Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE MOVING PARTY, AIR PASSENGER RIGHTS

Motion pursuant to Rules 41 and 318 of the *Federal Courts Rules*

VOLUME 1 of 3

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NOTICE OF MOTION

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

THE MOTION IS FOR:

1. An Order, pursuant to Rule 318(4), that within ten days the Agency transmit in electronic format to the Registry and to the Applicant complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications (defined further below), including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos [**Materials**];

2. In the alternative, an Order pursuant to Rule 41, directing the issuance of a subpoena to the Chief Executive Officer of the Agency to produce the Materials within ten days;

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

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

THE GROUNDS FOR THE MOTION ARE:

1. At the outset of the COVID-19 pandemic, the Agency widely disseminated two public statements, the "Statement on Vouchers" and the "Important Information for Travellers During COVID-19" page, which the Agency published or updated on March 25, 2020 [the **Publications**], purporting to inform, or otherwise influence the perception of, the travelling public regarding their rights to refunds of unused airfares for flights affected during the COVID-19 pandemic.

2. The Agency was not acting independently in respect of the Publications. Both the airlines and Transport Canada had input into or guided the Publications.

3. The Agency's chairperson, vice-chairperson, and unnamed appointed members ultimately approved, supported, and/or otherwise endorsed those Publications.

4. The Applicant is a non-profit group that advocates for the rights of the travelling public, seeking judicial review on behalf and for the benefit of the travelling public in respect of the Publications on two distinct and independent grounds:

   (a) **Reasonable Apprehension of Bias Ground** [**RAB Ground**] — the Agency's issuing of the Publications is contrary to the Agency's own *Code of Conduct*, **and** gives rise to a reasonable apprehension of bias with respect to the Agency's members who supported and/or endorsed the Publications; and

   (b) **Misinformation Ground** — the content of the Publications contains misinformation and omissions about passengers' legal rights vis-à-vis the airlines, and creates confusion for the travelling public.

5. At the outset, the Applicant also brought a motion for interlocutory injunctions.

6. On May 22, 2020, Mactavish, J.A. dismissed the motion for injunctions, ruling that the irreparable harm criterion was not met at that time, although the Applicant demonstrated a *serious issue to be tried* for the RAB Ground.

7. On August 3, 2020, the Agency brought a motion to strike the Applicant's application for judicial review.

8. On October 2, 2020, Webb, J.A. dismissed the Agency's motion to strike and ruled that the application for judicial review should be heard on the merits, and reaffirmed that the RAB Ground raises a *serious issue to be tried*.

9. On October 29, 2020, the Agency confirmed, in response to a request under the *Access to Information Act*, that its search identified approximately 10,000 pages of documents in respect of the drafting, review, approval, and/or publication of the Agency's Statement on Vouchers.

10. On November 13, 2020, Webb, J.A. directed that the Applicant bring a motion to compel the production of the materials that it requests from the Agency.

11. On December 1, 2020, the Agency's Chief Executive Officer testified before the House of Commons Transport Committee regarding the Agency's Publications.

12. On December 23, 2020, the Agency disclosed, under the *Access to Information Act*, 137 pages out of the aforementioned approximately 10,000 pages of documents that it identified. Although the 137 pages were substantially redacted, they reinforce both the existence and the relevance of the requested Materials.

The Materials are Relevant and Necessary for Adjudicating the RAB Ground

13. Justices of this Court have already twice confirmed that there is a *serious issue to be tried* for the RAB Ground, and that it must be addressed on its merits.

14. The Materials are necessary for a fair and just adjudication of the RAB Ground of this judicial review.

    (a) On the interlocutory injunctions motion, Mactavish, J.A. held that allegations of an apprehension of bias should normally be assessed against the conduct or involvement of each specifically named Agency member.

(b) The Agency's appointed members' involvement with the Publications and the nature and extent of their involvement are facts in dispute.

(c) It will therefore fall upon this Honourable Court to make findings of fact as to which members of the Agency were involved with the Publications, and also the nature and extent of each of those members' involvement.

(d) The Materials will demonstrate:

i. the names of the specific appointed members of the Agency who participated in the issuance of the Publications by approving, supporting, or otherwise endorsing the Publications, and the nature of their respective involvement; and

ii. the Agency's objective in issuing the Publications, including the nature and extent of the external influences on the Agency from the airline industry and/or Transport Canada.

15. As a matter of law, an applicant is entitled to the production of documents in the possession of the tribunal which demonstrate, or tend to demonstrate, bias on the part of a member of that board, or that board generally: *Majeed v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 908 at para. 3.

16. The question on this motion is therefore not *whether* the Materials should be produced, but *how* to order production of the Materials from the Agency (i.e., the procedural means).

17. Whether the Court orders production of the Materials from the Agency based on a purposive interpretation of Rules 317-318, or based on an application of the "exceptional evidence" approach under Rule 41, is a question of form, not substance. Without production of the Materials, the Agency's appointed members will effectively be immunized from judicial scrutiny and oversight.

Order Pursuant to Rule 318 for the Agency to Transmit the Materials

18. In the Notice of Application, the Applicant requested under Rule 317 that the Agency transmit material to the Registry and the Applicant.

19. The Agency objected to transmitting any of the requested material, arguing that this judicial review does not relate to an "order" from a tribunal.

20. In the interest of swift resolution of this motion and the application, only a small portion of the transmittal request is being pursued. The Applicant has further particularized and refined the request as follows:

> Complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos [**Materials**].

21. Pursuant to Rule 318(4) of the *Federal Courts Rules*, this Honourable Court may order production of the Materials.

Subpoena to the Chief Executive Officer of the Agency under Rule 41 for Production of the Materials

22. Alternatively, a subpoena may be issued under Rule 41 for production of the Materials. The requirements for Rule 41 are satisfied in this case.

(a) The Materials are necessary, and the Agency's conduct thus far demonstrates that there is no other way of obtaining them.

(b) The Applicant is clearly not engaging in a fishing expedition and there is a strong evidentiary basis that the Materials exist.

(c) The Agency's Chief Executive Officer has supervision over and direction of the Agency's work, and as such, has possession and/or control of the Materials.

23. Although subrule 41(5) empowers this Court to issue the subpoena on an *ex parte* motion, the Applicant will be giving notice to the Chief Executive Officer of the Agency. In any event, the Agency itself is already a party in this application.

24. The Chief Executive Officer of the Agency is presently Mr. Scott Streiner with an address for service at 15 Eddy Street, Gatineau, Quebec K1A 0N9 Canada and e-mail address at Scott.Streiner@otc-cta.gc.ca.

Statutes and Regulations Relied Upon

25. *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections 7, 13, 16, and 19;

26. *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 41, 81, 317-318, and 369; and

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

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on January 3, 2021.

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

January 3, 2021

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AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: January 3, 2021)

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

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

A. The Applicant: Air Passenger Rights

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

3. I am the president and a director of APR. I actively lead all the work of APR. Mr. Simon Lin, counsel representing APR on a *pro bono* basis on this judicial review, is also one of the directors of APR. APR operates on a non-profit basis and its directors, including myself, are not paid any salaries or wages.

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

5. APR is funded solely by small donations from passengers. Those donations only cover some out-of-pocket expenses incurred in undertaking APR's public interest advocacy work.

6. APR promotes passenger rights by referring passengers to information and resources through the press, social media, and the AirPassengerRights.ca website.

7. APR's Facebook group, entitled "Air Passenger Rights (Canada)" [**APR Facebook Group**], has more than 38,300 members as of the date of this Affidavit. The APR Facebook Group is a platform for passengers to share their concerns regarding air travel and passenger rights, and to discuss their issues and concerns with other passengers. A small group of volunteers, led by me, regularly responds to every passengers' Facebook post on the APR Facebook Group and provides passengers with information whenever possible.

B. Dr. Lukács's Public Interest Advocacy Activities

8. Since 2008, I have volunteered my time and expertise to advocate for the benefit of the travelling public. I filed more than two dozen regulatory proceedings with the Canadian Transportation Agency [**Agency**] leading to airlines being ordered to rectify their conduct, and secured better protection for passengers. Attached and marked as **Exhibit "B"** is an excerpt of that advocacy work.

9. In 2013, the Consumers' Association of Canada recognized my air passenger advocacy work and awarded me the Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices [...]."

10. Mr. Carlos Martins, a recognized aviation lawyer, commended my work in a 2013 review article on aviation law in Canada, a copy of which is attached and marked as **Exhibit "C"**.

11. I have successfully challenged, in the public interest, the legality of the Agency's actions on a number of occasions, including:

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

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

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

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

13. In October 2017, I appeared before the Supreme Court of Canada. The court's judgment is indexed as *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.

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

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

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

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

A copy of the court's order is attached and marked as **Exhibit "D"**.

Recognition by Parliament and the Agency as a Passenger Rights Advocate

17. I testified twice about the *Transportation Modernization Act*: (1) in September 2017, before the House of Commons' Standing Committee on Transport, Infrastructure and Communities [**TRAN Committee**]; and (2) in March 2018, before the Standing Senate Committee on Transport and Communications.

18. The Agency recognized me as a stakeholder in the consultation process leading to the development of the *Air Passenger Protection Regulations* [***APPR***]. By invitation, I attended two individual consultation meetings with the Agency and Transport Canada staff, and also filed two related written submissions between June 2018 and February 2019. These consultation meetings were distinct from the Agency's townhalls held for the general public.

19. On December 8, 2020, I testified at the TRAN Committee for a study on the "Impact of COVID-19 On the Aviation Sector" about the impact of the airlines' refusal to refund affected flights during the COVID-19 pandemic, and the Agency's failure to enforce passengers' rights.

C. The Agency's Organizational Structure and Composition

20. A copy of the Agency's organizational chart, retrieved from the Agency's website on December 22, 2020, is attached and marked as **Exhibit "E"**.

21. Mr. Scott Streiner is the Agency's Chairperson and Chief Executive Officer. A copy of Mr. Streiner's contact information, retrieved from the Government of Canada's Government Electronic Directory Services [**GEDS**] on December 22, 2020, is attached and marked as **Exhibit "F"**.

