on this point (see Halsbury's Laws of England, 4th ed. reissue, Vol. 1(1): Administrative Law, para. 130, and conflicting cases gathered at note 12).

13 The distinction had been drawn earlier by this Court; see Northern & Central Gas Corp. v. National Energy Board, [1971] F.C. 149 (T.D.); Minister National Revenue v. Gustavson

Drilling (1964) Ltd., [1972] F.C. 92 (T.D.); and Zong v. Commissioner of Penitentiaries, [1976] 1 F.C. 657 (C.A.).

Decision No. 38-C-A-2014

February 7, 2014

COMPLAINT by Tom Brown against Air Canada.

File No.: M4120-3/13-05008

INTRODUCTION

[1] On September 2, 2013, Tom Brown filed a complaint with the Canadian Transportation Agency (Agency) alleging that Air Canada's fuel surcharges applicable to international and domestic transportation are unreasonable, and that statements relating to fuel surcharges appearing on Air Canada's Web site are misleading. Mr. Brown's submission included correspondence with Air Canada documenting an unresolved dispute with the carrier regarding the application of a fuel surcharge to Aeroplan reward tickets for return carriage between Canada and Europe.

[2] On October 18, 2013, Air Canada filed its answer, and on October 30, 2013, Mr. Brown filed his reply. In its answer, Air Canada included a preliminary motion seeking dismissal of Mr. Brown's complaint due to lack of jurisdiction. In his reply, Mr. Brown submitted, among other things, that Air Canada's domestic fuel surcharges seem reasonable.

[3] On November 1, 2013, Air Canada filed a submission in which it stated that Mr. Brown's reply included an allegation regarding Air Canada's fuel surcharge that was not present in his original complaint. Air Canada points out that specifically, Mr. Brown alleges that charging different fuel surcharge amounts for carriage in Business and Economy class is discriminatory. Air Canada therefore requested that it be provided with an opportunity to address that allegation. The Agency subsequently granted Air Canada's request, and on November 19, 2013, Air Canada filed its response respecting this particular matter. Mr. Brown filed his reply to the response on November 20, 2013.

[4] Mr. Brown purchased two tickets with Air Canada using Aeroplan reward miles to travel in October 2013 between Kelowna, British Columbia, Canada and Florence, Italy, via several points and using the services of two other air carriers. An amount of $1,552 was assessed for fuel surcharges.

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PRELIMINARY MATTER

Air Canada's preliminary motion requesting dismissal of the complaint

Position of Air Canada

[5] Air Canada requests, on a preliminary basis, pursuant to section 32 of the *Canadian Transportation Agency General Rules*, SOR/2005-35, as amended, that because Mr. Brown redeemed Aeroplan reward miles to purchase his tickets, the Agency dismiss the complaint because of lack of jurisdiction.

[6] Air Canada submits that in Decision No. 82-C-A-2009 (*Kouznetchik v. Air Canada*), the Agency dismissed the complaint due to the fact that the object of the complaint did not fall under the Agency's jurisdiction. Air Canada points out that Mr. Kouznetchik's complaint related to the purchase of Business class travel through the redemption of Aeroplan miles. Air Canada adds that, in that Decision, the Agency determined that Aeroplan is neither a licensee nor an air carrier for the purposes of section 110 of the *Air Transportation Regulations*, SOR/88-58 (ATR).

[7] Air Canada further submits that in Decision No. 451-C-A-2009 (*Hopkins v. Air Canada*), the Agency re-affirmed that it has no jurisdiction over interline tickets obtained through Aeroplan, and that in Decision No. 456-C-A-2009 (*Wyant v. Air Canada*), the Agency did not address the portion of the complaint associated with the fuel surcharges applying to carriage using Aeroplan reward miles.

[8] Air Canada maintains that given that Aeroplan reward miles were used by Mr. Brown to purchase his tickets, and on the basis of the principles applied by the Agency in Decision Nos. 82-C-A-2009, 451-C-A-2009 and 456-C-A-2009, the complaint should be dismissed.

Analysis and findings

Is the complaint against Aeroplan or Air Canada?

[9] The Agency must first determine exactly what sort of complaint is before it. Is the complaint one with respect to the application of fuel surcharges to Aeroplan rewards only, or a broader complaint regarding fuel surcharges generally as applied to non-reward tickets, or both? In the case before the Agency, context is key.

[10] Prior to filing his complaint with the Agency, Mr. Brown submitted a written complaint to Air Canada, the air carrier that issued the tickets for the carriage pursuant to the redemption of Mr. Brown's

Aeroplan points. The tickets involved carriage on Air Canada and other carriers for certain segments (i.e., interline tickets).

[11] Mr. Brown has provided extensive and detailed pleadings, which by virtue of their phrasing and the description of the charges with which he takes issue, including a description in the online complaint form of “Airline fuel surcharges (international and domestic)”, would appear to address, at a minimum, those charges that apply to Aeroplan tickets and regular tickets available for purchase, for the reasons set out below.

[12] In his October 30, 2013 reply to Air Canada’s answer, Mr. Brown makes reference to a variety of fuel surcharge figures respecting domestic flights. It is unclear whether these are in respect of Aeroplan or Air Canada’s flights. In that answer, however, Air Canada makes reference to the values of certain surcharges that it has filed as part of its international tariff.

[13] The www.aircanada.com Web site does not appear to provide a breakdown of fuel surcharges, but rather, lists “air transportation charges” and “taxes, fees and charges”. The former charges consist of the base fare and any Air Canada-originating charges, such as fuel surcharges or a recouping of air navigation charges (NAV Canada surcharge), while the latter are third party imposed charges, such as taxes (HST), airport improvement fees or security charges.

[14] By contrast, it is only with an Aeroplan booking that a more detailed fuel surcharge would appear to be explicitly communicated to the passenger.

[15] In examining Mr. Brown’s pleadings and their detailed focus on the difference between Economy class and Business class fuel surcharges, and the reasonability of the various amounts, the Agency finds that a portion of the complaint is with respect to Aeroplan. However, as Mr. Brown makes a broad complaint against “airline fuel surcharges” in general as applied by Air Canada, and Air Canada goes into detail about the application of fuel surcharges applied to his tickets, the Agency also finds that the application of carrier fuel surcharges form part of this complaint.

Does the Agency have jurisdiction to hear a case against Aeroplan?

[16] Air Canada refers to a developed jurisprudence from the Agency regarding jurisdiction over Aeroplan. Air Canada cites Decision No. 82-C-A-2009 in support of its conclusion that Aeroplan is outside the jurisdiction of the Agency. Paragraph 28 of that Decision states, in part:

> [...] the Agency finds that Aeroplan is neither a “licensee” under the CTA, nor an “air carrier” for the purposes of section 110 of the ATR. Therefore, the Agency has no jurisdiction over Aeroplan.

[17] Air Canada also cites Decision No. 451-C-A-2009, which states:

> The Agency finds that Mr. Hopkins’ carriage will be by means of an interline ticket obtained through Aeroplan, involving carriage by successive carriers as opposed to an Air Canada online or codeshare ticket. As determined by the Agency in Decision No. 82-C-A-2009 dated March 10,

> 2009 in response to a complaint by Vlad Kouznetchik against Air Canada, such transportation is governed by Aeroplan's terms and conditions.

[18] This conclusion was reiterated in Decision No. 456-C-A-2009.

[19] Accordingly, the Agency finds that it has no jurisdiction to consider Mr. Brown's complaint insofar as it relates to the issue of the terms and conditions of Mr. Brown's Aeroplan membership.

Air Canada's fuel surcharges

[20] In this case, Mr. Brown has specifically challenged the international fuel surcharges assessed by Air Canada that are described in its international tariff, a matter over which the Agency does have jurisdiction. While Mr. Brown points out in his complaint that his travel was booked through Aeroplan reward miles, his complaint also relates to the reasonableness of Air Canada's fuel surcharges. Further, Mr. Brown alleges that Air Canada's fuel surcharges applied to international Business class fares are unjustly discriminatory. Therefore, the Agency denies Air Canada's preliminary motion, and will consider Mr. Brown's complaint with respect to these two issues.

Air Canada's domestic fuel surcharges

[21] While Mr. Brown's complaint initially challenged the reasonableness of both domestic and international fuel surcharges, in his submission dated October 30, 2013, Mr. Brown states the following:

> I have no problem conceptually with fuel surcharges to account for volatility in fuel supply costs. Domestic fuel surcharges (now included in the base fare but still identifiable) seem reasonable. It is the quantum of international fuel surcharges that seems out of line and unfair.

[22] In light of the foregoing, the Agency will not consider the reasonableness of Air Canada's domestic fuel surcharges to the extent that any such fuel surcharges may exist.

ISSUES

1. Are Air Canada's fuel surcharges for international carriage unreasonable within the meaning of subsection 111(1) of the ATR?
2. Are Air Canada's fuel surcharges for international carriage in Business class unjustly discriminatory within the meaning of paragraph 111(2)(*a*) of the ATR?
3. Has Air Canada made a misleading statement regarding fuel surcharges on its Web site?

LEGISLATIVE CONTEXT

The following provisions of the ATR are applicable to this case:

18. Every scheduled international licence and non-scheduled international licence is subject to the following conditions:

[...]

(*b*) the licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto; and

[...]

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.

111. (2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(*a*) make any unjust discrimination against any person or other air carrier;

[...]

ISSUE 1: ARE AIR CANADA'S FUEL SURCHARGES FOR INTERNATIONAL CARRIAGE UNREASONABLE WITHIN THE MEANING OF SUBSECTION 111(1) OF THE ATR?

Positions of the parties

Mr. Brown

[23] Mr. Brown indicates that 10 years ago, to recoup the incremental increases in spiking fuel prices, carriers started with modest fuel surcharge amounts, which seemed to represent the differential between actual fuel price escalations and the general rate of inflation, but now it appears certain that Air Canada's fuel surcharges represent the entire cost of fuel.

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Air Canada

[24] Air Canada submits that prices, which include carrier-imposed surcharges set by carriers, are covered under the Agreement on Air Transport between Canada and the European Community and its Member States, signed on December 18, 2009, the terms of which include a restriction against unilateral action by aeronautical authorities.

[25] Air Canada asserts that in Decision No. 248-C-A-2002 (*Hall v. Air Canada*), in the context of the Air Transport Agreement between the Government of Canada and the Government of the United States of America signed on March 12, 2007, the Agency dismissed the complaint due to the finding that the fuel surcharge was not discriminatory or unreasonably high by reason of a dominant position.

[26] Air Canada contends that in Decision No. 103-A-2013, the Agency allowed Air Canada to extend its international fuel surcharge without an expiry date, and to no longer file tariffs reflecting fuel surcharges with expiry dates. In other words, the Agency determined that it no longer needed to closely monitor surcharges, such as fuel surcharges. Air Canada points out that Decision No. 103-A-2013 was issued following amendments to the ATR relating to all-inclusive price advertising of air services. Among other things, those amendments require carriers in Canada to display the total prices that the consumers must pay.

[27] Air Canada points out that in Decision No. 456-C-A-2009, the Agency decided, with respect to the tickets that were purchased by the complainant, that given fuel price volatility and competitive considerations, the fuel surcharges were not considered unjust or unreasonable.

[28] Air Canada underlines that the principles applied by the Agency in Decision No. 456-C-A-2009 remain applicable for the following reasons:

- The cost of fuel constitutes the largest percentage of Air Canada's operating costs;
- The cost of fuel remains volatile;
- The competitive landscape for flights between Canada and Europe requires that Air Canada continue to apply fuel surcharges to remain viable.

Mr. Brown

[29] Mr. Brown states that, conceptually, he has no problem with fuel surcharges to account for volatility in fuel supply costs. He adds that it is the quantum of international fuel surcharges that seems out of line and unfair.

[30] Mr. Brown maintains that fuel price escalation and volatility beyond the average inflation rate are warranted in the calculation of a fuel surcharge, whereas normal and expected annual price increases are not.

[31] Based on calculations he performed respecting certain markets, using what he identifies as a particular fuel surcharge for domestic carriage, Mr. Brown contends that Air Canada's fuel surcharges

for international transportation are more than five times higher than what they should be, and that surcharge revenue more than covers the entire cost of fuel.

Analysis and findings

[32] The Agency is of the opinion that, generally, air carriers should have the flexibility to price and market their fares as they see fit, subject to legislative or regulatory obligations. The Agency notes that transatlantic markers are served by many air carriers, several of which apply fuel surcharges. As such, the prices assessed by Air Canada, as well as other carriers, including fuel surcharges, are very much influenced by competitive forces.

[33] As noted above, Air Canada has incorporated fuel surcharges into its base fares for domestic carriage, and therefore, those surcharges, in fact, are not identifiable. As such, Mr. Brown's calculations to support his submission that the quantum of Air Canada's fuel surcharges for international carriage are unreasonably high are not persuasive because the basis for those calculations, i.e., a comparison between domestic and international fuel surcharges, is ill-founded given that domestic fuel surcharges are not identifiable in either Air Canada's domestic tariff or on its Web site.

[34] Moreover, even if there were clearly identifiable domestic fuel surcharges, differences in routing, aircraft type, passenger configuration and varying passenger loads between domestic and international routes would render such comparison, in the absence of considerably more detailed historical data, meaningless. The Agency is not persuaded by the calculations offered by Mr. Brown in support of his contention that the international fuel surcharges are set at unjustified multiples of a putative domestic fuel surcharge.

[35] Accordingly, the Agency finds that Air Canada's fuel surcharges are not unreasonable within the meaning of subsection 111(1) of the ATR.

[36] In light of the foregoing, the Agency need not address Air Canada's arguments regarding the Agreement on Air Transport between Canada and the European Community and its Member States, signed on December 18, 2009.

ISSUE 2: ARE AIR CANADA'S FUEL SURCHARGES FOR INTERNATIONAL CARRIAGE IN BUSINESS CLASS UNJUSTLY

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DISCRIMINATORY WITHIN THE MEANING OF PARAGRAPH 111(2)(*a*) OF THE ATR?

Positions of the parties

Mr. Brown

[37] Mr. Brown alleges that charging different fuel surcharges for carriage in Business class versus Economy class (almost double) is discriminatory. He submits that all other fees and surcharges (security, insurance, airport improvement, service taxes, etc.) are the same for all passengers regardless of class of service or actual fare paid.

Air Canada

[38] Air Canada states that its fuel surcharge can vary depending on the chosen route and whether a passenger purchases a fare for carriage in a premium cabin or Economy class. Air Canada asserts that imposing different fuel surcharges based on that purchase does not constitute discrimination, and that a person's choice of fare type is not an "individual right of fundamental importance".

[39] Air Canada points out that in Decision No. 456-C-A-2009, the Agency stated that a term or condition of carriage would be discriminatory if, for example, it singled out a particular category of traffic for different treatment. The Agency applied this interpretation in the context of Decision No. 150-C-A-2013, where the Agency decided on the alleged discrimination against passengers travelling with their pets, which passengers are subject to additional fees. The Agency determined that, as Air Canada's tariff rule applied equally to all passengers who wished to travel with their pet, there was no discrimination between any such passengers.

[40] Air Canada points out that in this case, the applicable fuel surcharge for premium cabin seating applies to all passengers and will be assumed by passengers who opt to purchase that class of service. Air Canada argues that, as such, its surcharge is not discriminatory, and therefore not unduly discriminatory.

[41] Air Canada submits that should the Agency determine that the fuel surcharge applied to carriage in the premium cabin is discriminatory, such surcharge is not unduly discriminatory. Air Canada argues that the increased fuel surcharge applicable to seats in the premium cabin is a necessary result of its operational and commercial obligations. In this regard, Air Canada points out that the amount of fuel consumed by an aircraft is largely contingent on the weight of the aircraft, and that a premium cabin seat is bigger in size and weighs more than a seat in Economy class. Air Canada also points out that the level of service in premium cabins requires a higher proportion of flight attendants per passenger. Air Canada adds that other items, such as the more generous free baggage allowance and metal cutlery, also increase the weight associated with the operation of a premium class product. Air Canada

contends that other major carriers, such as British Airways Plc carrying on business as British Airways, Société Air France carrying on business as Air France and Alitalia Compagnia Aerea Italiana S.p.A. carrying on business as C.A.I. Compagnia Aerea Italiana, C.A.I. and Alitalia, have also introduced a premium fuel surcharge on major routes involving travel to and from Canada, and that Air Canada would be at a significant competitive cost disadvantage if it were unable to apply a different fuel surcharge for its economy and premium cabin products.