22. A copy of the Agency's "Organization and mandate" page as it was archived on March 30, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "G"**.

23. A copy of the Agency's "Members" page, retrieved from the Agency's website on December 22, 2020, is attached and marked as **Exhibit "H"**.

24. The *Code of Conduct of Members of the Agency* [***Code of Conduct***] provides under the heading "Interactions with non-Agency individuals and organizations," in part, that:

> (39) Members shall not communicate with political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.
>
> (40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.

A copy of the Agency's *Code of Conduct* is attached and marked as **Exhibit "I"**.

25. For greater certainty, I am attaching Exhibits "G" and "I" only for the purpose of placing before the Court the list of the Agency's appointed members from March 30, 2020 and the *Code of Conduct*, respectively. I do not agree with, nor accept, any other content within those documents as correctly reflecting the Agency's mandate under the *Canada Transportation Act*.

D. The COVID-19 Pandemic and Airlines' Withholding of Refunds

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

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

28. Within days of the March 11, 2020 WHO announcement and the March 13, 2020 Global Affairs Canada advisory, a significant and large scale controversy had developed between airlines and their passengers. The airlines were refusing to refund passengers to the original form of payment for unused airfares, even when it was the airline that cancelled, suspended, or otherwise failed to operate the flights; the airlines argued that they were under no legal obligation to do so. On the other hand, passengers were making legal demands for refunds to the original form of payment.

29. During this period, internet traffic to the APR Facebook Group substantially increased, despite passengers refraining from air travel for a number of reasons. The majority of that increased traffic related to passengers being consistently refused a refund to original forms of payment for unused airfares.

E. Agency's Publications: Statement on Vouchers and COVID-19 Agency Page

30. On March 25, 2020, the Agency posted a "Statement on Vouchers" [**Statement**] on its website, which read as follows:

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

A copy of the Statement is attached and marked as **Exhibit "L"**.

31. On March 25, 2020, the Agency also updated its webpage entitled "Important Information for Travellers During COVID-19" [the **COVID-19 Agency Page**], to include four references to the Statement and a URL linking to the Statement. A copy of the COVID-19 Agency Page is attached and marked as **Exhibit "M"**.

32. Neither the Statement nor COVID-19 Agency Page [collectively, **Publications**] were attributed to any of the appointed members of the Agency.

33. The Agency widely disseminated the Publications to passengers and the travel industry through various media, including its website, Twitter, responses to passengers' inquiries, and a *pro forma* acknowledgment email for formal complaints received.

    (a) A bundle of a series of the Agency's Twitter posts from March 25, 2020 to early April 2020 that relies on the Statement on Vouchers is attached and marked as **Exhibit "N"**.

    (b) A bundle of emails citing the Statement on Vouchers sent by the Agency in response to passengers' inquiries between March 27, 2020 to April 20, 2020 is attached and marked as **Exhibit "O"**.

    (c) The Agency's *pro forma* acknowledgment email for formal complaints, which links to the Statement on Vouchers under the heading "Air Carriers' obligations during the global COVID-19 pandemic," is attached and marked as **Exhibit "P"**.

(i) The Agency's Appointed Members' Involvement in the Publications

34. The Agency's appointed members, including its chairperson and vice-chairperson, approved the Publications. The source of my knowledge is the following documents:

(a) Email exchange between MP Nathaniel Erskine-Smith and Ms. Blake Oliver, a policy advisor at Transport Canada, dated October 5, 2020, a copy of which is attached and marked as **Exhibit "Q"**. MP Erskine-Smith provided me with Exhibit "Q", and I believe the content of the correspondence to be true.

(b) Mr. Streiner's testimony before the House of Commons Standing Committee on Transport, Infrastructure and Communities [**TRAN Committee**], whose transcript became available on or around December 16, 2020, and an excerpt of which is attached and marked as **Exhibit "R"**.

(c) A 137-page bundle of heavily redacted documents disclosed by the Agency under the *Access to Information Act* on December 23, 2020 (see paragraphs 61-70 below).

35. On March 25, 2020, the date the Agency issued the Publications, the following email exchanges took place within the Agency:

(a) At 10:36 a.m., Ms. Valerie Legace, the Agency's Secretary and General Counsel, emailed Mr. Streiner with the subject line "push button ready." Ms. Legace's email was copied to:

i. Ms. Liz Barker, the Agency's Vice-Chairperson;
ii. Mr. Sebastien Bergeron, the Agency's Chief of Staff; and
iii. Ms. Marcia Jones, the Agency's Chief Strategy Officer.

(b) At 1:35 p.m., Mr. Streiner emailed Ms. Jones and enclosed the Statement on Vouchers in Word format, which was also copied to Ms. Barker and Mr. Bergeron.

(c) At 1:55 p.m., Ms. Jones forwarded Mr. Streiner's email to Ms. Renee Langlois, the Agency's Senior Writer-Editor, with the message "Over to you! ☺", and copied to Mr. Tim Hillier, Director of Communications.

(d) At 2:25 p.m., Ms. Matilde Perrusclet, the Agency's Communications Advisor, informed Mr. Hillier that the Publications were live on the Agency's website.

A bundle of redacted copies of the emails referenced in this paragraph, disclosed by the Agency under the *ATIA*, is attached and marked as **Exhibit "S"**.

36. On October 5, 2020, MP Erskine-Smith exchanged multiple emails with Ms. Oliver about the Agency's Statement on Vouchers. MP Erskine-Smith asked Ms. Oliver, in refrence to the Statement on Vouchers:

> [...] so fair to say it was approved by the members, vice-chair, and chair.

Ms. Oliver replied "Yes, that's correct" (Exhibit "Q").

37. On December 1, 2020, Mr. Streiner acknowledged in his testimony before the TRAN Committee (Exhibit "R") that he was involved in preparing the Statement on Vouchers:

> **Mr. Xavier Barsalou-Duval:** You still announced that you wouldn't deal with any complaints about cancelled airline tickets until September 2020, and then you postponed it until 2021. In March, the Canadian Transportation Agency released the Statement on Vouchers, which was recently revised. I'd like to know if you had any input into this statement.

> **Mr. Scott Streiner:** All statements, guidelines and guidance material are written by the organization and, as head of the organization, I am always involved, of course.

38. Mr. Streiner failed to provide a responsive answer to a TRAN Committee member (Exhibit "R") on "who approved" the Statement on Vouchers:

> **Mr. Taylor Bachrach:** Thank you, Mr. Chair. Mr. Streiner, which individuals authored and approved the March 25 statement on vouchers?
>
> **Mr. Scott Streiner:** With regard to the statement on vouchers, like all guidance material posted by the CTA–and we post a great deal of non-binding guidance material, policy statements and information–there are many people who participate in its preparation, in its drafting and in its review, so it's a large number of employees who contributed to that.
>
> **Mr. Taylor Bachrach:** Who approved it?
>
> **Mr. Scott Streiner:** Ultimately, every statement like this is an expression of the organization's guidance. As I emphasized earlier, the statement on vouchers, like these other documents, was non-binding in nature, and it's an expression of guidance or a suggestion to the travelling public by the institution.
>
> **Mr. Taylor Bachrach:** An email from a policy adviser at Transport Canada to Member of Parliament Erskine-Smith revealed that the CTA's members, vice-chair and chair would have approved the statement on vouchers, which gave airlines clearance to refuse refunds. Is this correct?
>
> **Mr. Scott Streiner:** Mr. Chair, I'm not sure about that email. I haven't seen the email. It's not in front of me. The office of the Minister of Transport would not have been privy to the internal decision-making processes at the CTA, and I would simply reiterate that every statement—non-binding—that's made by the CTA, every guidance document is a reflection of institutional guidance and of course is reviewed by senior members of the organization.
>
> **Mr. Taylor Bachrach:** Mr. Streiner, will you commit to providing this committee with all internal documents, memos and emails concerning the March 25 statement on vouchers and the

subsequent clarification?

> **Mr. Scott Streiner:** The CTA is subject to the same access to information rules as any other organization. We have a policy of transparency, and so we try to come forward. I will commit to certainly providing the committee with those documents that it's appropriate to provide, but we are a quasi-judicial tribunal, an independent regulator, and certain material is privileged.

39. Mr. Streiner's claim before the TRAN Committee of having no prior knowledge of the email exchange of MP Erskine-Smith (Exhibit "Q") was incorrect. A copy of a media report by the Canadian Press, published on October 7, 2020, quoting the Agency's comments about the very same email, is attached and marked as **Exhibit "T"**.

40. For greater certainty, I am citing Mr. Streiner's TRAN Committee testimony only as the source of my knowledge about the Agency's appointed members' involvement with the Publications. I do not accept Mr. Streiner's TRAN Committee testimony as being correct, complete, or accurate about any other aspect of the Publications, particularly the asserted purpose for issuing the Statement on Vouchers and his assertion that the Agency has "a policy of transparency."

41. The evidence in this subsection relating to the Agency's appointed members' involvement with the Publications was not available to APR when the interlocutory injunctions motion was decided by Mactavish, J.A. on May 22, 2020.

(ii) Airlines' and Transport Canada's Input on the Publications

42. Airlines and Transport Canada had input during the drafting of the Publications. The source of my knowledge is the following documents:

(a) A heavily redacted email with subject line "by way of example," sent by an unidentified employee from WestJet's "Government Relations and Regulatory Affairs" team to Ms. Jones, the Agency's Chief Strategy Of-

ficer, on March 11, 2020, a copy of which is attached and marked as **Exhibit "U"**.

(b) An email with the subject line "APPR Guidelines - COVID-19," sent on March 12, 2020

i. from Mr. George Petsikas, Air Transat's Senior Director of Government and Industry Affairs,
ii. to Ms. Jones, the Agency's Chief Strategy Officer,

a copy of which is attached and marked as **Exhibit "V"**.

(c) An almost fully redacted email chain with subject line "CTA announcement tomorrow" between

i. Vincent Millette, Manager/Senior Policy Advisor of Transport Canada's National Air Services Policy department; and
ii. Caitlin Hurcomb, Team Leader and Senior Policy Advisor at the Agency,

from March 22-24, 2020, a copy of which is attached and marked as **Exhibit "W"**.

43. The WestJet March 11, 2020 email (Exhibit "U") was forwarded to other civil service staff at the Agency who were also involved with the Publications.

44. The Air Transat March 12, 2020 email (Exhibit "V") was a follow-up to a verbal discussion between Mr. Petsikas and Ms. Jones about "APPR Guidelines - COVID-19" earlier that day.

(a) Mr. Petsikas stated that Air Transat was "not alone in this task" of ensuring "the continued viability of our company and avoids potential impact on employment levels."

(b) Mr. Petsikas sought the Agency's assistance in "managing scheduling and capacity [...] in the face of enormous downward pressures on demand" by giving "clarity with respect to the application of the APPR provisions dealing with cancellations and resulting refund and alternative travel arrangement requirements" (emphasis added).

(c) Ms. Jones forwarded Mr. Petsikas's email to

i. Ms. Lagace, the Agency's Secretary and General Counsel; and
ii. Ms. Hurcomb, Team Leader and Senior Policy Advisor at the Agency.

45. The evidence in this subsection relating to the airlines' and Transport Canada's input in respect of the Publications was not available to APR when the interlocutory injunctions motion was decided by Mactavish, J.A. on May 22, 2020.

(iii) Travel Industry's Reliance on the Agency's Publications

46. After the Agency made the Publications available to the public, the travel industry immediately began relying on the Statement on Vouchers to fend off passengers' request or demand for refunds of unused airfares.

47. Air Canada, WestJet, Air Transat, and Sunwing cited the Statement on Vouchers in their communications with passengers and/or travel agents, claiming that the Statement on Vouchers was a ruling, support, and/or approval for issuing vouchers or credits instead of refunds to the original form of payment. A bundle of these communications from the aforementioned airlines from March 26 to April 1, 2020 is attached and marked as **Exhibit "X"**.

48. On April 1, 2020, the Canadian Life and Health Insurance Association issued a document entitled "Advisory: Travel cancellation insurance and airline vouchers or credits," a copy of which is attached and marked as **Exhibit "Y"**, stating,

among other things, that "[o]n March 25, 2020, the Canadian Transportation Agency updated its endorsement of the use of vouchers or credits [...]." The advisory also stated that travel insurance may not compensate passengers when a voucher or credit is being offered by the airlines.

(iv) Transport Minister's Interpretation and Reliance on the Publications

49. On May 28, 2020, the Minister of Transport represented to a committee of the House of Commons that:

> Mr. Chair, as my hon. colleague knows, the Canadian Transportation Agency has ruled on this issue and has ruled that, in the present circumstances and in a non-binding way, it is acceptable for airlines to offer credits for up to two years. In the case of Air Canada, the credit has no expiry date.
>
> [Emphasis added.]

An excerpt of the House of Commons COVI Committee's Evidence from May 28, 2020 is attached and marked as **Exhibit "Z"**.

(v) The Agency's Subsequent Amendments to Both Publications

50. Since APR commenced this application for judicial review, the Agency modified the Statement on Vouchers twice, and the COVID-19 Agency Page at least once.

51. On or about April 22, 2020, about a week before the deadline for the Agency's responding motion record for the interlocutory injunctions motion, the Agency added a new hyperlink at the bottom of the Statement on Vouchers, pointing to a new Frequently Asked Questions webpage [**FAQ Page**]. The FAQ Page stated for the first time that the Statement was not a legal ruling and purported to provide some explanation why the Agency issued the Statement on Vouchers. A copy of the FAQ Page is attached and marked as **Exhibit "AA"**.

52. On or about November 16, 2020, the Agency published a revamped version of the Statement on Vouchers [**Revamped Statement on Vouchers**].

(a) A new textbox was added to the top of the page, stating that the Statement on Vouchers is "non-binding" and purporting to explain why it was originally published on March 25, 2020.

(b) The hyperlink to the FAQ Page was replaced with the actual content from the FAQ Page.

A copy of the revamped Statement is attached and marked as **Exhibit "AB"**.

53. The Revamped Statement on Vouchers (Exhibit "AB") now includes a brand new sentence, near the beginning of the textbox, which misleads the public about the law:

> [...] the law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control [...]

54. For greater clarity, Exhibit "AB" is not tendered for the accuracy of its content, but merely as proof that the aforementioned Revamped Statement on Vouchers was posted on the Agency's website. I believe that the excerpted sentence from Exhibit "AB" is misleading because it fails to reference ss. 107(1)(n)(xii) and 122(c)(xii) of the *Air Transportation Regulations*, which state:

> **107 (1)** Every tariff shall contain
>
> (n) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> (xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

> **122** Every tariff shall contain
>
> (c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> (xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
>
> [Emphasis added.]

55. For all of the modifications above, the Agency did not update the "Date Modified" at the bottom of the Statement and COVID-19 Agency Page, which continue to read as "March 25, 2020" and "March 18, 2020", respectively.

F. The Agency's Objection to Transmit Relevant Materials under Rule 317

56. In the Notice of Application that APR submitted for filing on or about April 7, 2020, APR requested under Rule 317 that the Agency transmit to the Registry and to APR four categories of relevant materials.

57. On August 20, 2020, the Agency objected to APR's request to transmit materials pursuant to Rule 318(2). The Agency advanced a sole basis for its objection:

> [...] the application does not relate to an "order" of a tribunal, Rule 317 does not apply.

A copy of the Agency's letter dated August 20, 2020 is attached and marked as **Exhibit "AC"**.

58. Between August 25-31, 2020, the parties submitted letters to the Court to seek directions about how to resolve the Agency's objection to transmit the materials requested by APR. The bundle of letters submitted by the parties is attached and

marked as **Exhibit "AD"**.

59. On November 13, 2020, Webb J.A. issued a direction that APR is to bring a motion to compel the production of records that APR requests for the judicial review application.

60. On this motion, the APR is seeking only a small portion of the documents whose transmittal was originally sought. APR has further particularized and refined the request as follows:

> Complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos [**Materials**].

G. Formal Request under the *Access to Information Act*

61. On August 25, 2020, I personally submitted a formal request under the *Access to Information Act* [***ATIA***] to the Agency for an electronic copy of the following records:

> All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (https://otc-cta.gc.ca/eng/statement-vouchers). The time period we request is March 11, 2020 to April 9, 2020.

A bundle of the request, automated confirmation of receipt, and payment of the *ATIA* request fee is attached and marked as **Exhibit "AE"**.

62. On September 3, 2020, the Agency's access to information team formally acknowledged receipt of my request under the *ATIA*. A copy of the confirmation email is attached and marked as **Exhibit "AF"**.

63. On September 28-29, 2020, the Agency wrote to me claiming that due to an administrative error, it incorrectly opened my request as a so-called "informal request," and as a result, my request was not processed. The Agency further informed me that it would close the "informal" file, and restart the process as a "formal" *ATIA* request with a new file number. The bundle of emails exchanged between the Agency and myself from September 28-29, 2020 is attached and marked as **Exhibit "AG"**.

64. On October 16, 2020, I received a letter from the Agency stating that it was a "first installment of the records relevant to your request and disclosed under the authority of the [*Access to Information*] *Act*," enclosing 118 pages of documents that contained a substantial number of redactions [**October Disclosure**]. The October Disclosure appears to be a 118-page subset from a set of 5,953 pages of documents.

65. After reviewing the October Disclosure, I wrote to the Agency that the October Disclosure was not responsive to my request. On October 19, 2020, the Agency wrote to me indicating that the October Disclosure was the response package for a similar request they previously received from another person, and was released to me as a courtesy. The Agency asked me to disregard the October 16, 2020 letter and re-sent a new letter relating to the October Disclosure. The bundle of emails exchanged between the Agency and myself from October 16-19, 2020 is attached and marked as **Exhibit "AH"**.

66. On October 29, 2020, the Agency wrote to me indicating that its search for records returned approximately 10,000 pages of documents and that the analyst would do her best to provide a response within 2-4 weeks. A copy of the October 29, 2020 email is attached and marked as **Exhibit "AI"**.

67. I followed up with the Agency on November 13, 2020, and received an email from the Agency on November 18, 2020 stating that the analyst was reviewing the records responsive to my request.

68. On November 23, 2020, I submitted a complaint to the Office of the Information Commissioner of Canada [**OIC**]. The OIC acknowledged receiving my complaint on November 30, 2020, and advised me that I would be informed when an investigator had been assigned. Up to the date of this affidavit, the OIC has not assigned an investigator to my complaint.

69. On December 23, 2020, without prior notice, the Agency sent me another response to my August 25, 2020 *ATIA* request and enclosed 137 pages of documents that were almost entirely redacted. The 137 pages of documents released by the Agency on December 23, 2020 are attached and marked as **Exhibit "AJ"**.

70. The Agency's formal response letter accompanying the aforementioned 137 pages of documents is attached and marked as **Exhibit "AK"**.

AFFIRMED remotely by Dr. Gábor Lukács at the City of Halifax, Nova Scotia before me at the City of Coquitlam, British Columbia on January 3, 2021, in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*.