Mr. Brown

[42] Mr. Brown reiterates that he has no problem with higher fuel surcharges for carriage in Business class versus Economy class, but does take issue with the quantum of the difference in surcharges. He submits that higher fuel surcharges for Business class travellers is justifiable, and that heavier seats, potentially more baggage and the additional weight of cutlery should be considered. Mr. Brown argues, however, that fuel surcharges for Business class carriage that are more than double the surcharges applied for Economy class carriage are excessive.

Analysis and findings

[43] The test to determine whether a toll or term and condition relating to the international carriage applied by a carrier is “unjustly discriminatory” within the meaning of paragraph 111(2)(*a*) of the ATR was established by the Agency in Decision No. 746-C-A-2005 (*Black v. Air Canada*), and reiterated in Decision No. 482-A-2012 (*Public Health Agency of Canada and Queen’s University v. Air Canada*), a case dealing with the refusal by Air Canada to carry non-human primates as cargo for laboratory purposes.

[44] The test is a two-step process. The Agency must first determine whether the toll or term and condition of carriage applied by the carrier is “discriminatory”. If the Agency finds that the toll or term and condition of carriage is discriminatory, the Agency must then determine whether such discrimination is “unjust”.

[45] In addition, in order for the Agency to determine whether a toll or term and condition of carriage applied by a carrier is “unjustly discriminatory”, it must adopt a contextual approach which balances the rights of the travelling public not to be subject to terms and conditions of carriage that are discriminatory, with the statutory, operational and commercial obligations of air carriers.

[46] The Agency has stated in past decisions that a toll or term and condition of carriage would be discriminatory if it singled out a particular passenger or group of passengers, or shippers, for different treatment for reasons that could not be justified.

[47] In Decision No. 482-A-2012, the Agency stated that:

> [128] The Agency agrees with HSIC and BUAV. Paragraph 111(2)(*a*) of the ATR states that no carrier shall, in respect of the tolls or the terms and conditions of carriage, make any unjust

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discrimination against any person or other air carrier. To demonstrate discrimination, the complainants (PHAC and Queen's University) must provide evidence that a burden, obligation or disadvantage has been imposed on a particular group of shippers. The Agency is of the opinion that Air Canada's Proposed Tariff Revisions treat all shippers equally. No specific shipper has been singled out for different treatment based on a specific characteristic. In this respect, the key element to consider is whether any specific shipper is treated differently, not the cargo itself. In this case, the Agency finds that the Proposed Tariff Revisions apply equally to all shippers and are therefore not discriminatory.

[129] It is recognized that discrimination against a shipper could be achieved indirectly by imposing a tariff in respect of a specific type of cargo that affects only one shipper or a group of shippers based on their characteristics. However, the Agency has found that there is a rational basis for the Proposed Tariff Revisions; they are not indirectly aimed at discriminating between shippers, but represent a business decision to discontinue transporting non-human primates for research purposes given the effect that continuing to do so could have on Air Canada's reputation and commercial interests. The Agency is of the opinion that air carriers should have the business flexibility to decide which type of cargo they want to transport. By itself, an air carrier's decision to stop transporting a specific type of cargo for reasons that are rationally related to a business decision does not constitute discrimination.

[130] The Agency's finding that the Proposed Tariff Revisions do not constitute discrimination is sufficient to dispose of this ground of complaint. However, even if the Agency had found the Proposed Tariff Revisions to be discriminatory, balancing the shipper's arguments against the Proposed Tariff Revisions with the statutory, operational and commercial obligations of Air Canada, the Agency is of the opinion that the Proposed Tariff Revisions cannot be considered to be "unjust".

[48] Mr. Brown states that he can understand why different levels of fuel surcharges are applied to Business and Economy class carriage, but objects to the quantum difference in those levels. Immediately, this takes the differential between Economy and Business class fuel surcharges out of dispute, leading only to a dispute over whether the quantum renders the fuel surcharges, as applied to Business class passengers, discriminatory.

[49] The Agency does not find Mr. Brown's submission to be compelling, and is of the opinion that he has not demonstrated that the quantum difference in the amounts of fuel surcharges assessed by Air Canada for Business and Economy class carriage is discriminatory according to the applicable analytical framework set out above, as described and applied in Decision No. 482−A−2012.

[50] Absent a finding of discrimination between similar passengers, the Agency does not have to determine whether that quantum in unjustly discriminatory within the meaning of paragraph 111(2)(*a*) of the ATR.

ISSUE 3: HAS AIR CANADA MADE A MISLEADING STATEMENT REGARDING FUEL SURCHARGES ON ITS WEB SITE?

Positions of the parties

Mr. Brown

[51] Mr. Brown maintains that as Air Canada's Web site indicates that the surcharge is a measure to offset partially the volatility of and fluctuations in operating costs associated with the price of fuel, to label the entire flight fuel cost as a "surcharge" is misleading and unsupportable.

Air Canada

[52] Air Canada asserts that it accurately reflects the fuel surcharges as part of the "Air Transportation Charges", which also include the base fare, and that, as such, Air Canada is in compliance with the provision in the ATR that requires carriers to include carrier-imposed charges under the heading "Air Transportation Charges".

Analysis and findings

[53] The Agency notes that neither Air Canada's international tariff nor Air Canada's Web site explains how Air Canada calculates its fuel surcharges. In addition, Mr. Brown has not provided convincing evidence with respect to actual fuel costs. Given the absence of testable hard data, it is not evident to the Agency that Air Canada has misrepresented the amounts it assessed as "surcharges".

[54] The Agency also notes that paragraph 18(*b*) of the ATR prohibits a licensee from publicly making any false or misleading statement relating to the licensee's air services, and that subsection 135.8(3) of the ATR provides that:

> A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

[55] In addition, the Agency notes that section 135.5 of the ATR defines "air transportation charge" as follows:

> [...] in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge.

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[56] In light of the foregoing, the Agency finds that, in including fuel surcharges as part of the base fare under the heading “Air Transportation Charges” on its Web site, Air Canada has not contravened paragraph 18(*b*) of the ATR by making a misleading statement.

CONCLUSION

[57] Based on the above findings, the Agency dismisses the complaint.

Member(s)

J. Mark MacKeigan

Indexed as:

Castillo v. Castillo

Maribel Anaya Castillo, appellant;
v.
Antonio Munoz Castillo, respondent, and
Attorney General of Alberta, intervener.

[2005] 3 S.C.R. 870

[2005] S.C.J. No. 68

2005 SCC 83

File No.: 30534.

Supreme Court of Canada

Heard: November 16, 2005;
Judgment: November 16, 2005;
Reasons delivered: December 22, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

(52 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Limitation of actions -- Conflict of laws -- Car accident in California -- Action brought in Alberta court -- Action statute-barred under California limitations law but within limitations period in Alberta -- Whether s. 12 of Alberta Limitations Act can revive an action time-barred by substantive law of place where accident occurred -- Limitations Act, R.S.A. 2000, c. L-12, s. 12.

Constitutional law -- Division of powers -- Administration of justice -- Time limits to entertain

actions -- Whether s. 12 of Alberta Limitations Act valid provincial legislation -- Constitution Act, 1867, s. 92(14) -- Limitations Act, R.S.A. 2000, c. L-12, s. 12.

Summary:

The parties, husband and wife, were involved in a single vehicle car accident in California. The wife brought an action against her husband in Alberta where the parties were resident within the province's two-year limitations period but after the California one-year limitations period had expired. The husband sought to have the action dismissed as statute-barred, but the wife argued that, under s. 12 of the Alberta *Limitations Act*, the two-year limitations period applied notwithstanding the expiry of California's one-year limitations [page871] period. Section 12 provides that "[t]he limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction." The Court of Queen's Bench dismissed the wife's action as statute-barred under California law, holding that in order to maintain the action in Alberta under s. 12, neither limitation period could have expired prior to the commencement of the action. The Court of Appeal upheld the decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.: The applicable substantive law governing the accident was the law of California, including its limitations law. Since the California limitations period applied and had expired prior to the commencement of the action, no right of action existed when the wife initiated her claim in the Alberta court. Section 12 of the *Limitations Act* does not purport to revive an action time-barred by the substantive law of the place where the accident occurred. [paras. 3-4] [para. 8]

In view of this interpretation of s. 12, it is unnecessary to determine whether the impugned provision exceeds the territorial limits on provincial legislative jurisdiction. Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act, 1867*. The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the Alberta courts can entertain actions, including live actions arising in a foreign jurisdiction and governed by the substantive law of that foreign jurisdiction. [paras. 5-6] [para. 10]

Per Bastarache J.: The legislative jurisdiction of the provinces is limited to matters "[i]n each Province" by the wording of s. 92 of the *Constitution Act, 1867*. Here, s. 12 of the *Limitations Act* is an unconstitutional attempt by Alberta to legislate extra-territorially. This is true for both interpretations of s. 12 proposed by the parties. The California one-year limitation period therefore applies to bar the wife's action. [para. 18] [para. 30] [para. 47] [para. 52]

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Limitation periods, like s. 12, are substantive in nature and have the effect of cancelling the substantive rights of plaintiffs and of vesting a right in defendants not to be sued. While the pith and substance of s. 12 is related to civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*, s. 12 exceeds the territorial limits of legislative competence contained in s. 92. The impugned provision not only did not provide for a meaningful connection between Alberta, the civil rights affected by s. 12, and the plaintiffs and defendants made subject to it, but it also disregarded the legislative sovereignty of other jurisdictions within which the substantive rights at issue were situated. [paras. 34-35] [para. 46] [para. 50]

Section 12 is, in essence, a choice of law rule that is not premised on any connection, other than the real and substantial connection necessary for the Alberta courts to take adjudicative jurisdiction, but the real and substantial connection established is not sufficient to provide a meaningful connection between the province, the legislative subject matter and the individuals made subject to the law. The real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue. Both notions cannot be conflated. [paras. 41-45]

Cases Cited

By Major J.

Followed: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

By Bastarache J.

Followed: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; **applied:** *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49; **referred to:** *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2005 SCC 38; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *McKay v. The Queen*, [1965] S.C.R. 798; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323; *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271; *Unifund Assurance [page873] Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 92, 92(13), (14).

Limitations Act, R.S.A. 2000, c. L-12, s. 12.

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History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Russell, Berger and Wittmann JJ.A.) (2004), 244 D.L.R. (4th) 603, [2004] 9 W.W.R. 609, 30 Alta. L.R. (4th) 67, 357 A.R. 288, 334 W.A.C. 288, 1 C.P.C. (6th) 82, 6 M.V.R. (5th) 1, [2004] A.J. No. 802 (QL), 2004 ABCA 158, upholding a decision of Rawlins J. (2002), 3 Alta. L.R. (4th) 84, 313 A.R. 189, 24 C.P.C. (5th) 310, [2002] A.J. No. 519 (QL), 2002 ABQB 379. Appeal dismissed.

Counsel:

Anne L. Kirker and Catherine McAteer, for the appellant.

Avon M. Mersey and Michael Sobkin, for the respondent.

Robert Normey, for the intervener.

The judgment of McLachlin C.J. and Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. was delivered by

1 MAJOR J.:-- The parties are husband and wife. While vacationing in California, they were involved in a single vehicle car accident on May 10, 1998. Both are residents of Alberta. The appellant wife sued the respondent husband in Calgary two years less a day after the date of the accident. The husband sought to have the action dismissed as statute-barred in accordance with the one-year limitation [page874] under California law. The wife argued that, under s. 12 of the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, Alberta's two-year limitations period applied notwithstanding the expiry of California's one-year limitations period, and that her action therefore ought to be

allowed to proceed.

2 Section 12 of the Act provides:

> **12** The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

3 In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, the Court held that the *lex loci delicti* -- the substantive law of the place where the tort occurred -- applies in a tort action. In that case the plaintiff was injured in a motor vehicle accident in Saskatchewan. His claim became time-barred in that province but he commenced an action in British Columbia where it was not. Our Court held that the Saskatchewan law that governed the action included the Saskatchewan limitations period and dismissed the claim. In the present case, following *Tolofson*, the Alberta Court of Queen's Bench found the applicable substantive law governing the car crash to be the law of California including California's limitations law, which barred the claim ((2002), 3 Alta. L.R. (4th) 84, 2002 ABQB 379). The trial judge held that to determine whether the wife's action should be allowed to proceed required consideration of both California's and Alberta's limitations laws. In order to maintain the action in Alberta, neither limitation period could have expired. The Court of Appeal of Alberta unanimously upheld the trial judge's finding ((2004), 30 Alta. L.R. (4th) 67, 2004 ABCA 158). I agree with their conclusion.

4 Since the California limitations period applied and had expired prior to the commencement of the [page875] action, there was no right of action at the time the appellant initiated her claim in the Alberta court. Section 12 does not purport to revive an action time-barred by the substantive law of the place where the accident occurred. Had the intention of the legislature been as argued, the legislation would have said so.

5 Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act, 1867* (the "Administration of Justice in the Province"). *Tolofson* was a "choice of law" case. The Court's classification of limitation periods for "choice of law" purposes as substantive rather than procedural did not (and did not purport to) deny the province's legislative authority over the "Administration of Justice in the Province". A foreign jurisdiction, by adopting a limitation period longer than that of Alberta, cannot validly impose on Alberta courts an obligation to hear a case that Alberta, as a matter of its own legislative policy, bars the court from entertaining.

6 The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the Alberta courts can entertain actions, including live actions arising in a foreign jurisdiction governed by the substantive law of that foreign jurisdiction.

7 In *Tolofson*, as stated, this Court concluded that limitations law, which in the past had frequently been classified as procedural in common law traditions and substantive in civil law

traditions, was, in fact, substantive in nature and must be treated as such. Accordingly, when the California limitation period expired on May 10, 1999, the appellant's action against her husband became time-barred, and he acquired a substantive right under California law not to be further troubled by any claims arising out of the car crash.

8 Section 12 does not purport to revive time-barred actions. In this case, the doors of the Alberta court [page876] were still open on May 9, 2000, when the claim was filed but there was no right of action arising under the law of California capable of being pursued by the wife against her husband. They both lived in Alberta but the law governing the consequences of the car crash, California's, had barred the claim a year earlier.

9 Section 12 will operate, of course, if the law in the place the accident occurred provides for a limitation period longer than that of Alberta. In such a case, the claimant might still have a live cause of action against a defendant in Alberta, but the effect of s. 12 would be to close the door of the Alberta court against the claim's being heard in that jurisdiction (though it may be capable of pursuit elsewhere). This result follows from the legislature's use of a "notwithstanding" provision in s. 12, i.e., "[t]he limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction".

10 Both the parties and the intervener made submissions on the constitutionality of s. 12 on the assumption that the Alberta legislature had purported to breathe life into an action that was time-barred by the applicable substantive law. As I conclude that s. 12 does no such thing, it is unnecessary to address the constitutional question.

Conclusion

11 The limitations law forming part of the applicable foreign substantive law, in this case California law, applies. As the applicable California limitation is one year, the appellant's action is statute-barred. The appeal is dismissed with costs.

The following are the reasons delivered by

BASTARACHE J.:--

1. Introduction

12 This appeal concerns the proper interpretation and constitutional validity of s. 12 of the Alberta [page877] *Limitations Act*, R.S.A. 2000, c. L-12, which provides:

> **12** The limitations law of the Province shall be applied whenever a remedial

> order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

The circumstances in which the question came to be presented to this Court are as follows.