"Dr. Gábor Lukács"
Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

"Simon Lin"
Commissioner for Taking Affidavits

Simon (Pak Hei) Lin, *Barrister & Solicitor*
LSO #: 76433W
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Innovation, Science and Economic Development Canada
Corporations Canada

Innovation, Sciences et Développement économique Canada
Corporations Canada

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

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

1 Corporate name
Dénomination de l'organisation

Air Passenger Rights

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

NS

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

Min. 3 Max. 9

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

See attached schedule / Voir l'annexe ci-jointe

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

See attached schedule / Voir l'annexe ci-jointe

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

See attached schedule / Voir l'annexe ci-jointe

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

See attached schedule / Voir l'annexe ci-jointe

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

See attached schedule / Voir l'annexe ci-jointe

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

Name(s) - Nom(s)

Gabor Lukacs

Signature

Gabor Lukacs

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

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

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

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

Canada

Schedule / Annexe

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

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

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

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

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

Schedule / Annexe

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

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

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

Schedule / Annexe
Classes of Members / Catégories de membres

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

Schedule / Annexe

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

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

Schedule / Annexe
Additional Provisions / Dispositions supplémentaires

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

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

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

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Halifax, NS

AirPassengerRights.ca

lukacs@AirPassengerRights.ca

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

Submissions to the Standing Committee on Transport, Infrastructure and Communities

by *Air Passenger Rights*

September 2017

Appendix

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

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

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

WHO'SWHOLEGAL

AVIATION PRACTICE AREA REVIEW

SEPTEMBER 2013

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

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

Warsaw/Montreal Liability

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

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

YQ Fares Class Action

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

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

Regulatory/Passenger Complaints

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

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

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

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

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

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

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

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

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

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

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

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

Regulatory/ Notices to Industry

Wet Leasing

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

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

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

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

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

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

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

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

All-Inclusive Fare Advertising

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

Baggage Rules

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

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

Defining the Boundaries of Regulation

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

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

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200303

Docket: A-311-19

Ottawa, Ontario, March 3, 2020

Present: **NEAR J.A.**

BETWEEN:

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

Appellants

and

CANADIAN TRANSPORTATION AGENCY and THE ATTORNEY GENERAL OF CANADA

Respondents

and

DR. GÁBOR LUKÁCS

Intervener

ORDER

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

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

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

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

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

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

THIS COURT ORDERS that:

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

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

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

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

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

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

"D. G. Near"
J.A.

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

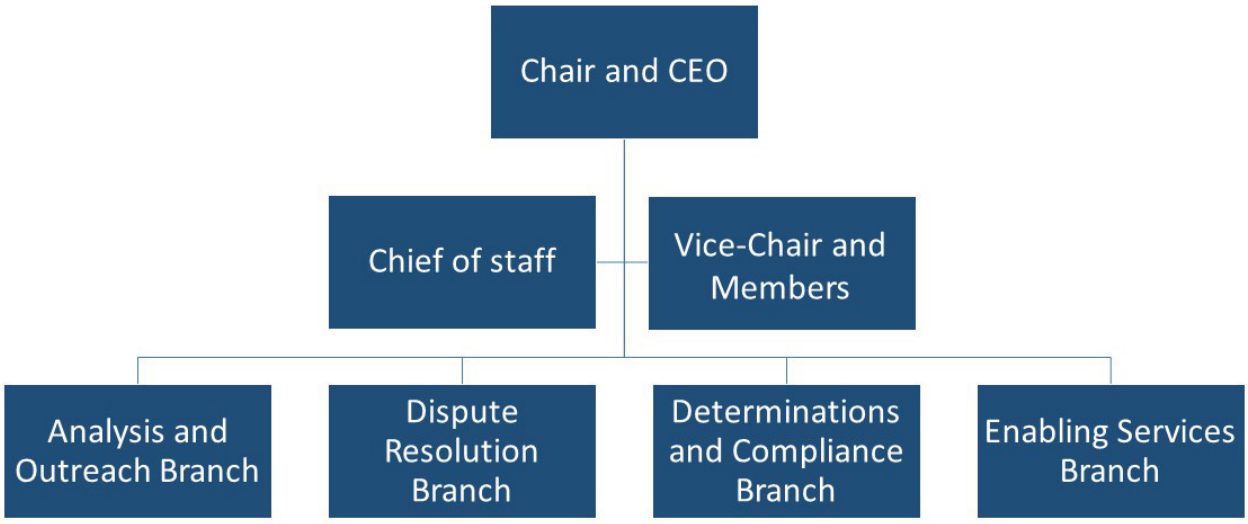
affirmed before me on January 3, 2021

"Simon Lin"

Signature

CANADIAN TRANSPORTATION AGENCY

Organizational chart



Reporting to the Chair and Chief Executive Officer

- Vice-Chair and Members
- Chief of Staff
- Analysis and Outreach Branch
- Dispute Resolution Branch
- Determinations and Compliance Branch
- Enabling Services Branch

Agency branches

- Led by the Chief Strategy Officer, the **Analysis and Outreach Branch** comprises the following directorates:
  - Analysis and Regulatory Reform
  - Communications
  - Centre of Expertise on Accessible Transportation
- Led by the Chief Compliance Officer, the **Determinations and Compliance Branch** comprises the following directorates:

    - Air Determinations
    - Rail and Marine Determinations
    - Monitoring and Compliance
- Led by the Chief Dispute Resolution Officer, the **Dispute Resolution Branch** comprises:
    - Air and Accessibility Alternate Dispute Resolution
    - Rail and Marine ADR
    - Dispute Adjudication
- Led by the General Counsel and Secretary, the **Enabling Services Branch** comprises the following directorates:
    - Legal Services
    - Secretariat and Registrar Services
    - Financial Services and Asset Management
    - Workforce and Workplace Services
    - Information and Technology Management Services

Date modified:
2016-04-01

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Scott Streiner - Chair & CEO

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Fax : 819-953-9979
Email : Scott.Streiner@otc-cta.gc.ca

15 Eddy Street
Gatineau, Quebec K1A 0N9
Canada

Organizations

- Canada
  - Canadian Transportation Agency
    - Office of the Chair & CEO
      - Chair & Members

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

CANADIAN TRANSPORTATION AGENCY

Organization and mandate

Our organization and mandate

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

The CTA is made up of five full-time Members; up to three temporary Members may also be named. The Members, who are all based in the National Capital Region, are supported in their decision-making process by some 240 employees and administrative staff.

The CTA has three core mandates

- We help ensure that the national transportation system runs efficiently and smoothly in the interests of all Canadians: those who work and invest in it; the producers, shippers, travellers and businesses who rely on it; and the communities where it operates.
- We protect the human right of persons with disabilities to an accessible transportation network.
- We provide consumer protection for air passengers.

Our tools

To help advance these mandates, we have three tools at our disposal:

- **Rule-making:** We develop and enforce ground rules that establish the rights and responsibilities of transportation service providers and users and that level the playing field among competitors. These rules can take the form of binding regulations or less formal guidelines, codes of practice or interpretation notes.
- **Dispute resolution:** We resolve disputes that arise between transportation providers on the

one hand, and their clients and neighbours on the other, using a range of tools from facilitation and mediation to arbitration and adjudication.

- **Information provision:** We provide information on the transportation system, the rights and responsibilities of transportation providers and users, and the Agency's legislation and services.

Our values

Our Code of Values and Ethics outlines the core values and expected behaviours that guide us in all activities related to our professional duties. Our guiding values are:

Respect for democracy - We uphold Canadian parliamentary democracy and promote constructive and timely exchange of views and information.
Respect for people - We treat people with dignity and fairness and foster a cooperative, rewarding working environment. Integrity - We act with honesty, fairness, impartiality and transparency.
Stewardship - We use and manage our resources wisely and take full responsibility for our obligations and commitments.
Excellence - We provide the highest quality service through innovation, professionalism and responsiveness.

Members

- Scott Streiner, Chair and CEO
- Elizabeth C. Barker, Vice-Chair
- William G. McMurray, Member
- Mark MacKeigan, Member
- Mary Tobin Oates, Member
- Heather Smith, Member
- Gerald Dickie, temporary Member
- Lenore Duff, temporary Member

Scott Streiner, Chair and CEO

Scott Streiner began a five-year term as Chair and CEO of the Canadian Transportation Agency (CTA) on July 20, 2015. Since that time, he has taken a series of steps to enhance the CTA's ability to respond to the needs of a rapidly evolving national transportation system, its customers, and the communities in which the system operates. These steps include: realigning the CTA's internal structure and recruiting top-notch talent to serve on the executive team; putting in place an action plan to foster a healthy, high-performing organization; increasing public awareness of the CTA's roles and services through speeches, media

interviews, and social media; introducing innovative approaches to delivering the CTA's regulatory and adjudicative mandates; and launching a broad review of the full suite of regulations, codes, and guidelines administered by the CTA.

Scott also led the revitalization of the Council of Federal Tribunal Chairs in 2016 and 2017, and is currently a member of the Board of Directors of the Council of Canadian Administrative Tribunals.

Prior to joining the CTA, Scott had a 25-year career in the federal public service. As Assistant Secretary to the Cabinet, Economic and Regional Development Policy, he served as Secretary to the Cabinet Committee on Economic Prosperity and played a key role in preparing advice to the Prime Minister on economic, environmental and trade matters, including in the areas of transportation and infrastructure. As Assistant Deputy Minister, Policy with Transport Canada, he led the development of policy options and advice on issues touching all modes of the national transportation system, and ran the Department's international, intergovernmental and data analysis functions.

Earlier positions included Executive Director of the Aerospace Review; Assistant Deputy Minister with the Labour Program; Vice President, Program Delivery with the Canadian Environmental Assessment Agency; Director General, Human Resources with the Department of Fisheries and Oceans; Director of Operations for the Reference Group of Ministers on Aboriginal Policy; Machinery of Government Officer at the Privy Council Office; and Director of Pay Equity with the Canadian Human Rights Commission.

Scott has led Canadian delegations abroad, including to India, China, and the International Labour Organization. He has also served as the Government Member with NAV Canada, Canada's Ministerial Designee under the North American Agreement on Labour Cooperation, Chair of the Council of Governors of the Canadian Centre for Occupational Health and Safety, and a Director on the Board of the Soloway Jewish Community Centre.

Scott received a bachelor's degree in East Asian Studies from the Hebrew University, a master's degree in International Relations from the Norman Paterson School of International Affairs, and a PhD in Political Science from Carleton University. He spent a year at Carleton University as a Public Servant in Residence and has taught courses, published articles, and made conference presentations on human rights, Middle Eastern history and politics, and public policy.

Elizabeth C. Barker, Vice-Chair

Liz Barker began a five-year term as Vice-Chair and Member of the Canadian Transportation Agency (CTA) on April 3, 2018.