13 While on a holiday, the parties were involved in a single car accident in or around Fresno, California, on May 10, 1998. The respondent was driving. The appellant and respondent are married and, at the time of the accident, were in the process of moving from British Columbia to Alberta. The vehicle they were driving was registered and insured in British Columbia. The parties have admitted that, for the purposes of this action, they were at all material times resident in Calgary, Alberta.

14 On May 9, 2000, the appellant filed a statement of claim in the Court of Queen's Bench of Alberta to recover compensation for the injuries and damages she sustained as a result of the accident. The respondent successfully sought an order for summary dismissal of the claim on the basis that the action was barred under California law, where the applicable limitation period is one year: (2002), 3 Alta. L.R. (4th) 84, 2002 ABQB 379. That decision was upheld by the Court of Appeal: (2004), 30 Alta. L.R. (4th) 67, 2004 ABCA 158. The appellant argues that the purpose and effect of s. 12 is to apply the two-year Alberta limitation period to the exclusion of the California one-year limitation period, thereby allowing the action to proceed.

15 The question before this Court is whether s. 12 effectively excludes the operation of the limitations law of the foreign jurisdiction whose laws otherwise govern the cause of action. Section 12 purports to apply Alberta limitations law "notwithstanding that, in accordance with conflict of [page878] law rules, the claim will be adjudicated under the substantive law of another jurisdiction". The difficulty in interpreting these words results in particular from the decision of this Court in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, which recognized that limitation periods are substantive. As such, the reference to the substantive law of the foreign jurisdiction in s. 12 would normally include that jurisdiction's limitations law. The appellant argues here, however, that the use of the word "notwithstanding" serves to exclude the limitations law of the foreign jurisdiction.

16 If, as the appellant suggests, s. 12 is interpreted as ousting the limitations law of the foreign jurisdiction, then Alberta limitations law applies exclusively in all cases where a remedial order is sought in Alberta. Where, as here, the relevant California limitation period is shorter than Alberta's, the longer Alberta limitation period applies and effectively recognizes a cause of action that California law would have extinguished. If the relevant California limitation period were longer than Alberta's, then the shorter Alberta limitation period would apply so as to bar the action in Alberta. Whether the appellant could file an action in California in such a case is not discussed by the Court of Appeal; this question is no doubt left to a determination of the *forum conveniens* by the court in which the action is eventually brought.

17 If, as the respondent suggests, s. 12 is interpreted so as not to oust the limitations law of the

foreign jurisdiction, then the court must apply the California limitation period first, followed by the Alberta limitation period. This is because the Alberta limitation period applies notwithstanding the fact that the claim is adjudicated under the substantive law of the foreign jurisdiction, including its limitations law. Thus, where, as here, the substantive law of California bars the action, the Alberta limitations law does not apply. This is because there is no right upon which a remedial [page879] order can be sought in the Alberta courts, and the conditions of s. 12 are therefore not met.

18 For the reasons that follow, I conclude that either interpretation of s. 12 results in an unconstitutional attempt by the province of Alberta to legislate extra-territorially.

2. The Proper Interpretation of Section 12 of the *Limitations Act*

2.1 *The Plain Language of Section 12*

19 The parties differ as to the meaning of the term "notwithstanding", specifically whether it ousts the limitations law of the foreign jurisdiction. According to P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 356:

> Because the legislature is aware of possible inconsistencies, it sometimes adopts explicit rules establishing an order of priority between different enactments.
>
> A variety of well-known terms is used. The statute will declare that it applies "notwithstanding" provisions to the contrary. If, on the other hand, precedence is to be given to another provision, the statute will operate "subject to" that enactment. Sometimes, a statute will contain a separate section decreeing that its provisions "prevail over any provision of any statute which may be inconsistent therewith".
>
> Two types of difficulty arise with this kind of enactment. The more obvious is the problem of identifying the inconsistency. This is not always a simple matter. Deciding on the mere existence of inconsistency itself gives rise to major issues of interpretation. [Emphasis added; footnotes omitted.]

20 Accepting for the sake of argument only that the use of the term "notwithstanding" establishes an order of priority favouring the application of Alberta limitations law in case of inconsistency, the question is whether an inconsistency arises as a result of the application of both limitations laws. [page880] The Alberta Court of Appeal concluded that the proper interpretation of s. 12 requires consideration of both California's and Alberta's limitations laws. The end result is that in order for an action to proceed in the Alberta courts, neither the foreign limitation period nor the Alberta limitation period can have expired. The Court of Appeal found that s. 12 recognizes that California

law governs and therefore creates the cause of action; the effect of s. 12 would then merely be to shorten the time period within which an action can be brought in Alberta: see *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2005 SCC 38.

21 Nonetheless, the operation of both limitation periods may result in an implicit inconsistency. Professor Côté explains that "implicit inconsistency occurs when the cumulative application of the two statutes creates such unlikely and absurd results that it is fair to believe this was not what the legislature desired" (p. 352). The effect of the Court of Appeal's interpretation would be the following: in actions proceeding before the Alberta courts where foreign law applies, the defendant would always benefit from the shortest available limitation period. There does not seem to be any legislative purpose served by such a result. If it is determined that the application of both limitations laws results in an implicit inconsistency, then the effect of the term "notwithstanding" is to favour the application of Alberta limitations law to the exclusion of foreign limitations law. Such an interpretation is likely more faithful to what the legislature intended. In fact, the legislature's inclusion of the word "notwithstanding" suggests that it contemplated the possibility that inconsistencies would arise in the application of both the forum limitations law and the foreign limitations law.

2.2 *Extrinsic Evidence of Legislative Intent*

22 This Court has consistently held that

> [t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire [page881] context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *The Construction of Statutes* (2nd ed. 1983), at p. 87)

23 The appellant contends that where the plain language of a legislative provision is clear and unambiguous, extrinsic evidence of legislative intent should not be admissible. I do not find the ordinary meaning of s. 12 to be clear and unambiguous. I would also question whether statutory interpretation should ever proceed solely on the basis of the plain language of the legislation, without consideration of the entire context, including the purpose and the scheme of the Act. In approving of Professor Driedger's approach to statutory interpretation, Iacobucci J. recognized that "statutory interpretation cannot be founded on the wording of the legislation alone" (*Rizzo & Rizzo Shoes*, at para. 21; see also R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 9-18). It is now well accepted that legislative history, Parliamentary debates and similar material may be quite properly considered as long as they are relevant and reliable and not assigned undue weight: *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 17.

24 There is very little available extrinsic evidence of the legislative intent behind s. 12. The appellant relies on the Alberta Law Reform Institute, Report No. 55, *Limitations* (1989), which concluded that limitations law was properly classified as procedural and that courts should apply local procedural law. The recommendation in the Report to include s. 12 in the new Alberta *Limitations Act* was premised in part on the uncertainty resulting from the characterization of limitation periods as substantive or procedural, depending upon their particular wording. The Report predated the decision in *Tolofson* by five years. In *Tolofson*, La Forest J. recognized that all limitation periods, regardless of [page882] their particular wording, were substantive, thereby resolving the uncertainty that had motivated the Report and its recommendation.

25 More importantly, there is no evidence on the record that the legislature considered or debated *Tolofson* or the Report, which was not tabled at the time the Act was introduced and passed. The government of Alberta opted not to implement the Report's recommendation in 1989. In 1996, s. 12 was introduced by way of private member's bill. The only other extrinsic evidence upon which the appellant relies is a single sentence spoken by Mr. Herard, the member of the Legislature who introduced the bill:

> To remove the often difficult task of categorizing limitations legislation to determine whose law applies to a claim, Bill 205 states that, regardless, limitations law is governed by Alberta law if an action is brought in this province.
>
> (*Alberta Hansard*, vol. I, 23rd Leg., 4th Sess., March 20, 1996, at p. 707)

Such evidence, taken alone, cannot be indicative of legislative intent. In fact, Mr. Herard refers to the difficult task of categorizing limitations legislation, even though La Forest J. authoritatively recognized in *Tolofson* that all limitation periods are substantive in nature.

2.3 *The Presumption Against Changing the Common Law*

26 This principle was recently affirmed by Iacobucci J., speaking for a majority of this Court in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 39:

> To begin with, I think it useful to stress the presumption that the legislature does not intend to change [page883] existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed". In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that

> "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law".

27 I do not find the principle to be applicable in this case. As mentioned earlier, the relevant principles of common law were developed by La Forest J. in *Tolofson*. In that case, La Forest J. held that the rule of private international law that should generally be applied in torts is the law of the place where the activity occurred or the *lex loci delicti*. This choice of law rule was largely premised on the territorial principle that organizes the international legal order and federalism in Canada. La Forest J. was also motivated by a number of important policy considerations, including the need for certainty, predictability, and ease of application. The *lex loci delicti* rule has the benefit of being forum-neutral and eliminates potential forum-shopping concerns. La Forest J. explained that "[o]rdinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly" (*Tolofson*, at pp. 1050-51).

28 Also in *Tolofson*, La Forest J. determined that where the governing law is the *lex loci delicti*, the relevant limitation period under that law is applicable and binding on the court hearing the dispute. The reason for this was that limitation periods constitute substantive law. I shall return to this issue in addressing the constitutionality of the impugned legislation. Generally then, the common law provides that the law of the place of the tort governs and that the limitation period it prescribes is [page884] applicable and binding on the court in which the action proceeds.

29 Section 12 accepts that "in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction". However, it seeks to apply Alberta limitations law "notwithstanding" these rules. The interpretation suggested by the appellant means that Alberta limitations law will displace the foreign limitations law in all cases. In effect, her argument would suggest that s. 12 has determined that limitation periods are procedural. The interpretation suggested by the respondent means that Alberta limitations law will only displace the foreign limitations law in cases where the applicable Alberta limitation period is shorter than its foreign counterpart. Effectively, the respondent argues that though the limitation period of California is part of its substantive law, Alberta can apply a procedural limitation period to determine whether a cause of action subsisting under the laws of California can be adjudicated in Alberta. Since both interpretations alter the common law, the presumption cannot be determinative.

2.4 *The Presumption Against Extra-Territorial Effect*

30 The legislative jurisdiction of the provinces is limited to matters "[i]n each Province" by the wording of s. 92 of the *Constitution Act, 1867*. Unless otherwise explicitly or implicitly provided, legislatures are presumed to respect the territorial limits of their legislative powers: Côté, at pp. 200-203. If possible, legislation should be construed in a manner consistent with this presumed intent. Similarly, it is now accepted that where legislation is open to more than one meaning, it

should be interpreted so as to make it consistent with the Constitution: *McKay v. The Queen*, [1965] S.C.R. 798, at p. 803; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078.

31 The parties have proposed two interpretations of s. 12. Although I find the interpretation [page885] suggested by the appellant to be more plausible, there is insufficient indicia of legislative intent to determine which interpretation should be preferred. I will therefore address the constitutionality of both interpretations.

3. The Constitutional Validity of Section 12 of the *Limitations Act*

32 The most recent authority on extra-territoriality is *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49. The legislative power of the provinces is territorially limited as a result of the words "[i]n each Province" appearing in the introductory paragraph of s. 92 of the *Constitution Act, 1867*, as well as by the requirements of order and fairness that underlie Canadian federalism: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1102-3; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 324-25; *Imperial Tobacco*, at paras. 26-27. The dual purposes of s. 92 are to ensure that provincial legislation has a meaningful connection to the enacting province and to pay respect to the legislative sovereignty of other territories: *Imperial Tobacco*, at para. 36.

33 The first step is to determine the pith and substance of the legislation and to determine under what head of power it falls: *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 332; *Imperial Tobacco*, at para. 36. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it: *Imperial Tobacco*, at para. 36. The court must also consider whether s. 12 pays respect to the legislative sovereignty of other territories: *Imperial Tobacco*, at para. 36. If these two conditions are met, then the purposes of s. 92 of the *Constitution Act, 1867* are respected and the legislation is valid.

3.1 *The Pith and Substance of Section 12 of the Limitations Act*

34 The purpose and effect of s. 12 is to render Alberta limitations law applicable whenever a [page886] remedial order is sought in the Alberta courts. Alberta limitations law being ordinarily applicable in cases proceeding before the Alberta courts where Alberta law otherwise governs the claim, the only circumstance in which s. 12 operates is where the Alberta conflict of law rules point to the substantive law of another jurisdiction as governing the cause of action. Typically, in applying this other law, the Alberta court would also apply the limitation period it prescribes, as this Court recognized in *Tolofson* that limitation periods are substantive in nature. The purpose and effect of s. 12 is therefore to render Alberta limitations law applicable in cases where it would not otherwise be -- precisely because the Alberta choice of law rules point to the law of a foreign jurisdiction as the governing law.

35 Limitation periods have the effects of cancelling the substantive rights of plaintiffs and of

vesting a right in defendants not to be sued in such cases. The pith and substance of the law must therefore be characterized as relating to civil rights, pursuant to s. 92(13) of the *Constitution Act, 1867*.

36 The appellant contended in oral argument that it was open to the Alberta Legislature to reverse the holding in *Tolofson* that limitation periods are substantive law and that this is what Alberta did by adopting s. 12. I believe this argument rests on a misunderstanding of *Tolofson*. La Forest J. did not decide as a principle of common law that limitation periods should simply be treated substantively. Instead, La Forest J. explained that "the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of *both* parties" (*Tolofson*, at pp. 1071-72 (emphasis in original)). La Forest J. recognized that limitation periods are, *by their very nature*, substantive, precisely because they are determinative of the rights of both parties in a cause of action: they destroy the right of the plaintiff to bring suit and vest a right in the [page887] defendant to be free from suit. The provinces cannot change the nature of limitations law without fundamentally changing the content of limitations law. No implicit intention to that effect could be found in the present case. Indeed, because substantive legislation can be applied by a court so as to affect rights governed by a foreign law, "legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive" (*Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323 (B.C.C.A.), at p. 328, cited with approval in *Tolofson*, at pp. 1068-69).

37 The procedural/substantive distinction is essentially a label. That label, however, has important constitutional consequences. Where a law is characterized as procedural, it constitutes valid law under s. 92(14) of the *Constitution Act, 1867*, as relating to the administration of justice within the province, so long as it applies to the Alberta courts or to actions proceeding before the Alberta courts. No other enquiry is required. If Alberta can treat limitation periods as procedural, then it can prescribe limitation periods for all actions proceeding before the Alberta courts without ever running afoul of the Constitution. If a law is characterized as substantive, however, it must be justified pursuant to s. 92(13) of the *Constitution Act, 1867*, as relating to civil rights in the province, meaning that the *Imperial Tobacco* analysis for the *situs* of intangibles is engaged. To allow Alberta to treat limitation periods as procedural is, essentially, to allow it to circumvent the *Imperial Tobacco* meaningful connection test. The effect would be to allow Alberta to legislate extra-territorially. In other words, the question of whether limitation periods are procedural or substantive is not something the province can decide. The reason for this is that the procedural/substantive distinction essentially determines, for purposes of constitutional validity, whether a law falls under s. 92(14) or s. 92(13) of the Constitution. That distinction must be based [page888] on something other than what a province says. It should in my view be based on the actual effects of the law. The effects of limitation periods were made clear in *Tolofson*: they cancel the substantive rights of plaintiffs to bring the suit, and they vest a right in defendants to be free from suit. This is the reality Alberta cannot ignore.

38 This may seem strange in light of the common law's traditional conception of limitation periods as procedural. This conception was relatively unchallenged until the decision in *Tolofson*, although La Forest J. notes at pp. 1071-72 that some common law courts had already begun to chip away at the right/remedy distinction on the basis of relevant policy considerations. In addition, at least one Canadian common law judge had recognized that limitation periods vest a right in the defendant to be free from suit: Stratton C.J.N.B., in *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271 (C.A.), at p. 275-76, cited with approval in *Tolofson*, at p. 1072. La Forest J. identified the two main reasons for the common law's long and mistaken acceptance of the procedural nature of limitation periods: the view that foreign litigants should not be granted advantages not available to forum litigants, and the mystical view that a common law cause of action gave the plaintiff a right that endured forever (*Tolofson*, at p. 1069). Neither of these is persuasive. I think the principle developed in *Tolofson* should no longer be questioned.

39 Nonetheless, the common law long considered limitation periods as procedural, such that it may [page889] seem strange, at first glance, to conclude that limitations law must be considered substantive and, as regards provincial legislation, must be justified pursuant to s. 92(13) of the *Constitution Act, 1867*, as constituting laws in pith and substance directed at civil rights. The characterization of limitation periods has up until now never raised constitutional concerns. This is the first time this Court has addressed a legislated choice of law rule dealing with limitation periods and had to pronounce on its constitutionality. In dealing with the issue, the Court must first recognize that the provinces cannot legislate extra-territorially. The common law was not similarly concerned with the territoriality principle until the decision in *Tolofson*, where La Forest J. refers to it explicitly. In holding that the proper choice of law rule for torts was the *lex loci delicti*, or the law of the place of the tort, La Forest J. explained that:

> It will be obvious from what I have just said that I do not accept the former British rule, adopted in *McLean v. Pettigrew*, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being "unjustifiable" in the other country. As I see it, this involves a court's defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. [Emphasis added; p. 1052.]

Turning to the mistaken common law rule that limitation periods are procedural, La Forest J. referred to this same analysis: "The principle justification for the rule [that limitation periods are procedural], preferring the *lex fori* over the *lex loci delicti*, we saw, has been displaced by this case" (p. 1071). In *Tolofson*, La Forest J. was formulating common law choice of law rules. In this case, the Court is faced with a provincially legislated choice of law rule. It must be remembered that the territoriality principle of which La Forest J. speaks is not merely a matter of comity; it also constitutes a [page890] constitutional limit on the legislative jurisdiction of the provinces.

40 The next question is whether, pursuant to the test developed in *Imperial Tobacco*, the rights to

which s. 12 purports to apply are located in the province within the meaning of s. 92 of the *Constitution Act, 1867*. If they are not, s. 12 will be deemed unconstitutional because of its extra-territorial effects.

3.2 *The Meaningful Connection Test*

41 Section 12 only renders Alberta limitations law applicable to actions proceeding before the Alberta courts. It constitutes in this sense a legislated choice of law rule that determines when the Alberta courts will apply Alberta limitations law. The appellant contends that the law on adjudicative jurisdiction and *forum conveniens* will ensure that, in all cases where s. 12 renders Alberta limitations law applicable, a real and substantial connection between Alberta and the cause of action will have been demonstrated. However, a real and substantial connection is not equivalent to a meaningful connection as defined in *Imperial Tobacco*. The two notions cannot be conflated.

42 In order for provincial legislation to be valid, there must be a meaningful connection between the enacting province, the legislative subject matter and the persons made subject to it. By contrast, the existence of a "real and substantial connection" is a more flexible inquiry that is meant to determine which court should hear the case as a matter of convenience. As La Forest J. explained in *Hunt*, at p. 325, the test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction". Binnie J. stated in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 58, that "a 'real [page891] and substantial connection' sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome".

43 Turning to the doctrine of *forum conveniens*, it is generally concerned with matters of convenience. This is why the real and substantial connection test and the *forum conveniens* doctrine do not necessarily require the same degree of connection between the province, the subject matter of the relevant law and the parties subject to that law, as does the *Imperial Tobacco* test. This led La Forest J. to recognize in *Tolofson*, at p. 1070, that "[t]he court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order."

44 The parties are making arguments that, should they be accepted, would bring this Court to conflate the constitutional threshold for adjudicative jurisdiction and the constitutional threshold for legislative jurisdiction. Such a result is unwarranted and would be contrary to *Imperial Tobacco*. The real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue.

45 Section 12 is, in essence, a choice of law rule that is not premised on any connection other than the real and substantial connection necessary for the Alberta courts to take adjudicative jurisdiction. I therefore conclude that the real and substantial connection established is not sufficient

to provide a meaningful connection between the province, the legislative subject matter and the individuals made subject to the law. Relying partly on *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), I concluded in dissenting reasons in *Unifund Assurance*, at para. 133, that "a link with the subject matter of [page892] the claim is sufficient to establish the jurisdiction *simpliciter* of a forum given the flexible approach that has been endorsed by this Court". The flexibility of the approach used to determine jurisdiction is reflected in the unanimous decision of the Ontario Court of Appeal in *Muscutt*, which identifies the factors which ought to be considered:

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;
- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature; and
- comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

These factors are not strictly concerned with the connection of the forum to the parties and the cause of action. Instead, these factors reflect important policy considerations such as fairness, comity and efficiency.

46 Since s. 12 does not provide for a meaningful connection between Alberta, the civil rights affected by s. 12, and the plaintiffs and defendants made subject to s. 12, it violates the territorial limits of legislative competence contained in s. 92 of the *Constitution Act, 1867*. The purpose and effect of s. 12 is to apply Alberta law so as to destroy accrued and existing rights situate without [page893] the province, regardless of whether or not Alberta has a meaningful connection to those rights or right-holders.

47 This is true for both proposed interpretations. The interpretation suggested by the appellant means that in all cases where a remedial order is sought in Alberta and where foreign law governs the claim, s. 12 will destroy the substantive right of either the plaintiff or the defendant. Where the Alberta limitation period is shorter than its foreign counterpart, s. 12 will destroy the right of the plaintiff to bring the suit. Where the Alberta limitation period is longer than its foreign counterpart, s. 12 will destroy the right of the defendant to be free from suit.

48 The interpretation suggested by the respondent means that s. 12 only has effect where the Alberta limitation period is shorter than the foreign limitation period. Where the Alberta limitation period is longer than its foreign counterpart, the respondent argues that the cause of action will have ceased to exist under the foreign law and that there will therefore be no claim upon which to sue in Alberta. According to this interpretation, s. 12 only destroys the substantive rights of plaintiffs.

Leaving aside the correctness of this interpretation, the fact that s. 12 destroys the substantive rights of plaintiffs to bring suit is sufficient to render it unconstitutional. This is because Alberta is legislating so as to destroy the substantive rights of plaintiffs to bring an action without providing for a meaningful connection between Alberta, the rights in question and the right-holders.

49 The notion that this problem can be overcome because a new action could be started in California, even where the Alberta court has decided that it constitutes the proper forum, is questionable. The question of whether or not the action could proceed in California is not before the Court. Instead, an Alberta court has taken jurisdiction and, in accordance with s. 12, must apply the substantive law of California to govern the claim. Here, the effect of s. 12 is then to deny the plaintiff the right to bring the suit. Accepting that s. 12 does not provide a [page894] meaningful connection between Alberta and the right upon which the plaintiff is suing, such an interference with the plaintiff's right is unconstitutional.

50 For the reasons given above, s. 12 of the *Limitations Act* also fails the second branch of the *Imperial Tobacco* test insofar as it simply disregards the legislative sovereignty of other jurisdictions within which the substantive rights at issue are situated.

51 This is not to say that the provinces are constitutionally prohibited from modifying the ordinary choice of law rules. However, should they chose to do so, they must legislate within their territorial limits and ensure that there is a meaningful connection between the enacting province, the legislative subject matter and the persons made subject to their laws.

Conclusion

52 Since I find that both proposed interpretations of s. 12 are unconstitutional, I need not resolve the issue of the proper interpretation of s. 12. Section 12 of the Alberta *Limitations Act* is invalid and of no force or effect. I therefore agree that the California one-year limitation period applies to bar the plaintiff's action.

Solicitors:

Solicitors for the appellant: Macleod Dixon, Calgary.

Solicitors for the respondent: Fasken Martineau DuMoulin, Vancouver.

Solicitor for the intervener: Alberta Justice, Edmonton.

Case Name:

Lukács v. Canada (Transportation Agency)

Between
Dr. Gábor Lukács, Appellant, and
Canadian Transportation Agency, Respondent

[2014] F.C.J. No. 301

2014 FCA 76

456 N.R. 186

Docket: A-279-13

Federal Court of Appeal
Halifax, Nova Scotia

Dawson and Webb JJ.A. and Blanchard J.A. (ex officio)

Heard: January 29, 2014.
Judgment: March 19, 2014.

(63 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Administrative law -- Bodies under review -- Nature of body -- Types -- Regulatory agencies -- Powers or functions -- Types -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was

reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Statutory interpretation -- Statutes -- Construction -- By context -- Legislative intent -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Appeal by Lukacs from the Canada Transportation Agency's decision to enact a rule (the "quorum rule") that provided that in all proceedings before the Agency, one member constituted a quorum. Prior to the enactment of the quorum rule, two members of the Agency constituted a quorum. The quorum rule was not made with the approval of the Governor in Council. The appellant took the position that the rules governing the conduct of the proceedings before the Agency were regulations within the meaning of s. 36(1) of the Canada Transportation Act and as such could only be made with the approval of the Governor in Council and that as the rules were originally approved by the Governor in Council, they could not be amended without the approval of the Governor in Council. The Agency argued that the quorum rule was a rule respecting the number of members that were required to hear any matter or perform any function of the Agency and, as such, it could be enacted by the Agency pursuant to the Agency's rule-making power in s. 17 of the Act.

HELD: Appeal dismissed. The appropriate standard of review was reasonableness as the issue was whether the Agency properly interpreted its rule-making power contained in its home statute. The Agency's decision to enact the quorum rule pursuant to its rule-making power, so that the approval of the Governor in Council was not required, was reasonable. A contextual analysis of the Canada Transportation Act suggested that rules held a subsidiary position to orders or regulations, which was consistent with the view that rules were created by the Agency on its own initiative, while order came at the end of an adjudicative process and regulations must be approved by the Governor in Council. Furthermore, the interpretation of "rules" as a subset of "regulation" violated the presumption against tautology. Moreover, whenever "rule" appeared in the Act, it was in the context of internal procedural or non-adjudicative administrative matters and wherever "regulation" appeared in the Act it referred to more than internal, procedural matters. In addition, since the Act specifically required Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure but there was no express requirement for the Agency to do so, the application of the expressio unius maxim was consistent with the interpretation that the Agency's rules were not subject to that requirement. Furthermore, under the former Act, the predecessor of the Agency had the power to make rules with the approval of the Governor in Council. Interpreting

the Act so as to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) was consistent with the purpose of the Agency as envisioned in the Act. The fact that the Governor in Council had approved the Rules in 2005 did not mean that the approval of the Governor in Council was required to amend the rules. Firstly, Governor in Council approval in 2005 was an unnecessary step. Secondly, the quorum rule was new and did not rescind or vary any provision of the rules that was previously approved by the Governor in Council.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 4(1), s. 16(1), s. 17, s. 17(a), s. 17(b), s. 17(c), s. 25, s. 25.1(4), s. 29(1), ss. 34-36, s. 34(1), s. 34(2), s. 36(1), s. 36(2), s. 41, s. 54, s. 86(1), s. 86.1, s. 92(3), s. 109, s. 117(2), s. 128(1), s. 163(1), s. 169.36(1), s. 170

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 2.1

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

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22, s. 22(1)

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

Counsel:

Dr. Gábor Lukács, the Appellant (on his own behalf).

Simon-Pierre Lessard, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states 'In all proceedings before the Agency, one member constitutes a quorum". The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

2 The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made

with the approval of the Governor in Council.

3 The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

4 The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

5 Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

6 The Act contains a quorum provision that is expressly subjected to the Agency's rules:

> 16. (1) Subject to the Agency's rules, two members constitute a quorum.
>
> * * *
>
> 16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

7 The Agency's rule-making power is as follows:

> 17. The Agency may make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> (*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament. [Emphasis added.]

* * *

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale. [Le souligné est de moi.]

8 The relevant provision of the Act dealing with regulations states:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.
(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

* * *

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.
(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

The Standard of Review

9 The parties disagree about the standard of review to be applied.

10 The appellant argues that the issue of whether the Agency was authorized to enact the Quorum Rule without the approval of the Governor in Council is a true question of jurisdiction, or *vires*. As a result, he submits the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). In oral argument, the appellant also argued that a quorum requirement is a question of law that is both of central importance to the legal system as a whole and outside the Agency's specialized area of expertise so that the validity of the Quorum Rule should be reviewed on the standard of correctness.

11 The respondent counters that in more recent jurisprudence the Supreme Court of Canada has held that true questions of jurisdiction are narrow and exceptional, and that an administrative

tribunal's interpretation of its own statute should be presumed to be reviewable on the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 33 and 39).

12 I agree that what is at issue is whether the Agency properly interpreted its rule-making power contained in its home statute. Pursuant to *Alberta Teachers'*, the presumption of reasonableness review applies. In my view, the presumption of reasonableness review has not been rebutted.

13 As recently discussed by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 N.R. 340, at paragraphs 32 and 33, legislatures do not always speak with clarity. As a result, applying the principles of statutory interpretation may not always provide a single, clear interpretation of a provision. The resolution of unclear language in an administrative agency's home statute is usually best left to the agency, because the choice between competing reasonable interpretations will often involve policy considerations the legislature presumably wanted the agency to decide.

14 For two reasons I reject the assertion that a quorum rule raises a general question of law of central importance to the legal system outside the expertise of the Agency.

15 First, while conceptually quorum requirements are of importance to the fair administration of justice, it does not follow that the Agency's choice between a quorum of one or two members is a question of central importance to the legal system as a whole. In my view, it is not. The Quorum Rule does not seek to define quorum requirements for any other body than the Agency itself.

16 Second, the Supreme Court has rejected such a narrow view of the expertise of an administrative agency or tribunal. It is now recognized that courts may not be as well-qualified as a given agency to provide an interpretation of the agency's home statute that makes sense in the broad policy context in which the agency operates (*McLean*, at paragraphs 30 and 31, citing, among other authorities, *Council of Canadians with Disabilities v. Via Rail, Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 92 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paragraph 25.

17 It follows that the Agency's interpretation of its rule-making authority is a question reviewable on the standard of reasonableness.

18 Before leaving the issue of the standard of review I will deal with two authorities raised by the appellant in reply, which were, as a result, the subject of supplementary written submissions.

19 The two authorities are *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286, and *Yates v. Newfoundland and Labrador (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317.

20 In my view both decisions are distinguishable. At issue in the first case was whether

regulations enacted by the Lieutenant-Governor in Council were *ultra vires*. In the second case, the Court's attention was not drawn to the decisions of the Supreme Court in *Alberta Teachers'* and *McLean*. I am not persuaded either case supports the appellant's position.

The Applicable Principles of Statutory Interpretation

21 Whether rules made under section 17 of the Act must be approved by the Governor in Council depends upon the interpretation to be given to the word "regulation" as used in subsection 36(1) of the Act.

22 The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

24 This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

25 Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

Application of the Principles of Statutory Interpretation

26 I therefore turn to the required textual, contextual and purposive analysis required to answer this question.

(i) Textual Analysis

27 The appellant argues that the definitions of"regulation" found in the *Interpretation Act*, R.S.C. 1985, c. I-21 and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 decide the meaning of "rules" under the Act. The appellant's argument relies on paragraph 15(2)(*b*) of the *Interpretation Act*, which states:

> 15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> [...]
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> * * *
>
> 15. (2) Les dispositions définitoires ou interprétatives d'un texte :
>
> ...
>
> *b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

28 Subsection 2(1) of the *Interpretation Act* provides that:

> 2. (1) In this Act,

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité. [Le souligné est de moi.]

29 Similarly, subsection 2(1) of the *Statutory Instruments Act* provides:

2. (1) In this Act,

"regulation" means a statutory instrument

(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

> and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament. [Emphasis added.]
>
> * * *
>
> 2. (1) Les définitions qui suivent s'appliquent à la présente loi.
>
> "règlement" Texte réglementaire :
>
> *a*) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;
>
> *b*) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.
>
> Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale. [Le souligné est de moi.]

30 In the alternative, even if the definitions of "regulation"do not formally apply to the Act, the appellant submits that they are declaratory of the usual and ordinary meaning of the word "regulation". It follows, the appellant argues, that the word "regulation" found in subsection 36(1) of the Act includes "rules" made under section 17, so that the Agency was required to obtain the Governor in Council's approval of the Quorum Rule.