Liz joined the CTA's predecessor, the National Transportation Agency, in 1991 as counsel. She has held several positions at the CTA, including, most recently, Chief Corporate Officer, Senior General Counsel and Secretary. She has worked in all areas of the Agency's mandate over the years, but has specialized in advising the tribunal in complex dispute adjudications and oral hearings on controversial subjects including rail level of service complaints, a wide range of complex accessible transportation disputes, and ministerial inquiries into marine pilotage and the accessibility of inter-city

motor coach services. She has also worked extensively in the development of the Agency's approach to its human rights mandate, administrative monetary penalties regime, alternative dispute resolution, final offer arbitration, and rail level of service arbitration. She has appeared as counsel before all levels of court, including the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada, as co-counsel in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650.

Liz was a recipient of the Queen's Diamond Jubilee Medal in 2016 for her work at the Agency, in particular in accessible transportation, the administrative monetary penalties program, and for her leadership of the Legal Services Branch.

Liz received her law degree from Osgoode Hall Law School in 1987 and her B.A. (Honours in Law) from Carleton University in 1984. She has been a member of the Law Society of Ontario since 1989.

William G. McMurray, Member

William G. McMurray became a Member of the Canadian Transportation Agency on July 28, 2014.

Prior to his appointment to the Agency, he served as Vice-Chairperson of the Canada Industrial Relations Board.

A lawyer, Mr. McMurray practised administrative law and litigation in the private sector for over 23 years. He acted as counsel for some of Canada's largest employers in the federal transportation industry. He successfully pleaded complex cases before a number of federal administrative tribunals, including the Agency and its predecessors. He has argued cases, in both official languages, before the Federal Court, the Federal Court of Appeal and has appeared in all levels of the civil courts. While practising law, he also taught "transportation law and regulation" at McGill University in Montréal for over ten years.

He studied common law and civil law at the University of Ottawa and studied political economy at Université Laval in Québec City and at the University of Toronto. Mr. McMurray completed his articles of clerkship while working in the Law Department of the former Canadian Transport Commission.

He has been a member of the Law Society of Upper Canada since 1986.

Mark MacKeigan, Member

Mark MacKeigan began a four-year term as a Member of the Canadian Transportation Agency on May 28, 2018.

He comes to the Agency from The St. Lawrence Seaway Management Corporation, the not-for-profit operator of the federal government's Seaway assets, where he was Chief Legal Officer and Corporate Secretary from 2014.

Mark is not entirely new to the Agency, having served previously as a Member from 2007 to 2014 and as legal counsel on specific files in a contract position during 1996.

His transportation law experience includes six years as senior legal counsel with the International Air Transport Association in Montréal from 2001 to 2007, focusing on competition law, cargo services, aviation regulatory and public international law matters. From 1996 to 2000, he was legal counsel with NAV CANADA, the country's provider of civil air navigation services.

Mark began his legal career in private practice in Toronto. After earning a Bachelor of Arts with highest honours in Political Science from Carleton University, Mark obtained his law degree from the University of Toronto and a Master of Laws from the Institute of Air and Space Law at McGill University. He also holds a postgraduate diploma in European Union Competition Law from King's College London.

He is a member of the Bars of Ontario and the State of New York and is admitted as a solicitor in England and Wales.

Mary Tobin Oates, Member

After 25 years of public service, Mary Tobin Oates joined the Canadian Transportation Agency on 9 July 2018. As a lawyer, Mary practised in different areas of law, largely in public and administrative law. She appeared before the Pension Appeals Board and the Federal Court of Appeal regarding disability benefits under the Canada Pension Plan and the Old Age Security Act. Mary served as a Board member of the Veterans Review and Appeal Board where she determined eligibility for disability benefits for members of the Canadian Forces and the Royal Canadian Mounted Police. Mary provided legal and policy advice on indigenous issues to the Department of Justice and to Indian and Northern Affairs Canada. She also served as Board member to Tungasuvvingat Inuit, a not-for-profit, charitable organization that provides services to and advocates on behalf of Inuit who live in southern Canada.

Before becoming a lawyer, Mary worked as a technical editor for the Canadian Transportation Accident and Safety Board (now Transportation Safety Board).

Mary received her Bachelor of Arts from Memorial University of Newfoundland and graduated from Osgoode Hall Law School. She has been a member of the Law Society of Ontario (formerly the Law Society of Upper Canada) since February 1997.

Heather Smith, Member

Heather Smith became a full-time Member of the Canadian Transportation Agency on August 27, 2018. Heather was most recently Vice-President, Operations at the Canadian Environmental Assessment Agency. In previous positions, Heather was Executive Director in the Government Operations Sector of Treasury Board Secretariat, and Director General in the Strategic Policy Branch at Agriculture and Agri-Food Canada (AAFC). Heather held several management positions within Justice Canada, as General Counsel and Head of AAFC Legal Services, General Counsel and Head of Legal Services at the Canadian Environmental Assessment Agency, and General Counsel in the Legal Services Unit of Social Development Canada/Human Resources and Skills Development Canada.

Heather also served as legal counsel at Environment Canada Legal Services and Manager of the Canadian Environmental Protection Act Office at Environment Canada. Heather holds a B.A.(Hons.) from the University of King's College and an L.L.B. from the University of Toronto. She has also earned the Chartered Director (C.Dir.) designation from the McMaster/DeGroote Directors College.

Gerald Dickie, temporary Member

Gerald Dickie comes to the Canadian Transportation Agency after having worked for 36 years in the grain industry at different port locations. He spent the first 6 years in Thunder Bay at the Cargill Terminal. The next 30 years, he worked at the Port of Metro Vancouver. He initially worked on the rehabilitation of the Alberta Wheat Pool Terminal (now Cascadia Terminal) and was part of the team that automated the facility and introduced unit train unloading capabilities. In July of 2007, as a result of the ownership change of Agricore United, he moved to the North Vancouver Cargill Facility (formerly SWP) as the General Manager. He is an experienced manager of people, capital projects, business

operations, labour negotiations, supply chains and strategy.

The 30 years he spent working at the Port of Vancouver included being part of several external groups. He has held every position within the Vancouver Terminal Elevator Association, from President to Secretary. He was a member of the Senior Port Executive Committee Group, the Port Competitiveness Committee, BC Terminals Association and North Shore Waterfront Industry Association. This included leadership roles and active work in everything from port education for the community to Low Level Road Initiative and social licence activities. This experience included a good exposure to the issues that all port tenants, railway companies, vessel companies and customers faced.

He has worked with Transport Canada on the Winter Rail Contingency Meeting programs and on supply chain issues with a number of groups. He is familiar with marine and rail supply chains and with the producers, shippers and customers that rely on these chains.

Gerald has an MBA from Royal Roads University and a BScF from Lakehead University.

Lenore Duff, temporary Member

Lenore Duff is a former public service executive with 28 years of service with the Government of Canada whose positions included Director General, Strategic Initiatives at the Labour Program; Director General, Surface Transportation Policy at Transport Canada; and Senior Privy Council Officer supporting the Social Affairs Committee of Cabinet. Her primary focus throughout her career has been on the development of policy and legislation across a broad range of economic and social policy areas.

As Director General, Surface Transportation Policy at Transport Canada, Lenore was responsible for developing policy options and providing advice on strengthening the freight rail liability and compensation regime, as well as on reforming freight rail provisions as part of the recent modernization of the Canada Transportation Act. At the Labour Program, her work included leading the development of a series of legislative initiatives designed to enhance protections for federally regulated employees. Prior to that, Lenore was responsible for the development of policy initiatives related to income, employment and disability.

In the course of her career, Lenore has also had the opportunity to conduct consultations with a broad range of industry, civil society and government stakeholders to inform the development of policy and legislation.

Lenore earned both a Bachelor of Arts (Honours Sociology) and Master of Arts in Sociology from Carleton University.

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Date modified:

2019-05-02

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

CANADIAN TRANSPORTATION AGENCY

Home

Members

- Scott Streiner, Chair and CEO
- Elizabeth C. Barker, Vice-Chair
- William G. McMurray, Member
- Mark MacKeigan, Member
- Mary Tobin Oates, Member
- Heather Smith, Member
- Allan Matte, temporary Member

Scott Streiner, Chair and CEO

Scott Streiner was appointed Chair and CEO of the Canadian Transportation Agency (CTA) by the Governor in Council in 2015 and reappointed in 2020. His term runs until July 2021.

Scott has taken a series of steps to enhance the CTA's ability to respond to the needs of the national transportation system, its users, and the communities in which it operates. These include reorganizing and streamlining the CTA's internal structures and processes; recruiting top-notch talent to serve on the executive team; implementing action plans to foster a healthy, high performing, and agile organization; increasing public awareness of the CTA's roles and services; introducing innovative approaches to delivering regulatory and adjudicative mandates; and undertaking a comprehensive review and modernization of all regulations made and administered by the CTA.

Among the most important results of these efforts are the groundbreaking *Air Passenger Protection Regulations* and *Accessible Transportation for Persons with Disabilities Regulations*. Following finalization of these regulations, Scott launched major projects to update the CTA's suite of guidance materials, automate complaint intake, and modernize compliance assurance activities.

Scott led the revitalization of the Council of Federal Tribunal Chairs in 2016 and 2017, and is currently Vice Chair of the Board of Directors of the Council of Canadian Administrative Tribunals and a member of the Bureau (steering committee) of the OECD's Network of Economic Regulators.

Prior to joining the CTA, Scott had a 25-year career in the federal public service. His public service positions included Assistant Secretary to the Cabinet, Economic and Regional Development Policy; Assistant Deputy Minister, Policy with Transport Canada; Executive Director of the Aerospace Review;

Assistant Deputy Minister with the Labour Program; Vice President, Program Delivery with the Canadian Environmental Assessment Agency; Director General, Human Resources with the Department of Fisheries and Oceans; and Director of Pay Equity with the Canadian Human Rights Commission.

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Heather also served as legal counsel at Environment Canada Legal Services and Manager of the Canadian Environmental Protection Act Office at Environment Canada. Heather holds a B.A.(Hons.) from the University of King's College and an L.L.B. from the University of Toronto. She has also earned the Chartered Director (C.Dir.) designation from the McMaster/DeGroote Directors College.