31 There are, in my view, a number of difficulties with these submissions.

32 First, the definition of "regulation" in subsection 2(1) of the *Interpretation Act* is preceded by the phrase "In this Act". This is to be contrasted with subsection 35(1) of the *Interpretation Act* which contains definitions that are to be applied "[i]n every enactment". As the word "regulation" is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

33 Similarly, the word "regulation" is defined in the *Statutory Instruments Act* only for the

purpose of that Act.

34 Second, paragraph 15(2)(*b*) of the *Interpretation Act* is subject to the caveat "unless a contrary intention" is evidenced in the enactment under consideration. For reasons developed in the contextual analysis, I am of the view that the Act does demonstrate such a contrary intention.

35 Third, subsection 3(3) of the *Interpretation Act* states that "[n]othing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act." This further limits the application of paragraph 15(2)(*b*) of the *Interpretation Act*.

36 Notwithstanding these difficulties, I agree that there is some potential ambiguity in the plain meaning of the word "regulation"in that in some contexts it can include a "rule". Where the word "regulation"can support more than one ordinary meaning, the meaning of the word plays a lesser role in the interpretive process. I therefore turn to the contextual analysis to read the provisions of the Act as a harmonious whole.

(ii) Contextual Analysis

37 An electronic search of the Act discloses that the word "rule" is used in the order of 11 different provisions, while "regulation"is found in over 30 provisions. In no case are the words used interchangeably. For example, at subsection 4(1) of the Act, "orders and regulations" made under the Act relating to transportation matters take precedence over any "rule, order or regulation" made under any other Act of Parliament. Similarly, under section 25 of the Act, the Agency is granted all powers vested in superior courts to, among other things, enforce "orders and regulations" made under the Act. The absence of reference to "rules" in both provisions suggests rules hold a subsidiary position to orders or regulations. This interpretation is consistent with the view that rules are created by the Agency on its own initiative, while orders come at the end of an adjudicative process and regulations must be approved by the Governor in Council.

38 Other provisions relevant to the contextual analysis are sections 34 and 36 of the Act. Subsection 34(2) requires the Agency to give to the Minister notice of every rule proposed under subsection 34(1) (which deals with the fixing of license and permit fees). Subsection 36(2) similarly requires the Agency to give the Minister notice of every regulation proposed to be made under the Act. If rules are a subset of regulations, subsection 34(2) would be redundant, because the Minister must be notified of all proposed regulations. The interpretation of "rules" as a subset of "regulation" would violate the presumption against tautology, where Parliament is presumed to avoid speaking in vain *(Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] 1 S.C.R. 831, at page 838.

39 Moreover, whenever "rule" appears in the Act it is in the context of internal procedural or non-adjudicative administrative matters. See:

* subsection 16(1): dealing with the quorum requirement;
* subsection 17(*a*): dealing with sittings of the Agency and the carrying on of its work;
* subsection 17(*b*): concerning procedures and business before the Agency, including the circumstances in which hearings may be held in private;
* subsection 17(*c*) dealing with a number of members required to hear any matter or perform any of the functions of the Agency;
* subsection 25.1(4): dealing with the Agency's right to make rules specifying a scale under which costs are taxed;
* subsection 34(1): dealing with fixing fees for, among other things, applications, licenses and permits;
* section 109: dealing with the right of judges of the Federal Court to, with the approval of the Governor in Council, make general rules regarding the practice and procedure of the Court in relation to insolvent railways;
* subsection 163(1): providing that in the absence of agreement to the contrary, the Agency's rules of procedure apply to arbitrations; and
* subsection 169.36(1): dealing with the right of the Agency to make rules of procedure for an arbitration.

40 In contrast, the Act's use of the word"regulations" generally refers to more than merely internal, procedural matters. For example:

* subsection 86(1): the Agency can make regulations relating to air services;
* section 86.1: the Agency shall make regulations respecting advertising of prices for air services within or originating in Canada;
* subsection 92(3): the Agency can make regulations concerning the adequacy of liability insurance for a railway;
* subsection 117(2): the Agency may make regulations with respect to information to be contained in a railway tariff;
* subsection 128(1): the Agency can make regulations relating to the interswitching of rail traffic; and
* section 170: the Agency can make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities.

41 The dichotomy between internal/procedural matters on one hand and external/substantive on the other is reflected in section 54 of the Act, which provides that the appointment of receivers or managers does not relieve them from complying with the Act and with the "orders, regulations, and directions made or issued under this Act". The absence of "rules" from this listing is consistent with the interpretation that, in the context of the Act, rules only apply to procedural matters and not the substantive operations that a receiver or manager would be charged with. This interpretation also accords with the presumption of consistent expression, since it is generally inferred that "[w]hen an

Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning" (*Peach Hill Management Ltd. v. Canada*, [2000] F.C.J. No. 894, 257 N.R. 193, at paragraph 12 (F.C.A.).

42 Another relevant provision is section 109, which requires Federal Court judges to seek approval from the Governor in Council when establishing rules of procedure for matters relating to insolvent railways. Two possible conclusions may be taken from this provision. First, it could imply that the Agency's rules are also subject to Governor in Council approval. Second, it could imply that since Federal Court judges are explicitly required to seek such approval, the absence of that same requirement under section 17 is indicative of Parliament's intent that the Agency is not required to seek such approval.

43 The latter interpretation is, in my view, the better view. It is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*, which in essence states that consistent drafting requires that some legislative silences should be seen as deliberate. While this maxim should be approached with caution, the Supreme Court has relied on similar reasoning to find Parliament's inclusion of express limitations in some sections of an act as evidence Parliament did not intend those limitations to be included in other provisions where the exceptions are not explicitly stated (*Ulybel Enterprises* at paragraph 42).

44 In the present case, since the Act specifically requires Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure, the application of the *exclusio unius* maxim is consistent with the interpretation that the Agency's rules are not subject to this requirement.

45 There is a further, final contextual aid, found in the legislative evolution of the Act. In *Ulybel Enterprises* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act,1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business

before the Agency, including the circumstances in which in camera hearings may be held; and

(*c*) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.

(2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum. [Emphasis added.]

* * *

22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

(2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres. [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

50 The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

51 First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

52 Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

53 Subsection 29(1) of the Act requires the Agency to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation).

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

<u>What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?</u>

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005

stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347, at paragraph 23). As the Agency later reasonably concluded that Governor in Council approval was not required to enact the Quorum Rule, it follows that Governor in Council approval in 2005 was an unnecessary step that does not limit or bind the Agency now or in the future.

61 Second, the Quorum Rule is new. It does not vary or rescind any provision in the Rules that could be said to be previously approved by the Governor in Council.

Conclusion

62 For these reasons, I would dismiss the appeal. In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

63 In the event the parties are unable to reach agreement on the disbursements, they shall be assessed.

DAWSON J.A.
WEBB J.A.:-- I agree.
BLANCHARD J.A. (*ex officio*):-- I agree.

DECISION NO. 335-C-A-2012

August 22, 2012

COMPLAINT by Gábor Lukács against United Air Lines, Inc.

File No. M4120-3/12-03038

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that a statement found on United Air Lines, Inc's. (United) various new Web sites regarding its liability for delay, loss and damage to baggage misrepresents United's obligations under the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Convention), contrary to paragraph 18(*b*) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR).

ISSUES

[2] 1. Has United publicly made a statement regarding its baggage liability policy that is false or misleading with respect to its air service or any service incidental thereto, contrary to paragraph 18(*b*) of the ATR?

2. Has United applied a policy governing baggage liability not appearing in its International Passenger Rules and Fares Tariff No. UA-1, NTA(A) No. 361 (Tariff) and, if so, does United's Tariff clearly state its policy governing liability for baggage?

STATUTORY PROVISIONS

[3] The legislative and tariff provisions relevant to this Decision are set out in the Appendix.

ISSUE 1: HAS UNITED PUBLICLY MADE A STATEMENT REGARDING ITS BAGGAGE LIABILITY POLICY THAT IS FALSE OR MISLEADING WITH RESPECT TO ITS AIR SERVICE OR ANY SERVICE INCIDENTAL THERETO, CONTRARY TO PARAGRAPH 18(*b*) OF THE ATR?

Positions of the parties

[4] Mr. Lukács submits that United's Web sites are globally accessible on the Internet. He adds that passengers from all over the world, including from Canada, regularly access them, especially when they are travelling and are away from their homes. He submits that United's Web sites are relevant to the users of United's international service to and from Canada and, in particular, to the Canadian travelling public.

[5] Mr. Lukács objects to the following statement, which is found on United's Global Web site and Canadian Web page:

> Prior approval must be obtained through the Baggage Resolution Service Center in order for any expenses to be reimbursed.

[6] Mr. Lukács submits that Articles 17(2) and 19 of the Convention establish a regime of strict liability for carriers for delay, damage and loss of baggage, where the carrier can exonerate itself from liability only in specific circumstances, and that the burden of proof is on the carrier to demonstrate that these conditions are met. He further submits that Article 31 of the Convention imposes a strict timeline to notify the carrier about complaints related to damage to and/or delay of baggage, but that there is nothing in the Convention which would allow a carrier to condition its liability upon receipt of prior approval by the passenger. Mr. Lukács therefore concludes that the statement misrepresents United's obligations under the Convention.

[7] United contends that Mr. Lukács is attempting to read into the statement something which is not there. United maintains that a carrier is entitled to satisfy itself that a baggage complaint is legitimate, prior to making payment for any claimed damage, and that asserting the contrary would be suggesting that a carrier must pay all damage claims without any right to confirm the legitimacy of the complaint. United points out that to pay out a claim, its Baggage Resolution Service Center, which addresses the legitimacy of baggage complaints, must be satisfied that the claim is legitimate and one for which United is liable. United submits that this is the necessary "approval", and obviously the approval must be "prior" to the actual reimbursement. United concludes that there is nothing about this process that is contrary to the Convention.

[8] Mr. Lukács agrees that a carrier is entitled to satisfy itself that a baggage complaint is legitimate prior to making payment for claimed damage. However, he submits that the statement is misleading, in that the plain and ordinary meaning of that statement is that passengers affected by loss, damage or delay of baggage must first obtain an approval from United's Baggage Resolution Service Center, and only then can they incur expenses; otherwise, United will not compensate them. According to Mr. Lukács, this essentially means that United will refuse to reimburse legitimate expenses if the passenger did not seek United's approval before incurring the expenses.

Analysis and finding

[9] In Decision No. 208-C-A-2009, the Agency found that a carrier can avoid liability only if the damage resulted from an inherent quality or defect in the baggage.

[10] The Agency notes that Article 31 of the Convention lays out the timeframes within which a complaint for damage to and/or delay of baggage must be filed. Article 31 specifies that if no complaint is made within the stipulated timeframes, no action shall lie against the carrier. Article 31, however, does not specify that prior approval must be obtained in order for expenses to be reimbursed. However, the Agency accepts that a carrier must be able to satisfy itself that a claim is legitimate, and the Agency has previously ruled that complainants must provide proof of the expenses that they are claiming.

[11] United states that to pay out a claim, the Baggage Resolution Service Center must be satisfied that the claim is legitimate and one for which United is liable, and that this is the prior necessary approval. However, the Agency is of the opinion that the manner in which the process is described in the statement may be interpreted to mean that approval is necessary prior to making a purchase. Consequently, passengers may be given the wrong impression of United's liability for damage to and/or delay of baggage, under the Convention.

[12] The Agency therefore finds that the statement appearing on United's Global Web site and Canadian Web page is misleading, contrary to paragraph 18(*b*) of the ATR.

ISSUE 2: HAS UNITED APPLIED A POLICY GOVERNING BAGGAGE LIABILITY NOT APPEARING IN ITS TARIFF AND, IF SO, DOES UNITED'S TARIFF CLEARLY STATE ITS POLICY GOVERNING LIABILITY FOR BAGGAGE?

Positions of the parties

[13] Mr. Lukács submits that he is not aware of any tariff provisions of United that condition reimbursement of expenses related to delay, damage or destruction of baggage to prior approval from United. He asserts that if such a condition did exist, it would be null and void under Article 26 of the Convention, as tending to relieve United from liability and/or to set a lower limit of liability than laid down in the Convention.

[14] United has made no submissions concerning whether any such provision appears in its Tariff.

Analysis and findings

[15] Subparagraph 122(*c*)(xii) of the ATR requires that a tariff clearly state the carrier's policy with respect to procedures to be followed and time limitations for making claims.

[16] The Agency has reviewed United's Tariff and notes that it does not contain any provisions reflecting the contents of the statement found on United's Global Web site and Canadian Web page. The Agency therefore finds that United has applied, and continues to apply, a policy concerning baggage liability that is not contained in its Tariff.

[17] While Rule 28(E) of United's Tariff sets out the time limits for which actions for damages must be brought, the Tariff is silent regarding the procedures to be followed respecting claims. Instead, the policy is set out on United's Global Web site and Canadian Web page.

[18] Accordingly, the Agency finds that, in applying a policy that is not clearly set out in its Tariff, United contravened subparagraph 122(*c*)(xii) of the ATR.

CONCLUSION

[19] As noted above, the Agency finds that:

1. The statement found on United's Global Web site and Canadian Web page, on which this complaint is based, is misleading, contrary to paragraph 18(*b*) of the ATR;

2. United has applied, and continues to apply, a policy, namely that set out on its Global Web site and Canadian Web page, that does not appear in its Tariff; and,

3. United's Tariff does not clearly state United's policy governing the procedures to be followed respecting claims, contrary to subparagraph 122(*c*)(xii) of the ATR.

ORDER

[20] The Agency orders United, within 30 days from the date of this Decision, to:

1. amend the statement found on its Global Web site and Canadian Web page to state: "Reimbursement for expenses will be based upon acceptable proof of claim.";

2. ensure that its Global Web site and Canadian Web page reflect the findings made by the Agency in this Decision and remove any language that is contrary to these findings; and,

3. amend Rule 28 of its Tariff to reflect the statement set out in Number 1, and file its revised Tariff with the Agency.

(signed)

J. Mark MacKeigan
Member

(signed)

Geoffrey C. Hare
Member

***AIR TRANSPORTATION REGULATIONS*, SOR/88-58, AS AMENDED**

Paragraph 18(*b*)

Every scheduled international licence and non-scheduled international licence is subject to the following conditions:

[...]

(*b*) the licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto; and

[...]

Subparagraph 122(*c*)(xii)

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,

[...]

(xii) procedures to be followed, and time limitations, respecting claims.

[...]

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR – MONTREAL CONVENTION

Article 17 – Death and injury of passengers – damage to baggage

[...]

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

[...]

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.

Article 31 – Timely notice of complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

INTERNATIONAL PASSENGER RULES AND FARES TARIFF NO. UA-1, NTA(A) NO. 361

RULE 28 ADDITIONAL LIABILITY LIMITATIONS

For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

[...]

(E) Under the Warsaw Convention and the Montreal Convention, whichever may apply [...] and a complaint must be made to the carrier within seven calendar days in the case of damage to baggage and 21 calendar days in the case of delay thereof.

Canadian Transportation Agency

Decision No. 8-A-2014

January 13, 2014

APPLICATION by Scandinavian Airlines System for a review of a warning of alleged violations of paragraph 135.8(1)(a), subsections 135.8(2) and (3), and section 135.91 of the *Air Transportation Regulations*, SOR/88-58, as amended.

File No.: L4352/13-05321

INTRODUCTION

[1] Scandinavian Airlines System (SAS) is licensed to operate a non-scheduled international service to transport traffic between points in Sweden, Norway and Denmark and points in Canada. SAS is also licensed to operate a scheduled international service in accordance with the Agreement between the Government of Canada and the Government of the Kingdom of Norway on Air Transport, initialled *ad referendum*, on February 17, 1989, and scheduled international services in accordance with the Agreement on Air Transport between Canada and the European Community and its Member States, signed on December 18, 2009.

[2] In 2012, amendments to the *Air Transportation Regulations* (ATR) came into effect which govern the regulation of air services price advertising. These provisions are set out in Part V.1 of the ATR.

[3] A compliance verification was conducted on July 10, 2013 by an enforcement officer designated by the Canadian Transportation Agency (Agency), pursuant to paragraph 178(1)(*a*) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA). The designated enforcement officer (DEO) found that SAS contravened paragraph 135.8(1)(*a*), subsections 135.8(2) and (3), and section 135.91 of the ATR with respect to its online booking system found at www.flysas.com.

[4] In particular, the DEO found that when selecting a flight, the prices are not total prices as a service fee is added and the prices are not in Canadian dollars. Further, the DEO found that there are no headings on SAS's online booking system as required by subsections 135.8(2) and (3) of the ATR. In addition, the DEO found that an amount for fuel surcharges on SAS's online booking system is set out as if it were a third party charge, contrary to section 135.91 of the ATR.

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[5] Accordingly, on July 16, 2013, the DEO issued a formal warning that SAS had contravened paragraph 135.8(1)(*a*), subsections 135.8(2) and (3), and section 135.91 of the ATR.

[6] On July 29, 2013, SAS requested an extension until September 16, 2013 to file an application for a review.

[7] On September 16, 2013, SAS filed an application for a review of the warning. On September 30, 2013, the DEO filed comments on SAS's application for a review. On October 10, 2013, SAS filed a reply to the DEO's comments.

ISSUE

[8] Was the warning of alleged violations of paragraph 135.8(1)(*a*), subsections 135.8(2) and (3), and section 135.91 of the ATR warranted?

POSITIONS OF THE PARTIES

SAS

Application of Part V.1 of the ATR

[9] SAS refers to the Agency's *Air Transportation Regulations – Air Services Price Advertising: Interpretation Note* (Interpretation Note) which states that where a carrier has multiple geographic specific versions of its Web site, the ATR only applies to the carrier's Canadian version of its Web site. SAS states that it has no Canadian version of its Web site that would trigger a requirement to comply with Part V.1 of the ATR.

[10] SAS submits that it has relied on the Agency's Interpretation Note for the proposition that as it does not maintain a Canadian version of its Web site – and does not operate flights to and from Canada with its own aircraft or hold out code-share flights from Canada on its Web sites, it is not required to comply with the price advertising provisions of the ATR. SAS submits that Part VI of the Interpretation Note states that advertising requirements do not apply to advertising where the Canadian public has not been targeted.

[11] SAS contends that the DEO reached the conclusions with respect to the violations after examining SAS's Web site (flysas.com) using the "Other countries" version of the Web site which is not advertising to or targeting the Canadian public.

[12] SAS submits that it is not offering on its Web sites any of its own flights today to the Canadian market. SAS adds that it does no advertising of its flights in Canada either on the Internet or in print

media. SAS submits that although it owns the rights to the domain name *flysas.ca*, this Web site is currently not in use.

[13] SAS argues that Interline flight routings that were displayed on its "Other countries" Web site online booking engine when viewed by the DEO showed SAS flights operating from points in the United States to Denmark, Norway or Sweden only, not from any Canadian city.

[14] SAS states that Canadian cities appear on the pull-down menu on the SAS "Other countries" Web site so that European customers can book round-trip itineraries to Canadian cities that begin with a westbound flight on SAS. SAS asserts that if the Agency were to uphold the DEO's view that the "Other countries" Web site's offering of interline flights constitutes a targeting of the Canadian public, SAS would have to permanently delete all Canadian cities from its pull-down menu so that no Europe to Canada interline routings would be displayed on the "Other countries" Web site. SAS submits that this would deprive SAS's European customers who rely on the "Other countries" Web site from booking Europe-Canada interline itineraries where a SAS flight is displayed on the initial sector out of Europe.

[15] SAS contends that there is no factual support that the SAS "Other countries" Web site is targeting the Canadian public.

[16] SAS states that imposing these Canadian price advertising regulations on the "Other countries" Web sites of European carriers like SAS that do not serve Canada with their own aircraft (or even hold out code-share flights from Canada on their Web sites), and only sell interline itineraries for travel from Canada via the United States, will also limit competition in fares and routings in the Canada-Europe air transportation market to the detriment of consumers. As is the case for SAS, such carriers will find the investment necessary to establish and maintain a separate Web site dedicated to the Canadian market to be prohibitively expensive and they will be forced to cease offering interline flights from Canada on their "Other countries" Web sites. Thus, SAS argues that these regulations, as currently applied, effectively discriminate against European carriers like SAS that do not serve Canada with direct flights.

[17] SAS submits that with no direct flights into and out of Canada, the revenue that SAS earns from the interline bookings from Canadian customers is insufficient to justify the expense involved in creating and maintaining a new Canadian version of the SAS Web site.

[18] SAS advises that, as an interim measure pending the Agency's review of the DEO's warning, it has removed all Canadian cities from the booking engine on its "Other countries" Web site so that customers are no longer able to use the Web site to book itineraries that include an origin or destination in Canada.

Paragraph 135.8(1)(*a*) of the ATR

[19] SAS submits that while the Web site is in English, the prices are displayed in euros consistent with what the Web site is: a generic Web site primarily for customers in Europe who want to book flights on SAS in English because SAS does not offer a Web site version in their native language or home country. SAS argues that its Web site is a global Web site on which it would be practically impossible to

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reflect all currencies that could conceivably be used in all parts of the world and to comply with the various regulatory requirements of individual jurisdictions.

[20] SAS asserts that other than showing prices in Canadian dollars for Canadian originating itineraries, the “Other countries” Web site is in substantial compliance with the price advertising provisions of the ATR.

[21] SAS asserts that establishing and maintaining a separate Canadian Web site that displays fares in Canadian dollars would be an expensive undertaking.

[22] SAS points out that while a service fee is added during the booking process, the “total price” of the ticket, including the service charge and other fees and taxes, is provided on the right hand side of the same screen.

Subsections 135.8(2) and (3) of the ATR

[23] SAS submits that establishing and maintaining a separate Canadian Web site that meets the specific heading requirements (“Taxes, Fees and Charges” and “Air Transportation Charges”) would be an expensive undertaking considering that there are no direct flights into and out of Canada and the revenue that SAS earns from Canadian customers is insufficient to justify the expense involved in creating and maintaining a new Canadian version of the SAS Web site.

Section 135.91 of the ATR

[24] SAS disagrees that its fuel surcharge is set out as if it were a third party charge. SAS submits that, to the contrary, its fuel surcharge is included with the amount described on its Web site next to the heading “Of which includes taxes and carrier-imposed fees”. SAS explains that a hyperlink with the text “Breakdown of taxes and carrier-imposed fees” is included directly below this heading leading to a pop-up screen, which again includes the heading “Breakdown of taxes and carrier-imposed fees”. The pop-up screen provides a description of each of the taxes and carrier-imposed fees, such as the “fuel and security surcharge” applicable to the ticket being purchased. SAS thus contends that no reasonable reading of the SAS “Other countries” Web site displays would lead to the conclusion that the SAS fuel surcharge is being portrayed as if it were a third party charge or a government tax.

The DEO

Application of Part V.1 of the ATR

[25] The DEO submits that a Canadian version of a Web site will only be considered if such a version exists. Numerous domestic and international carriers as well as travel agencies have only one version

of their Web site. The DEO states that not having a Canadian version of a Web site does not remove the advertiser from an obligation to comply with the price advertising regulatory requirements.

[26] The DEO states that the following factors suggest that the "Other countries" version of SAS's Web site is targeting the Canadian public:

- under the "Need Help?" link, there is a drop down list of all countries where contact details are available for consumers. Canada is listed and there is a 1-800 customer service telephone number available to Canadians;
- prior to the current interim measure, Canadians could book a flight originating in Canada using a Canadian credit card and a Canadian address;
- SAS is required under section 116.1 of the ATR to display its terms and conditions of carriage on its Web site. This document can be found on SAS's United States Web site. As SAS posts its Canadian terms and conditions of carriage on a Web site, the DEO is of the view that SAS is targeting Canadians.
- SAS admits that it does get business and revenues from Canadian consumers.

[27] The DEO states that the ATR apply to "Any person who advertises the price of an air service within or originating in Canada". The DEO submits that the fact that SAS does not operate direct flights from or to Canada is irrelevant. The person advertising does not necessarily have to be a carrier or even operate flights. For example, travel agencies must comply with the ATR even though they do not operate flights.

[28] The DEO submits that it is not necessary for SAS to establish and maintain a Canadian Web site to comply with the ATR.

Section 135.91 of the ATR

[29] With respect to the alleged violation of section 135.91 of the ATR, the DEO refers to Decision No. 320-A-2013 regarding a similar issue raised by British Airways Plc carrying on business as British Airways (British Airways). In that Decision, the Agency stated that:

> [28] The Agency finds that by setting out the amount for fuel surcharges under the heading "Taxes, fees and carrier charges per person," British Airways has contravened section 135.91 of the ATR.

[30] The DEO contends that because the phrase "taxes and carrier-imposed fees" used by SAS is very similar to the phrase "Taxes, fees and carrier charges per person" used by British Airways, SAS has contravened section 135.91 of the ATR.

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SAS's reply to the DEO's comments

Application of Part V.1 of the ATR

[31] SAS submits that the application of the price advertising provisions of the ATR advanced by the DEO would render meaningless the Agency's Interpretation Note that defines the scope of the rules. SAS states that the Interpretation Note expressly states under Part VI "What is Not Subject to the Advertising Requirements" that "for carriers having multiple geographical specific versions of their Web sites, the Canadian version would need to comply." SAS contends that the Interpretation Note does not state, as the DEO argues, that a carrier's global Web site, such as SAS's "Other countries" Web site, must comply with the price advertising provisions of the ATR if it has no Canadian version of its Web site. In SAS's view, this is especially critical as SAS does not hold out on its global Web site flights from or to Canada operated with its own aircraft or even on a code-share basis.

[32] SAS states, as it has stated before, that it has multiple geographical versions of its Web site but no Canadian version that would trigger application of the price advertising provisions of the ATR. SAS submits that its "Other countries" Web site is a generic Web site created by SAS primarily for its customers in Europe who want fares quoted in euros and who want to book flights in English in countries where SAS does not have a Web site specific to that country. SAS adds that prior to the interim measure that removed the Canadian interline connecting flights from the "Other countries" Web site, SAS showed interline connecting flights to and from Canada for such SAS customers originating their journey in Europe who wanted to travel on SAS for the transatlantic portion of their trip and connect in the United States to a flight to Canada operated by a Canadian or an American carrier. SAS reiterates that it does not operate flights to or from Canada with its own aircraft and does not even hold out Canadian code-share flights on its global "Other countries" Web site.

[33] SAS submits that the unintended consequence of the DEO's expansive reading of the Interpretation Note – if not rejected by the Agency – would be to prevent SAS from selling tickets for travel to Canada on its global "Other countries" Web site as it is impossible for technical reasons to remove only Canadian originating itineraries from the Web site, which cannot be what the Agency intended.

[34] SAS maintains that its "Need help?" link is not evidence that SAS is targeting the Canadian public. SAS adds that the 1-800 number on the "Other countries" Web site is for all SAS customers who may need to contact SAS while in Canada and not just for Canadians who are using the "Other countries" Web site to book flights. SAS submits that the presence of the 1−800 number on its Web site adds nothing to the DEO's argument in support of a violation.

[35] SAS states that it is correct that prior to removing the Canadian cities from its "Other countries" Web site, SAS received a very small amount of revenue from Canada from the tickets sold on the "Other countries" Web site for travel originating in Canada. SAS asserts that the amount of such revenue was however *de minimis* as the primary reason the Web site displayed Canadian cities was to sell tickets to European-originating passengers who wanted to travel to Canada.

[36] SAS submits that the DEO's reading would require SAS's "Other countries" global Web site to comply with both SAS's own national authorities and the Agency's advertising provisions. SAS maintains that requiring it to apply Part V.1 of the ATR is a classic regulatory overreach that would require carriers that do not even serve Canada to comply not only with the fare advertising rules of their home countries, but also with the Agency's price advertising provisions. SAS contends that such an application may very well subject such carriers' global Web sites to conflicting regulatory requirements or, at the very least, impose two sets of requirements that would be difficult to comply with on a single Web site.

[37] SAS states that while the DEO asserts that it is not necessary for SAS to establish and maintain a Canadian Web site to comply with the price advertising provisions of the ATR, SAS sees no options other than creating and maintaining a Canadian version of its Web site (which SAS is not prepared to do given the costs involved) or continuing to cease offering interline connecting flights to or from Canada on its "Other countries" Web site lest it be in conflict with either the European or the Agency's price advertising rules.

[38] SAS asserts that placing international carriers like SAS in such a position makes no sense. SAS submits that the Agency's Interpretation Note struck the right balance between protecting Canadian consumers and limiting the extraterritorial reach of the Agency's price advertising regulations to advertisers that are targeting the Canadian public. SAS states that the Agency should reaffirm its Interpretation Note regarding the extent of its jurisdiction under the price advertising provisions of the ATR and reject the DEO's overly expansive reading of it.

Section 135.91 of the ATR

[39] SAS maintains that its fuel surcharge is set out in substantial compliance with the ATR. SAS points out that its fuel surcharge is not set out on its "Other countries" Web site as if it were a third party charge as the surcharge is described on the Web site next to the heading "Of which includes taxes and carrier-imposed fees". With respect to Decision No. 320-C-A-2013, SAS maintains that there are significant differences between that case and this case. SAS states that in Decision No. 320-C-A-2013 the case involved the Canadian edition of British Airways' Web site on which British Airways was holding out extensive service to and from Canada with its own aircraft and on a code-share basis. SAS states that on the other hand, it has no Canadian version of its Web site and prior to the interim measure, it only showed interline connecting flights operated by other carriers on its global "Other countries" Web site.

[40] SAS argues that its global "Other countries" Web site is in substantial compliance with section 135.91 of the ATR and that exacting compliance with the price advertising provisions of the ATR should not be required of SAS's Web site given the very limited nature of the Canadian service displayed on the Web site.

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LEGISLATION

[41] Subsection 135.7(1), paragraph 135.8(1)(*a*), subsections 135.8(2) and (3), and section 135.91 of the ATR provide that:

> 135.7(1) Subject to subsection (2), this Part applies to advertising in all media of prices for air services within, or originating in, Canada.
>
> 135.8(1) Any person who advertises the price of an air service must include in the advertisement the following information:
>
> > (*a*) the total price that must be paid to the advertiser to obtain the air service, expressed in Canadian dollars and, if it is also expressed in another currency, the name of that currency.
>
> 135.8(2) A person who advertises the price of an air service must set out all third party charges under the heading “Taxes, Fees and Charges” unless that information is only provided orally.
>
> 135.8(3) A person who mentions an air transportation charge in the advertisement must set it out under the heading “Air Transportation Charges” unless that information is only provided orally.
>
> 135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party charge or use the term “tax” in an advertisement to describe an air transportation charge.

ANALYSIS AND FINDINGS

Application of Part V.1 of the ATR

[42] Pursuant to subsection 135.7(1) of the ATR, the price advertising provisions of the ATR apply to advertising in all media of prices for air services within, or originating in, Canada. It is therefore irrelevant whether or not SAS operates flights to or from Canada as the issue is one of advertising. In that sense, an air carrier does not have to “operate” a service to or from Canada in order to fall under the purview of Part V.1 of the ATR; it need only advertise air services available to the Canadian public.

[43] Where a person or, in the case of SAS, a carrier, has no Canadian Web site or no Canadian page on its global Web site, if advertising is done for air services within, or originating in, Canada, that global Web site must comply with Part V.1 of the ATR.

[44] The Agency notes that SAS admits that it did receive a very small amount of revenue from Canada from tickets sold for travel originating in Canada. The fact that the revenue received was “*de minimis*” is irrelevant; the obligation to comply with Part V.1 of the ATR is not dependent on the amount received by the person advertising the air services.

[45] Therefore, the Agency finds that SAS must comply with Part V.1 of the ATR.

Paragraph 135.8(1)(*a*) of the ATR

[46] The DEO found that when selecting a flight, the prices are not total prices as a service fee is added.