Allan Matte, temporary Member

Allan Matte was appointed as a temporary Member of the Canadian Transportation Agency effective September 14, 2020. Prior to his appointment, Allan held the position of Senior Counsel with the Agency in its legal services unit. Before accepting a position with the Agency, Allan worked as Counsel with the Department of Justice in the legal services unit of Employment and Social Development Canada, and before that Industry Canada. Allan also worked as Counsel with the federal Office of the Commissioner of Review Tribunals. Allan has appeared as Counsel before numerous administrative tribunals as well as before the courts at all levels including the Ontario Superior Court, the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada.

In 2014, Allan was appointed by the Ontario provincial government as a part-time Member of the Social Benefits Tribunal, a position he held for 5 years until February of 2019.

Allan holds an LLB from Osgoode Hall Law School, a Postgraduate Certificate in Procedural Law, a Postgraduate Diploma in Public Law, and a Master's degree (LLM) in Human Rights Law from the University of London (UK).

Related pages

Code of Conduct for Members of the Agency

Date modified:

2017-02-07

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

CANADIAN TRANSPORTATION AGENCY

Home

Code of Conduct for Members of the Agency

A. CONTEXT

Mandate of the Agency

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

(2) The Agency and has three core mandates:

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

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

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

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

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

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

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

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

B. GENERAL PROVISIONS

Purpose, guiding principles, and application of the Code

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

(10) The Code reflects:

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

(11) Members shall:

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

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

Members' expertise and work arrangements

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

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

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

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

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

C. DECISION MAKING

Impartiality

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

Natural justice and fairness

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

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

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

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

Preparation

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

Timeliness

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

Quality

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

Consistency

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

Respect for parties and participants

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

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

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

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

Case-related communications

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

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

D. WORKING RELATIONS AND INTERACTIONS

Relations with other Members

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

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

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

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

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

Relation with Agency staff

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

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

Interactions with non-Agency individuals and organizations

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

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

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

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

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

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

E. OUTSIDE ACTIVITIES

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

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

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

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

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

F. AFFIRMATION

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

---

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

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

Date modified:
2014-01-22

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

World Health Organization

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

11 March 2020

Good afternoon.

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

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

Thousands more are fighting for their lives in hospitals.

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

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

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

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

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

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

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

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

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

We have rung the alarm bell loud and clear.

===

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

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

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

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

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

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

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

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

Some countries are struggling with a lack of capacity.

Some countries are struggling with a lack of resources.

Some countries are struggling with a lack of resolve.

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

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

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

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

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

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

Let me summarize it in four key areas.

First, prepare and be ready.

Second, detect, protect and treat.

Third, reduce transmission.

Fourth, innovate and learn.

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

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

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

Ready your hospitals;

Protect and train your health workers.

77

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

===

There’s been so much attention on one word.

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

Prevention.

Preparedness.

Public health.

Political leadership.

And most of all, people.

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

I thank you.

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Government of Canada / Gouvernement du Canada

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

From: Global Affairs Canada

News release

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

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

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

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

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

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

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

Quotes

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

- François-Philippe Champagne, Minister of Foreign Affairs

Associated links

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

Contacts

Syrine Khoury
Press Secretary
Office of the Minister of Foreign Affairs
Syrine.Khoury@international.gc.ca

Media Relations Office
Global Affairs Canada
343-203-7700
media@international.gc.ca

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

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

Date modified:
2020-03-13

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

CANADIAN TRANSPORTATION AGENCY

Statement on Vouchers

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

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

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

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

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

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

Date modified:
2020-03-25

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

CANADIAN TRANSPORTATION AGENCY

Home

Important Information for Travellers During COVID-19

Official Global Travel Advisory from the Government of Canada

Suspension of all air dispute resolution activities

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

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

Air Passenger Protection Obligations During COVID-19 Pandemic

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

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

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

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

Related Links

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

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

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

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

Delays and Cancellations

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

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

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

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

Airline obligations

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

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

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

In these situations, airlines must:

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

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

Situations within airline control

In these situations, airlines must:

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

Situations within airline control, but required for safety

In these situations, the airline must:

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

Other APPR requirements

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

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Refusal to transport

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

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

Share this page

Date modified:
2020-03-18

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

90

"please refer to this link that will answer your question

Top Latest People Photos Videos

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

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

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

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

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







CTA.gc.ca
4,231 Tweets

CTA.gc.ca
@CTA_gc

Canadian Transportation Agency: Making Transportation Efficient and Accessible. Nous envoyons des tweet en français à partir @OTC_gc
ow.ly/1XYo309pLpW

Translate bio

Canada · otc-cta.gc.ca · Joined October 2010

281 Following **4,664** Followers

Followed by Western Aviation News, Take Off, Eh ✈️🇨🇦💰, and 127 others you follow

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Tweets | Tweets & replies | Media | Likes

Pinned Tweet

CTA.gc.ca @CTA_gc · Mar 19

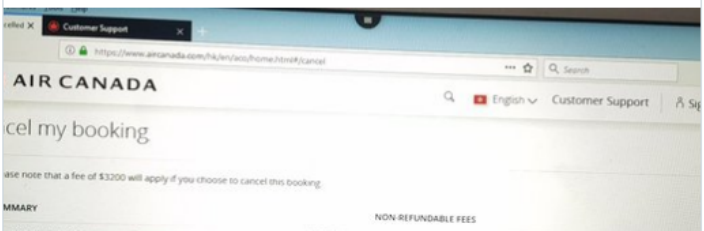
#COVID19 @CTA_gc suspends all air dispute resolution activities to allow air carriers to focus on urgent operational demands: ow.ly/SyJ550yQqqM
It also suspends all dispute proceedings involving air carriers: otc-cta.gc.ca/eng/ruling/202… @TravelGoC @Transport_gc

16 · 2 · 2

ashish agarwal @ashish_agwl · Apr 2

@CTA_gc can you pls help. @AirCanada has cancelled flights and now refund is not provided and they are charging cancellation fee. Pls assist. My tickets was booked in august 2019 last year for travel in 2020

> **ashish agarwal** @ashish_agwl · Mar 27
> @AirCanada why there is cancellation fee even during COVID where none of the airlines are charges just help people



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#PandemicIn5Words
18.8K Tweets

Trending in Canada
Maple Leaf Foods

Politics · Trending
#NotMeUs
29.8K Tweets

Trending in Canada
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2,288 Tweets

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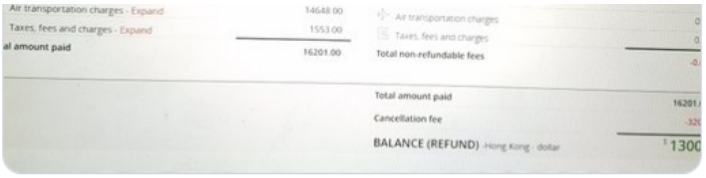

1

CTA.gc.ca @CTA_gc · 46m
Hi @ashish_agwl, please refer to the CTA's Statement about vouchers: otc-cta.gc.ca/eng/statement-...
As to the cancellation fee, let us see and we'll get back to you shortly. CTA social media

Shelly @shellyseaa · Mar 31
@CTA_gc Hi, according to your new policy, we are denied a refund for our $3000+ flight to Italy that was cancelled. I am wondering if there is some way Air Canada can give us the refund or DONATE the money being unused for health products such as masks....

1

Show more replies

Shelly @shellyseaa · Mar 31
Replying to @shellyseaa
Where my money really needs to be, to support our people.

1 1

CTA.gc.ca @CTA_gc · 52m
Hi @shellyseaa, you would have to ask that question to the carrier as to their donation initiatives. CTA social media

Michael @MDim15 · Mar 30
@CTA_gc when will @WestJet be given instructions on how to return money to people who had their trips canceled that do not intent on using the "24 month credit"?

#OnPoli #COVID19 #COVID #COVID__19 #WestJet

1

CTA.gc.ca @CTA_gc · 56m
Hi @MDim15 kindly refer to the CTA statement on the matter. Best, CTA social media
otc-cta.gc.ca/eng/statement-...

CTA.gc.ca @CTA_gc · 57m
Replying to @ananthan1987 @TravelGoC and @Transport_gc
Hi @ananthan1987, kindly refer to the CTA statement on the matter. Best, CTA social media
otc-cta.gc.ca/eng/statement-...

Jeff McMaster @jeff_mcmaster · Mar 26
@FlySwoop how about you just issue a refund for a cancelled flight ... 2 hours on hold seems excessive to resolve this.

2 1

Show more replies

Jeff McMaster @jeff_mcmaster · Mar 30
Replying to @jeff_mcmaster

Hey @CTA_gc .. what are my options .. @FlySwoop cancelled both my flights and hasn't responded in 4 days .. help

2 1

CTA.gc.ca @CTA_gc · 59m

Hi @jeff_mcmaster, kindly refer to the CTA statement on the matter. Best, CTA social media
otc-cta.gc.ca/eng/statement-...

Who to follow

Ian Seggie and 2 others follow

Travel.gc.ca
@TravelGoC
Follow

Travel advice from the Government of Canada | Français: @VoyageGdC

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

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

Hello Tammy,

Thanks for following up.

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

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

Best,

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

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

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

Hello,

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

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

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

Any info/clarification would be appreciated.

Thank you.

Sent from my iPhone

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

Hello Tammy,

Thanks for contacting the Canadian Transportation Agency.

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

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

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

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

Best,

info@ Team

Office des transports du Canada / Gouvernement du Canada

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

Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada

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

Follow us: Twitter / YouTube

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

From: Tammy 2019 <tammylyn2019@gmail.com>

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

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

Subject: SWOOP AIRLINES

Hello,

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

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

Thank you,

Tammy Pedersen

604-308-6926

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

Hello,

Thanks for contacting the Canadian Transportation Agency.

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

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

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

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

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

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

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

Best,

info@ Team

Office des transports du Canada / Gouvernement du Canada

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

Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada

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

Follow us: Twitter / YouTube

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

Good Afternoon,

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

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

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

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

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

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

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

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

I would like your assistance during these uncertain times.

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

Jennifer Mossey

519-471-9949

Sent from my iPhone

From: **Info** <Info@otc-cta.gc.ca>
Date: Wed., Apr. 8, 2020, 10:57 a.m.
Subject: RE: Complaint about CTA Conduct
To: Trevor Smith <trevorsmith.gc@gmail.com>

Hello Trevor,

Thank you for sharing your concerns with us. We understand that air passengers are experiencing challenges and frustrations during these difficult times.

The situation passengers and airlines face as a result of the COVID-19 pandemic is without precedent. When the existing legislation, regulations, and airline tariffs were developed, none anticipated a once-in-a-century pandemic, worldwide disruptions in air travel, huge drops in passenger volumes, and mass layoffs across the airline sector.

Canada's legislative framework, which differs from those of other jurisdictions such as the United States and European Union, does not impose as a minimum obligation the requirement to refund passengers if a flight is cancelled due to situations outside of the airline's control, such as a global pandemic. We recognize, however, that in the context of widespread flight cancellations, passengers who have no prospect of completing their planned travels could be left out-of-pocket for the cost of cancelled flights.

In these extraordinary circumstances, it would not be unreasonable for airlines to provide vouchers or credits, even if this is not clearly required in certain situations, and for passengers to accept them.

This approach strikes a balance between passenger protection and airlines' operational realities during this unprecedented situation. It could help ensure that passengers do not simply lose the full value of their flights and that, over the longer term, the air sector is able to continue providing diverse services.

Any complaint filed with the CTA will, of course, be assessed on its merits, taking into consideration all relevant facts and the law.

If you would like more information, please consult the statement the CTA issued on March 25, 2020.

Thank you again for your message.

Best,

info@ Team

Office des transports du Canada / Gouvernement du Canada

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

Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada

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

Follow us: Twitter / YouTube

From: Trevor Smith <trevorsmith.gc@gmail.com>
Sent: Friday, March 27, 2020 2:48 PM
To: Info <Info@otc-cta.gc.ca>
Subject: Complaint about CTA Conduct

This is an official complaint in regards to the recent action of the Canadian Transportation Agency. The statement titled "Statement on Vouchers" dated March 25, 2020 is reckless and irresponsible. The statement is not based on any case law and/or Tribunal decisions, and clearly lacks any merit. It willfully disregards the rights of Canadian consumers and shows a clear bias towards the airline industry.

Please, tell me what guarantees we have as consumers that these vouchers will be worth anything in the next 24 months? Will the Canadian government repay the millions of dollars consumers lose when the vouchers are worthless? Doubtful.

Show me within case law where Force Majeure has ever been applied to circumstances such as these. Show me a ruling where Force Majeure has been applied to events in the future, where a customer is not actually sitting in an airport, staying at a resort, or enroute to a destination when an unforeseeable event occurs.

Explain to me why you feel a business would be allowed to sit on a consumer's money for years without providing a service? I must have missed the memo where we became

banks for airlines. I must have also missed the memo that we are on the hook to keep airlines afloat during unprecedented times. I have to put food on my table during these unforeseen times and now you expect me to borrow an airline my money for the next two years and trust that they will pay me back. Give me a break. It is not a sensible balance to allow airlines to keep our money so they can pay their executives and lay off thousands of employees. If you want to protect the airline industry, then allow Canadians to choose to support the industry. Don't tell them they have to when they don't. It is the choice of Canadian's to use the services of an airline in the future, not yours. **It is also very much our money, not yours or the airlines!!!!**

The CTA hasn't honoured the mandate they swore to uphold in the slightest. **Instead, the Canadian Transportation Agency just helped large airlines bully their customers into waiving their rights.**

Bottom line, there is no legal support for this statement. I am demanding this statement be retracted and that the Canadian Transportation Agency issue a written apology to Canadian consumers.

Sincerely,

Trevor Smith

From: Info <Info@otc-cta.gc.ca>
Date: April 14, 2020 at 10:23:15 AM MDT
To: dale smith <smith_d@shaw.ca>
Subject: RE: Airtransat Will not Refund $$$ Formal complaint

Hello Dale,

Thank you for sharing your concerns with us. We understand that air passengers are experiencing challenges and frustrations during these difficult times.

The situation passengers and airlines face as a result of the COVID-19 pandemic is without precedent. When the existing legislation, regulations, and airline tariffs were developed, none anticipated a once-in-a-century pandemic, worldwide disruptions in air travel, huge drops in passenger volumes, and mass layoffs across the airline sector.

Canada's legislative framework, which differs from those of other jurisdictions such as the United States and European Union, does not impose as a minimum obligation the requirement to refund passengers if a flight is cancelled due to situations outside of the airline's control, such as a global pandemic. We recognize, however, that in the context of widespread flight cancellations, passengers who have no prospect of completing their planned travels could be left out-of-pocket for the cost of cancelled flights.

In these extraordinary circumstances, it would not be unreasonable for airlines to provide vouchers or credits, even if this is not clearly required in certain situations, and for passengers to accept them.

This approach strikes a balance between passenger protection and airlines' operational realities during this unprecedented situation. It could help ensure that passengers do not simply lose the full value of their flights and that, over the longer term, the air sector is able to continue providing diverse services.

Any complaint filed with the CTA will, of course, be assessed on its merits, taking into consideration all relevant facts and the law. If you would like to file an air travel complaint with the CTA, you may do so here; https://rppa-appr.ca/eng/file-air-travel-complaint

If you would like more information, please consult the statement the CTA issued on March 25, 2020; https://otc-cta.gc.ca/eng/statement-vouchers

Thank you again for your message.

Yours truly,
The CTA Team

-----Original Message-----
From: dale smith <smith_d@shaw.ca>
Sent: Sunday, April 5, 2020 2:52 PM
To: Info <Info@otc-cta.gc.ca>
Subject: Airtransat Will not Refund $$$ Formal complaint

o Whom It May Concern:

My Wife and I had a Holiday booked through Amore Away Travel Consultant Cherie Weber and Air Transat for the booking of April 10, 2002 to April 17, 2020 to Cancun Mexico.

Obviously the flight was cancelled by Air Transat due to the Convid Pandemic and they are not refunding our monies in the amount of $4,160.00.

I would like to point out the the US issued the following ruling to the Air Lines to refund customers due to flight cancellations:

https://www.transportation.gov/briefing-room/us-department-transportation-issues-enforcement-notice-clarifying-air-carrier-refund

I would like to submit this formal complaint to Canadian Tranportation Agency and have them look into the Flight Cancellations for many Canadians and rule that the Canadian Airlines refund clients in which their flights were cancelled.

I have submitted a registered letter the Air Transat requesting a refund but have not heard anything back as of yet. They are saying they will issue travel vouchers, this should not be the only option as they have received our monies and we should expect a refund as they have cancelled our Flights and this was out of our control.

Thank-You,
Dale Smith
Medicine ,Alberta
smith_d@shaw.ca

From: **Info** <Info@otc-cta.gc.ca>
Date: Fri, Apr 17, 2020 at 9:50 AM
Subject: RE: CTA statement regarding vouchers and refunds
To: Richard T <richardswtang@gmail.com>

Hello Richard,

Thank you for sharing your concerns with us. We understand that air passengers are experiencing challenges and frustrations during these difficult times.

The situation passengers and airlines face as a result of the COVID-19 pandemic is without precedent. When the existing legislation, regulations, and airline tariffs were developed, none anticipated a once-in-a-century pandemic, worldwide disruptions in air travel, huge drops in passenger volumes, and mass layoffs across the airline sector.

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Any complaint filed with the CTA will, of course, be assessed on its merits, taking into consideration all relevant facts and the law.

If you would like more information, please consult the statement the CTA

issued on March 25, 2020; https://otc-cta.gc.ca/eng/statement-vouchers

Thank you again for your message.

Yours truly,

The CTA Team

From: Richard T <richardswtang@gmail.com>
Sent: Friday, April 3, 2020 3:34 PM
To: Info <Info@otc-cta.gc.ca>
Subject: CTA statement regarding vouchers and refunds

Hi there,

Considering that the CTA released a statement that was neither an official decision, and in fact goes against current CTA decisions in place, various transborder tariffs, Air Passenger Rights section 17(2) and 17(7), and also various provincial laws that indicate refund in the form of original payment should be issued, why has CTA gone against these regulations? Considering that thousands of Canadian families are now being laid off, the money could be used to support themselves during this Covid-19 crisis. Your statement, while not legally binding, on March 25 has effectively made all airlines and credit card companies to work together and deny refunds and chargebacks. Your ill advised statement has effectively caused further financial difficulty for thousands of Canadians. You should follow in the steps as the US Department of Transportation and order airlines to uphold their tariffs, provincial law, the existing CTA decisions, as they in effect are breaking the law. CTA you are behind in the times and a government agency that does not support Canadians when in need. It is very clear. The reality while this global event is something that was unforeseen, it is the cost of doing business, and they cannot go back on the contracts and laws they've agreed.

Please respond accordingly, and hope you go back on your statement and inform all airlines they have an obligation to fulfill. I did not authorize my credit card to be charge for future credit. CTA effectively made that happen.

Richard

From: Info <Info@otc-cta.gc.ca>
Date: April 20, 2020 at 11:56:45 AM EDT
To: Paola Ferguson <fergusonpjc@hotmail.com>
Subject: RE: Airlines refusing refund in original form of payment

Hello,

Thank you for sharing your concerns with us. We understand that air passengers are experiencing challenges and frustrations during these difficult times.

The situation passengers and airlines face as a result of the COVID-19 pandemic is without precedent. When the existing legislation, regulations, and airline tariffs were developed, none anticipated a once-in-a-century pandemic, worldwide disruptions in air travel, huge drops in passenger volumes, and mass layoffs across the airline sector.

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Any complaint filed with the CTA will, of course, be assessed on its merits, taking into consideration all relevant facts and the law.

If you would like more information, please consult the statement the CTA issued on March 25, 2020; https://otc-cta.gc.ca/eng/statement-vouchers

Thank you again for your message.