[47] SAS argues that while a service fee is added during the booking process, the total price of the ticket is provided on the right hand side of the same screen.

[48] It should be noted that Part V.1 of the ATR supports two key objectives: (1) to enable consumers to readily determine the total price of an advertised service; and (2) to promote fair competition between all advertisers in the air travel industry.

[49] The Agency finds that the initial price that appears on SAS's Web site for each leg of the trip does not include the total price of the air service as the service fee is not included in that price. As a result, the Agency finds that SAS is in contravention of subsection 135.8(1) of the ATR.

[50] The DEO also found that the prices on SAS's Web site are not in Canadian dollars, in contravention of paragraph 135.8(1)(*a*) of the ATR.

[51] SAS maintains that the prices on its Web site are displayed in euros consistent with what the Web site is: a generic Web site primarily for European customers who want fares quoted in euros and who want to book flights in English because SAS does not offer a Web site version in their native language or home country. SAS submits that it is not targeting the Canadian public.

[52] The Agency finds that it is irrelevant which consumers a Web site is primarily geared toward; if Canadian consumers may purchase air services through SAS's global Web site, then SAS is marketing the air services to the Canadian public.

[53] The Agency finds that SAS's Web site lists the air transportation charges in euros and not in Canadian dollars as required by paragraph 135.8(1)(*a*) of the ATR. Accordingly, the Agency finds that SAS has contravened paragraph 135.8(1)(*a*) of the ATR.

Subsections 135.8(2) and (3) of the ATR

[54] Subsections 135.8(2) and (3) of the ATR clearly set out the requirements that all third party charges are to be listed under the heading "Taxes, Fees and Charges" and all air transportation charges are to be set out under the heading "Air Transportation Charges". However, neither heading is used by SAS as required by Part V.1 of the ATR. Rather, SAS's online booking system contains only one heading, "Breakdown of taxes and carrier-imposed fees", under which all air transportation charges, taxes, fees and surcharges are listed. SAS simply argues that meeting the specific heading requirements would be an expensive undertaking.

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[55] The fare is an air transportation charge, as is the fuel surcharge, yet the two charges are not grouped together on SAS's Web site. Further, these two charges are not grouped together under the heading "Air Transportation Charges" as required by the ATR. The ATR are clear that the appropriate headings are to be used and that the relevant charges are to be found under the appropriate headings.

[56] The Agency therefore finds that SAS has contravened subsections 135.8(2) and (3) of the ATR.

Section 135.91 of the ATR

[57] Section 135.91 of the ATR states that a person must not set out an air transportation charge in an advertisement as if it were a third party charge or use the term "tax" in an advertisement to describe an air transportation charge.

[58] SAS argues that it is in substantial compliance with Part V.1 of the ATR and exacting compliance should not be required because of the very limited nature of the Canadian air services displayed on its Web site. There are no varying levels of compliance; a person complies with Part V.1 of the ATR or does not comply. The fact that the air services advertized are limited in nature is irrelevant.

[59] SAS's fuel surcharge is set out on its Web site as "Fuel and security surcharge" and is included under the broader heading "Breakdown of taxes and carrier-imposed fees" and not under a heading "Air Transportation Charges" as required by subsection 135.8(3) of the ATR. As fuel surcharges are considered to be air transportation charges, these must not appear under third party charges as was done by SAS on its Web site.

[60] The Agency finds that by setting out the amount for fuel surcharges under the heading "Breakdown of taxes and carrier-imposed fees", SAS has contravened section 135.91 of the ATR. As a result, the Agency finds that SAS has failed to comply with the requirements set out in section 135.91 of the ATR.

CONCLUSION

[61] In light of the above, the Agency finds that SAS did contravene paragraph 135.8(1)(*a*), subsections 135.8(2) and (3), and section 135.91 of the ATR and, as such, the formal warning issued by the DEO was warranted. The Agency dismisses SAS's application for a review.

[62] The Agency shall retain a record of SAS's violations, bearing the date of the original warning. If SAS contravenes paragraph 135.8(1)(*a*), subsections 135.8(2) and (3), or section 135.91 of the ATR within four years of the date of the original warning, the record of the original warning shall constitute evidence of a first violation, and a designated enforcement officer may then issue an administrative monetary penalty.

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Member(s)

Geoffrey C. Hare

Decision No. 378-C-A-2000

May 31, 2000

IN THE MATTER of a complaint filed by Jan Witvoet against Bradley Air Services Limited also carrying on business as First Air and/or Ptarmigan Airways and/or Northwest Territorial Airways and/or NWT Air concerning the damage to one of his checked baggage, the loss of some items included in the baggage and the subsequent loss of the baggage following its repair, after a trip from Montréal to Kuujjuaq on January 11, 1999.

File No. 4370/F151/99

APPLICATION

On October 8, 1999, Jan Witvoet filed with the Canadian Transportation Agency (hereinafter the Agency) the complaint set out in the title.

On November 18, 1999, Bradley Air Services Limited also carrying on business as First Air and/or Ptarmigan Airways and/or Northwest Territorial Airways and/or NWT Air (hereinafter First Air) filed its answer to the complaint and, on January 20, 2000 and April 10, 2000, filed additional comments.

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, the parties have agreed to an extension of the deadline until May 31, 2000.

ISSUES

The issues to be addressed are whether First Air clearly states in its tariff:

i. its policy with respect to refusal to transport goods, in accordance with subparagraph 107(1)(*n*)(viii) of the *Air Transportation Regulations*, SOR/88-58, as amended (hereinafter the ATR);

ii. its limits of liability respecting goods, in accordance with subparagraph 107(1)(*n*)(x) of the ATR;

iii. exclusions from liability respecting goods, in accordance with subparagraph 107(1)(*n*)(xi) of the ATR.

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FACTS

Mr. Witvoet travelled from Montréal to Kuujjuaq on January 11, 1999. Upon arrival in Kuujjuaq, one piece of his checked baggage was reported missing. The baggage arrived the next day in a severely damaged condition and some items were missing. A Damaged Baggage Report was filed by First Air's personnel in Kuujjuaq. On January 13, 1999, Mr. Witvoet provided a list of missing items to First Air and requested compensation.

POSITIONS OF THE PARTIES

Mr. Witvoet submits that upon his arrival in Kuujjuaq, one of his suitcases was missing. Although the suitcase arrived the next day, it was in a severely damaged condition and certain items, such as compact disks and computer software on compact disks, were missing.

Mr. Witvoet maintains that it was First Air's responsibility to transport and deliver his baggage in an appropriate and secure way and that he holds First Air accountable for the damage to his suitcase and for the loss of his personal belongings.

First Air submits that the liability of the air carrier for loss or damage to baggage is governed by the *Carriage by Air Act,* R.S.C., 1985, c. C-26 and the terms of a passenger's ticket, as set out under *Conditions of Contract* appearing thereon. First Air states that the *Carriage by Air Act* indicates that air carriers cannot be held responsible for missing valuables for which a prior declaration has not been made. The carrier maintains that a passenger should identify and declare at check-in that he or she is carrying valuables in checked baggage.

In response, Mr. Witvoet points out that, according to the notice of baggage liability limitation found on the IATA cover of First Air's ticket issued to him in Montréal, liability for loss, delay or damage to baggage is limited, unless a higher value is declared in advance and additional charges are paid. Mr. Witvoet also refers to a statement in the notice which indicates that, for travel wholly between points in Canada, liability is limited to CAD$750.00. In Mr. Witvoet's opinion, even though he did not declare a higher value, First Air is still liable up to the maximum amount of non-declared missing items.

First Air submits that IATA rules and regulations do not apply to domestic travel. The carrier also refers to its Domestic General Rules Tariff No. CDGR-1 (Rule 190(A)(3)(b), on *Acceptance of Baggage*, and Rule 230(B)(1), on *Exclusions from Liability*), which describes its liability with respect to valuables.

With respect to the damaged baggage, First Air states that it had the suitcase repaired and sent to Mr. Witvoet. First Air submits that as Mr. Witvoet never received the repaired suitcase, it sent him a cheque to cover its replacement cost.

ANALYSIS AND FINDINGS

The Agency considers consumer complaints by ensuring that the provisions of the CTA, as well as those of its related regulations, including the ATR, are complied with by air service operators.

Section 55 of the CTA defines a tariff as a schedule of fares, rates, charges and terms and conditions of carriage applicable to an air service or other incidental services. Subsection 67(1) of the CTA provides, among other matters, that the holder of a domestic licence shall publish and make available for public inspection its tariffs for the domestic service it offers.

Carriers operating domestic air services are free to establish their own terms and conditions of carriage provided that they are set out in a tariff as required by subsection 67(1) of the CTA. Pursuant to paragraph 107(1)(*n*) of the ATR, tariffs shall contain the terms and conditions of carriage **clearly stating** the air carrier's policy in respect of, among other matters: (Emphasis added)

> (viii) refusal to transport passengers or goods,
>
> (x) limits of liability respecting passengers and goods,
>
> (xi) exclusions from liability respecting passengers and goods.

Accordingly, the Agency has to determine whether the air carrier has published, displayed or made available a tariff that clearly states the carrier's policy with respect to matters such as limits of liability and exclusions from liability respecting goods, as well as the refusal to transport goods.

In the case at hand, the terms and conditions of carriage applicable to First Air's flight from Montréal to Kuujjuaq on January 11, 1999 were governed by the air carrier's Domestic General Rules Tariff No. CDGR-1 in effect at the time of travel.

Rule 190(A), *General Conditions of Acceptance*, of First Air's Domestic General Rules Tariff No. CDGR -1 provides, in part, that:

> (3)(b) Carrier does not agree to carry in checked baggage or when otherwise placed in the care of the carrier, money, jewelery, silverware, negotiable papers, securities or **other valuables**, business documents, samples, liquids, and perishable items. (Emphasis added)

Rule 230-7F, *Liability - Baggage*, of First Air's Domestic General Rules Tariff No. CDGR-1 further provides, in part, that:

> (A)(2) Liability for the loss of, damage to, or the delay in delivery of, baggage or other personal property ... shall not be more than 750 dollars per passenger unless a higher value is declared in advance and charges are paid pursuant to carriers regulations as

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> defined in paragraph (C). In the event, the liability of the carrier shall be limited to such higher declared value. In no case shall the carriers liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.
>
> (B) Exclusions from Liability
>
> > (1) Carrier shall not be liable for the loss, damage, or delay in delivery of fragile or perishable articles, money, jewelry, silverware, negotiable papers, securities, or **other valuables**; spirits; business documents; band/orchestra equipment; household items; office equipment, cameras/ accessories or samples included in the passenger's checked baggage, with or without the knowledge of the carrier. (Emphasis added)

As for the carrier's policy on refusal to transport passengers or goods and on exclusions from liability, the Agency finds that the reference to "other valuables", as found in Rule 190(A), *General Conditions of Acceptance*, and Rule 230-7F(B)(1), *Exclusions from Liability*, is unclear, ambiguous, and thus is subject to interpretation. In order to meet the requirements of paragraph 107(1)(*n*) of the ATR, an exclusion from a general policy found in a tariff must clearly and specifically identify the elements contained in the said exclusion. Accordingly, if First Air intended or intends to refuse to transport such objects as musical albums and computer software on compact disks, then its domestic tariff must clearly state so.

In light of the above, the Agency notes that it was difficult for Mr. Witvoet to assess whether the carrier accepts or restricts its liability with respect to objects such as musical albums and computer software on compact disks. The rule of statutory interpretation *ejusdem generis* examined by the Supreme Court of Canada in *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, provides that where general words follow an enumeration of particular things, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. As such, a reasonable person would expect the nature of the term "other valuables", as found in Rule 190(A), *General Conditions of Acceptance*, and Rule 230-7F(B)(1), *Exclusions from Liability*, to be limited to type of genus or like class or nature as of the narrow enumeration that precedes it. Accordingly, a reasonable passenger could expect the air carrier to accept, without exclusion from liability, objects such as the ones carried by Mr. Witvoet. The Agency notes this was not done in the present case.

With respect to limits of liability respecting goods, the Agency finds that First Air has complied with the regulations as its tariff contains, as provided by subparagraph 107(l)(*n*)(x), provisions relating to the limits of liability respecting passengers and goods.

CONCLUSION

In light of the above findings, the Agency concludes that First Air has contravened paragraph 107(1)(*n*) of the ATR because its domestic tariff does not clearly state the carrier's policy with respect to refusal to transport goods, and exclusions from liability respecting goods.

Accordingly, the Agency, pursuant to section 26 of the CTA, hereby requires First Air to refrain from publishing, displaying or making available a tariff in contravention of paragraph 107(1)(*n*) of the ATR.

Case Name:

Duale v. Canada (Minister of Citizenship and Immigration)

Between
Mohamed Aden Duale, applicant, and
The Minister of Citizenship and Immigration, respondent

[2004] F.C.J. No. 178

[2004] A.C.F. no 178

2004 FC 150

2004 CF 150

40 Imm. L.R. (3d) 165

128 A.C.W.S. (3d) 1168

Docket IMM-6712-02

Federal Court
Ottawa, Ontario

Dawson J.

Heard: January 26, 2004.
Judgment: January 30, 2004.

(24 paras.)

Counsel:

Michael Bossin, for the applicant.
Marie Crowley, for the respondent.

REASONS FOR ORDER

1 **DAWSON J.**:-- In Stumf v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 590, 2002 FCA 148, the Federal Court of Appeal held that subsection 69(4) of the Immigration of Act, R.S.C. 1985, c. I-2 ("former Act") imposed the obligation on the Convention Refugee Determination Division of the Immigration and Refugee Board ("Board") to designate a representative for any refugee claimant who met the statutory criteria. This was to be done at the earliest point in time at which the Board became aware of facts which revealed the necessity of the appointment of a designated representative. In Stumf the obligation to appoint a designated representative for one of the claimants was triggered by the fact that this claimant was a minor. Because the age of the minor claimant was apparent to the Board from the outset, and because the failure to appoint a designated representative could have affected the outcome of the claim, the failure of the Board to designate a representative was held by the Court of Appeal to be an error that vitiated the entire decision made with respect to the minor claimant's claim. This was so notwithstanding that the issue of the failure to designate a representative was not raised before the Board, nor was it raised in the application to the Trial Division of the Federal Court (as it then was) for judicial review of the Board's decision.

2 In the present case, two issues arise. First, are the principles enunciated by the Federal Court of Appeal in Stumf applicable under the current legislation, the Immigration and Refugee Protection Act, S.C. 2001, c. 27 ("Act")? Second, on the facts of the present case should the decision of the Refugee Protection Division ("RPD") denying Mr. Duale's claim to status as a Convention refugee be set aside?

3 Counsel for the Minister fairly conceded that there is not a sufficient distinction between the relevant provisions of the former Act and the Act as to allow the proposition of law determined in Stumf to be distinguished. I agree. Indeed, in my view, the provisions of the Act, together with the provisions of the Refugee Protection Division Rules, SOR/2002-228 ("Rules"), clearly reflect that the obligation to designate a representative for a claimant who is a minor or who is otherwise unable to appreciate the nature of the proceedings arises at the earliest point in time at which the RPD becomes aware of facts which reveal the need for a designated representative. Further, the need for the designation of a representative applies to the entirety of the proceedings in respect of a refugee claim and not just to the actual hearing of the claim before the RPD. I so conclude for the following reasons.

4 First, the statutory obligation under subsection 167(2) of the Act to appoint a designated representative is virtually identical to the statutory obligation considered by the Federal Court of Appeal in Stumf. Similarly, the obligation on counsel for such a claimant to notify the Board in writing without delay that a claimant is under 18 years of age is continued under the Rules. Such obligation was formerly found in section 11 of the Convention Refugee Determination Division Rules, SOR/93-45 ("former Rules") and is now found in subsection 15(1) of the Rules. The slight difference in wording between the two provisions is not, in my view, material. Subsection 69(4) of

the former Act, subsection 167(2) of the Act, section 11 of the former Rules and subsection 15(1) of the Rules are set out in Appendix A to these reasons.

5 That the designation of a representative is to apply to the entirety of the proceedings in respect of a refugee claim flows from the fact that "Board proceedings" as used in section 167 of the Act encompasses more than the actual hearing before the RPD. Thus, subsection 168(1) allows a division to determine that "a proceeding" before it has been abandoned for such pre-hearing matters as failing to provide required information or failing to communicate with the division as required. As well, the word "proceeding" is defined in the Rules to include "a conference, an application, a hearing and an interview". Thus, the duty upon counsel to notify the RPD that a claimant in the "proceedings" is a minor applies to the status of the claimant at conferences, applications, interviews and the like.

6 The Immigration and Refugee Board acknowledges this to be the case in both the "Guidelines concerning Child Refugee Claimants: Procedural and Evidentiary Issues" ("Guidelines") continued under the statutory authority contained in paragraph 159(1)(h) of the Act, and in the Commentary to the Rules ("Commentary") published by the Immigration and Refugee Board.

7 The Guidelines state as follows under the heading "Processing Claims of Unaccompanied Children":

> 1. Claims of unaccompanied children should be identified as soon as possible by Registry staff after referral to the CRDD. The name of the child and any other relevant information should be referred to the provincial authorities responsible for child protection issues, if this has not already been done by Citizenship and Immigration Canada (CIC). After referral, all notices of hearings and pre-hearing conferences should be forwarded to the provincial authority.
> 2. The CRDD panel and Refugee Claim Officer (RCO) should be immediately assigned to the claim and, to the extent possible, the same individuals should retain responsibility for the claim until completion. It may also be necessary in some cases to assign an interpreter to the claim as early as possible so that the child can develop a relationship of trust with the interpreter. Before the panel, RCO and interpreter are assigned, consideration should be given to their experience in dealing with the claims of children.
>
> [...]
>
> 4. A designated representative for the child should be appointed as soon as possible following the assignment of the panel to the claim. This designation would usually occur at the pre-hearing conference referred to below, but it may be done earlier. CRDD panels should refer to Section II above for guidelines on

designating an appropriate representative. In determining whether a proposed representative is willing and able to act in the "best interests of the child", the panel should consider any relevant information received from the provincial authorities responsible for child protection as well as any relevant information from other reliable sources.

5. A pre-hearing conference should be scheduled within 30 days of the receipt of the Personal Information Form (PIF). The purposes of the conference would include assigning the designated representative (if this has not already been done), identifying the issues in the claim, identifying the evidence to be presented and determining what evidence the child is able to provide and the best way to elicit that evidence. Information from individuals, such as the designated representative, medical practitioners, social workers, community workers and teachers can be considered when determining what evidence the child is able to provide and the best way to obtain the evidence.

[underlining added, footnotes omitted]

8 The Commentary states:

> Designation applies to all the proceedings in a claim
>
> The designation of a representative applies to all the proceedings in respect of a refugee claim and not just to the hearing of the claim. [emphasis in original]

9 Turning to the application of facts of this case to the law, the Minister argues that the following are significant facts. First, by the time the hearing took place before the RPD, Mr. Duale was 18 years of age and represented by counsel. Thus, it is argued that Mr. Duale was competent to instruct counsel at the hearing and that any designated representative appointed before the hearing would have been dismissed at the hearing. To vitiate the decision in this circumstance is said not to be in accord with the intent of the legislation. Second, the RPD found that Mr. Duale failed to establish his identity that he was not credible. Therefore, it is asserted that the designation of a representative could not change the outcome of the claim and it would be futile to remit the matter for redetermination. Finally, it is said that neither Mr. Duale nor his counsel raised the issue of a designated representative before the RPD so that Mr. Duale is deemed to have waived the requirement.

10 I agree that it is necessary to consider the facts of each particular case and that it may be possible that the failure to designate a representative will not vitiate the determination of a claim. In the present case, the chronology of relevant events is as follows.

11 Mr. Duale was born on October 27, 1984. Therefore, his 18th birthday fell on October 27, 2002.

12 Mr. Duale arrived in Canada unaccompanied by anyone on March 2, 2001. He made his claim to refugee status on April 12, 2001. At that time Mr. Duale was 16 years of age.

13 In consequence of his claim, a notice to appear was issued to Mr. Duale on May 31, 2001 requiring that he appear on July 2, 2001 for the purpose of discussing his claim. Mr. Duale's Personal Information Form ("PIF") was completed by him on June 20, 2001 and was received by the Immigration and Refugee Board on June 21, 2001. On July 12, 2001, copies of documents which Citizenship and Immigration Canada had provided to the Immigration and Refugee Board were provided to counsel for Mr. Duale. Sometime between July 12, 2001 and October 12, 2001, a case officer was assigned to Mr. Duale's file. The case officer completed a checklist which expressly noted that Mr. Duale was a minor and that he was not represented by a designated representative.

14 October 12, 2001, a Refugee Claim Officer ("RCO") File Screening Form was completed which noted that a member of the RPD had been assigned to the claim. Subsequently, on February 12, 2002 the RCO wrote to counsel for Mr. Duale advising of the issues which the presiding member had noted as being particularly relevant. Those issues included Mr. Duale's personal identity and the fact that Mr. Duale was undocumented. On May 21, 2002, an expedited hearing was requested on Mr. Duale's behalf. This request was denied on May 22, 2002.

15 On July 2, 2002, a notice to appear was issued to Mr. Duale advising that the hearing before the RPD would take place on November 5, 2002. On October 22, 2002, correspondence was sent to Mr. Duale's counsel requiring that Mr. Duale bring to the hearing original identification documents.

16 All of these matters transpired while Mr. Duale was a minor not represented by a designated representative.

17 It is also important to consider the purpose of a designated representative. The Guidelines provide that the duties of a designated representative are as follows:

> The duties of the designated representative are as follows:
>
> - to retain counsel;
>
> - to instruct counsel or to assist the child in instructing counsel;
>
> - to make other decisions with respect to the proceedings or to help the child make those decisions;

- to inform the child about the various stages and proceedings of the claim;

- to assist in obtaining evidence in support of the claim;

- to provide evidence and be a witness in the claim;

- to act in the best interests of the child.

[emphasis in original]

18 Mr. Duale went through each stage of the proceeding, except for the actual hearing, without the assistance a designated representative was intended to provide. In particular, Mr. Duale did not have the benefit of any assistance from a designated representative in gathering evidence to support his claim. This is contrary to the intent and scheme of the Act and the Rules, and contrary to the Guidelines.

19 As to the effect of the failure to comply with the Act, Rules and Guidelines upon his claim, the RPD made the following findings:

1. Mr. Duale failed to establish his identity. The lack of original identification documents was found to be "incredible";
2. After reciting Mr. Duale's testimony to the effect that the UNHCR issues documents to persons in refugee camps only when they reach 18 years of age, and without commenting adversely on such testimony, the Board wrote:

> So I asked if his mother was in the camp with him, had any documents, if she had a ration card because I know from testimony that there are ration cards issued in these camps, and his response was, I never asked my mother, to which I replied it would have made your job a lot easier in establishing your identity and my job a lot easier in accepting that you had made an effort to establish your identity if we had some documentation from the camp.

3. With respect to an affidavit tendered as to Mr. Duale's identity, the Board wrote:

> We do have an affidavit going to identity and this affidavit was

> entered into evidence as Exhibit C-2. Affidavits are always problematic and certainly even more problematic if the author of the affidavit is not available for testimony in support of his affidavit, which is the case in this situation. When asked where the author of the affidavit was, the claimant said he was on his way to Somalia. Asked when he left, he said the 2nd of November.
>
> I find it puzzling that on an issue as important as this, that is the identity of this claimant, the man who authors an affidavit saying he knew the claimant in Somalia would not be able to delay his departure for Somalia by three days so that he would be able to testify as an identity witness. It is up to the claimant to establish his identity and he must make a genuine, substantive effort to do so.
>
> 4. The RPD went on to find Mr. Duale's story not to be credible.

20 In light of the first three findings of the RPD set out above, I am unable to safely conclude that the failure to appoint a designated representative could not have had an adverse effect on the outcome of the claim. A designated representative would have been responsible for assisting Mr. Duale to obtain evidence. The evidence before me supports the inference that the evidence gathering process was not what it could have been. (In fairness, I note that counsel for Mr. Duale in this Court did not represent Mr. Duale before the RPD).

21 In sum, to use the words used by Madam Justice Sharlow for the Court in Stumf, I am satisfied that "the designation of a representative in this case could have affected the outcome".

22 I am mindful of the adverse credibility findings of the RPD, but having carefully reviewed them I am satisfied that they could well have been coloured by the RPD's initial finding with respect to identity. Further, the Guidelines note that special evidentiary issues arise when eliciting the evidence of children and when assessing that evidence. While Mr. Duale was not a minor at the time of his hearing, he had turned 18 only 9 days before the hearing and he was 16 when he prepared his PIF. The reasons of the RPD do not expressly refer to Mr. Duale's age, notwithstanding a particularly minute examination of Mr. Duale's PIF. The failure to expressly acknowledge Mr. Duale's age and the impact that age may have had on the completion of his PIF, his testimony and the assessment of his testimony, while perhaps by itself not a reviewable error, does not enhance the credibility findings.

23 I have as well considered the Minister's argument of waiver. In Stumf the claimant's failure to raise the issue of designation either at the hearing or on the application for judicial review did not prevent the issue from being raised in the Court of Appeal. I am not prepared to reach a contrary conclusion in the present case where the issue of the failure to designate a representative was raised

squarely in the application for judicial review.

24 For these reasons, an order will issue allowing the application for judicial review and remitting the matter for redetermination. Prior to the issuance of such order, counsel may make submissions with respect to the certification of a question by serving and filing correspondence with the Court within seven days of the receipt of these reasons. Opposing counsel may then serve and file reply submissions within four days of receipt of the opposing party's submissions with respect to certification. Following consideration of any submissions received with respect to certification, an order will issue allowing the application for judicial review and dealing with the issue of certification of a question.

DAWSON J.

* * * * *

APPENDIX A

Subsection 69(4) of the former Act, subsection 167(2) of the Act, section 11 of the former Rules and subsection 15(1) of the Rules are as follows:

> 69(4) Where a person who is the subject of proceedings before the Refugee Division is under eighteen years of age or is unable, in the opinion of the Division, to appreciate the nature of the proceedings, the Division shall designate another person to represent that person in the proceedings.
>
> [...]
>
> 167(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.
>
> [...]
>
> 11. Where counsel of the person concerned believes that the person concerned is under 18 years of age or is unable to appreciate the nature of the proceeding, counsel shall so advise the Refugee Division forthwith in writing so that the Refugee Division may decide whether to designate a

representative pursuant to subsection 69(4) of the Act.

[...]

15(1) If counsel for a party believes that the Division should designate a representative for the claimant or protected person in the proceedings because the claimant or protected person is under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, counsel must provide the person's contact information in the notice.

* * *

69(4) La section du statut commet d'office un représentant dans le cas où l'intéressé n'a pas dix-huit ans ou n'est pas, selon elle, en mesure de comprendre la nature de la procédure en cause.

[...]

167(2) Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.

[...]

11. Dans le cas où le conseil de l'intéressé croit que ce dernier est âgé de moins de dix-huit ans ou n'est pas en mesure de comprendre la nature de la procédure en cause, il en avise par écrit sans délai la section du statut afin qu'elle décide si elle doit commettre d'office un représentant conformément au paragraphe 69(4) de la Loi.

[...]

15(1) Si le conseil d'une partie croit que la Section devrait commettre un

représentant à la personne en cause parce qu'elle est âgée de moins de dix-huit ans ou n'est pas en mesure de comprendre la nature de la procédure, il en avise sans délai la Section par écrit. S'il sait qu'il se trouve au Canada une personne ayant les qualités requises pour être représentant, il fournit les coordonnées de cette personne dans l'avis.

cp/e/qw/qlklc/qlhcs

Indexed as:

Rizzo & Rizzo Shoes Ltd. (Re)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, appellants;

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, respondent, and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, party.

[1998] 1 S.C.R. 27

[1998] S.C.J. No. 2

File No.: 24711.

Supreme Court of Canada

1997: October 16 / 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law -- Bankruptcy -- Termination pay and severance available when employment terminated by the employer -- Whether bankruptcy can be said to be termination by the employer -- Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a -- Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) -- Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) -- Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the Employment

Standards Act ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to severance, termination or vacation pay under the ESA. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the ESA suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's Interpretation Act provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the ESA and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the ESA and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbitrarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the Employment Standards Amendment Act, 1981 exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the ESA is benefits-conferring legislation, it ought to be interpreted in a broad and

generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the ESA. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the Bankruptcy Act for termination and severance pay in accordance with ss. 40 and 40a of the ESA. It was not necessary to address the applicability of s. 7(5) of the ESA.

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Distinguished: Re Malone Lynch Securities Ltd., [1972] 3 O.R. 725; Re Kemp Products Ltd. (1978), 27 C.B.R. (N.S.) 1; Mills-Hughes v. Raynor (1988), 63 O.R. (2d) 343; referred to: U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86; R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103; Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; R. v. TNT Canada Inc. (1996), 27 O.R. (3d) 546; Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1; R. v. Vasil, [1981] 1 S.C.R. 469; Paul v. The Queen, [1982] 1 S.C.R. 621; R. v. Morgentaler, [1993] 3 S.C.R. 463; Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513; British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25; R. v. Z. (D.A.), [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3 [now the Bankruptcy and Insolvency Act], s. 121(1).
Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. ibid., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. par. 210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. par. 14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.
Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.
Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

The judgment of the Court was delivered by

1 IACOBUCCI J.:-- This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the Employment Standards Act, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the ESA.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the Bankruptcy Act (now the Bankruptcy and Insolvency Act) and the Employment Standards Act for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. --

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the Employment Standards Act.

40. -- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;
(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1)Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January,

> 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

> 121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> . . .
>
> 17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the BA. Relying on U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the ESA such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the ESA is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the ESA is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit

and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the ESA.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the BA. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the BA.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the ESA termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the ESA. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the Employment Standards Amendment Act, 1981, S.O. 1981, c. 22 (the "ESAA"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the ESA. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the ESA. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and

severance pay to situations in which the employer terminates the employment. The operation of the ESA, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited Re Malone Lynch Securities Ltd., [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the ESA termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon Re Kemp Products Ltd. (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the ESA, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the ESAA. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the ESA, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins

with the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the ESA termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the ESA.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103.

22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

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

24 In Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701). It was in this context that the majority in Machtinger described, at p. 1003, the object of the ESA as being the protection of ". . . the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the ESA requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, Employment Law in Canada (2nd ed. 1993), at pp. 572-81.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In R. v. TNT Canada Inc. (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's

interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra, at p. 88).

28 The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the ESA to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the ESAA introduced s. 40a, the severance pay provision, to the ESA. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> 2. . . .
>
> (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the

> meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the ESA. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., R. v. Vasil, [1981] 1 S.C.R. 469, at p. 487; Paul v. The Queen, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in Royal Dressed Meats Inc., supra. Having reviewed s. 2(3) of the ESAA, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . .

> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in R. v. Morgentaler, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2, at p. 10; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in Malone Lynch, supra. In Malone Lynch, Houlden J. held that s. 13, the group termination provision of the former ESA, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the ESA then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after Malone Lynch was decided, the 1970 ESA termination pay provisions were amended by The Employment Standards Act, 1974, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 ESA eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the Malone Lynch decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 ESA have no application to a bankrupt employer. For this reason, I do not accept the Malone Lynch decision as persuasive authority for the Court of Appeal's findings. I note that the courts in Royal Dressed Meats, supra, and British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon Malone Lynch based upon similar reasoning.

39 The Court of Appeal also relied upon Re Kemp Products Ltd., supra, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the ESA. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on Mills-Hughes v. Raynor (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in Malone Lynch, supra, with approval.

40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see R. v. Z. (D.A.), [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the ESAA, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim ESA termination and severance pay where their termination has

resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the ESA, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the ESA. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the ESA.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the ESA underwent another amendment. Sections 74(1) and 75(1) of the Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the Interpretation Act directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.