Yours truly,
The CTA Team

-----Original Message-----
From: Paola Ferguson <fergusonpjc@hotmail.com>
Sent: Thursday, April 16, 2020 3:56 PM
To: Info <Info@otc-cta.gc.ca>
Subject: Airlines refusing refund in original form of payment

Good Afternoon,

I am writing to you about the issue regarding airlines refusing to issue a refund to Canadian consumers who either have had their flights cancelled or who no longer wish to travel due to the current pandemic. Other federal governments in other countries, like the United States, have already directed airlines to refund money to consumers in the original form of payment as is outlined in the signed contracts all consumers possess.
https://www.cnn.com/2020/04/03/politics/airlines-canceled-flights-refunds/index.html

Your organization can help all Canadians deal with the economic hardships this pandemic has caused. Many people have lost jobs and airlines, who are protecting their businesses, are holding these funds unfairly. What is the plan of the CTA to address this issue?

Thank you for your attention to this matter. Please email me at fergusonpjc@hotmail.com or call me at the number below.

Sent from my iPhone

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Fwd: Air travel complaint: 20-84843

Reine Desrosiers <reinedesrosiers@gmail.com> Mon, Apr 20, 2020 at 2:58 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>

---------- Forwarded message ---------
From: **Canadian Transportation Agency** <pta-atc@otc-cta.gc.ca>
Date: Mon., Apr. 6, 2020, 7:05 p.m.
Subject: Air travel complaint: 20-84843
To: <reinedesrosiers@gmail.com>

Thank you. We have successfully received your complaint. Your case number is 20-84843

Suspension of all air dispute resolution activities

CTA Operations during the COVID-19 crisis

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

Dispute resolutions involving air carriers during the COVID-19 crisis

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

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

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

Air carriers' obligations during the global COVID-19 pandemic

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

Statement on Vouchers for flight disruptions

Status of Your Complaint

You can check the status of your complaint online. Please note it can take up to 24 hours for your case to process before your status is available online.

Need immediate help during your trip?

Official Global Travel Advisory from the Government of Canada

IMPORTANT NOTICE FOR BAGGAGE COMPLAINTS – TIME LIMITS IN EFFECT

- **7 day time limit for damaged baggage or missing items:**
  You must submit a written claim with your airline within 7 days of receipt of your baggage if your claim relates to damaged baggage or missing items.

- **21 day time limit for lost baggage:**
  You must submit a written claim with your airline within 21 days for baggage that is potentially lost.

Failure to submit a written claim to the airline within the set time limits could result in the carrier denying your claim. All claims are subject to proof of loss so be sure

to include all out of pocket expenses.

Note: You can update your case file by emailing pta-atc@otc-cta.gc.ca or by faxing 819-953-6019.

20-84843_2020-04-06T185531.pdf
382K

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Fw: Quick question re: CTA and vouchers

Nathaniel.Erskine-Smith.P9@parl.gc.ca <Nathaniel.Erskine-Smith.P9@parl.gc.ca> Tue, Oct 6, 2020 at 11:10 AM
To: lukacs@airpassengerrights.ca

Here's the response I've received in writing, by way of follow up.

_____
From: Oliver, Blake <Blake.Oliver@tc.gc.ca>
Sent: October 05, 2020 5:06 PM
To: Erskine-Smith, Nathaniel - Personal
Subject: RE: Quick question re: CTA and vouchers

Yes, that's correct.

From: Erskine-Smith, Nathaniel - Personal [mailto:Nathaniel.Erskine-Smith.P9@parl.gc.ca]
Sent: Monday, October 05, 2020 5:04 PM
To: Oliver, Blake <Blake.Oliver@tc.gc.ca>
Subject: Re: Quick question re: CTA and vouchers

That's what I thought, so fair to say it was approved by the members, vice-chair, and chair.

Get Outlook for iOS<https://aka.ms/o0ukef>

_____
From: Oliver, Blake <Blake.Oliver@tc.gc.ca<mailto:Blake.Oliver@tc.gc.ca>>
Sent: Monday, October 5, 2020 5:02:29 PM
To: Erskine-Smith, Nathaniel - Personal <Nathaniel.Erskine-Smith.P9@parl.gc.ca<mailto:Nathaniel.Erskine-Smith.P9@parl.gc.ca>>
Subject: RE: Quick question re: CTA and vouchers

Hi Nate, all guidance and decisions issued by the CTA are taken as a body, not at the individual level. I hope that helps.

Warmly,

Blake

From: Erskine-Smith, Nathaniel - Personal [mailto:Nathaniel.Erskine-Smith.P9@parl.gc.ca]
Sent: Monday, October 05, 2020 4:50 PM
To: Oliver, Blake <Blake.Oliver@tc.gc.ca<mailto:Blake.Oliver@tc.gc.ca>>
Subject: Quick question re: CTA and vouchers

Blake,

I've been asked by Gabor Lukacs about the authorship of the CTA's statement on vouchers,

and specifically whether any individual takes responsibility, or whether it is a statement from the board/chair.

I know there is litigation on this issue, but it also seems like an answer that should be available. I recall asking this question before, but I might have only done it over the phone as I can't find a written answer.

Thanks for the help.

Nate

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

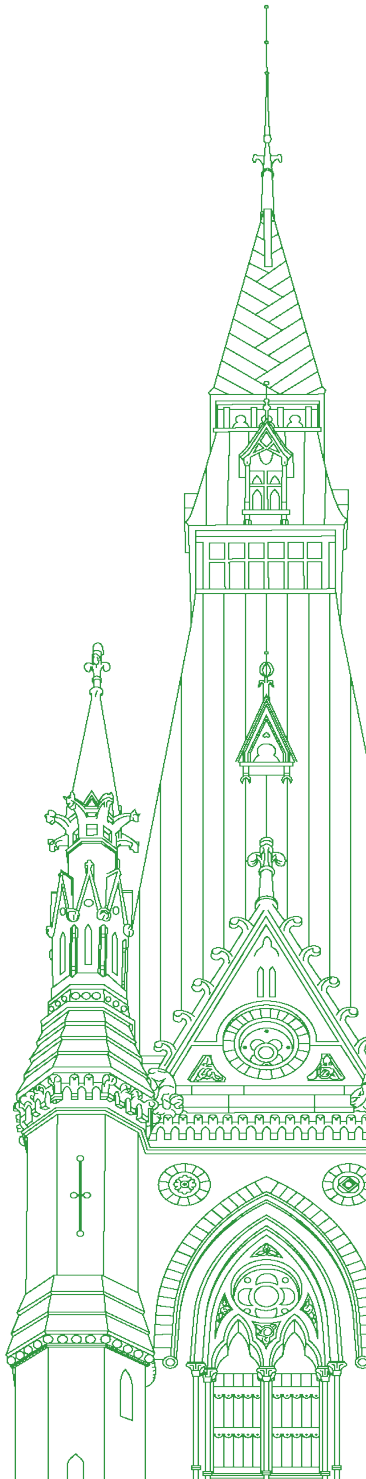
43rd PARLIAMENT, 2nd SESSION

Standing Committee on Transport, Infrastructure and Communities

EVIDENCE

NUMBER 008

Tuesday, December 1, 2020



Chair: Mr. Vance Badawey

Standing Committee on Transport, Infrastructure and Communities

Tuesday, December 1, 2020

● (1535)

[*English*]

The Chair (Mr. Vance Badawey (Niagara Centre, Lib.)): I call this meeting to order. Welcome to Meeting number eight of the House of Commons Standing Committee on Transport, Infrastructure and Communities.

Today's meeting is taking place in a hybrid format, pursuant to the House order of September 23. The proceedings will be made available via the House of Commons website. So that you are aware, the webcast will always show the person speaking, rather than the entire committee.

To ensure an orderly meeting, I would like to outline a few rules to follow. Members and witnesses may speak in the official language of their choice. Interpretation services are available for this meeting. You have the choice at the bottom of your screen of either the floor, English or French.

For members participating in person, proceed as you usually would when the whole committee is meeting in person in a committee room. Keep in mind the directives from the Board of Internal Economy regarding masking and health protocols.

Before speaking, please wait until I recognize you by name. If you are on video conference, please click on the microphone icon to unmute yourself. For those in the room, your microphone will be controlled as normal by the proceedings and verification officer. I will remind you that all comments by members and witnesses should be addressed through the chair. When you are not speaking, your mike should be on mute. With regard to a speaking list, the committee clerk and I will do the best we can to maintain the order of speaking for all members, whether they be participating virtually or in person.

Members, pursuant to Standing Order 108(2), the committee is meeting today to begin its study on the impact of COVID-19 on the aviation sector.

Now I would like to welcome our witnesses. Between 3:30 and 4:30, we have from the Canadian Transportation Agency, the CTA, Scott Streiner, chair and chief executive officer; Valérie Lagacé, senior general counsel and secretary; and Marcia Jones, chief strategy officer. From the Department of Transport, we have Lawrence Hanson, assistant deputy minister, policy; Aaron McCrorie, associate assistant deputy minister, safety and security; Nicholas Robinson, director general, civil aviation; Colin Stacey, director general, air policy; Christian Dea, director general, transportation and economic analysis and chief economist. Welcome, all you folks.

With that, I'm going to move to our witnesses. I'm not sure who has been queued to start us off with their five-minute presentation. I'll leave that up to you folks. The floor is yours.

● (1540)

Mr. Lawrence Hanson (Assistant Deputy Minister, Policy, Department of Transport): Thank you, Chair, I will begin.

Honourable members, thank you for the invitation to speak to you about the impact of the COVID-19 pandemic on the air transport sector in Canada.

My name is Lawrence Hanson, and I'm the ADM of policy at Transport.

Owing to the fact that Canada is a very large country with a widely dispersed population, and has a material number of people for whom the air mode is the only viable source of supply for parts of the year, we rely on air travel more than many other countries.

Canada has built a strong and effective air transport system that connects Canadians to each other and the world. It supports tourism, regional economic development, and an aerospace supply chain that produces aircraft with world-leading environmental performance.

The air sector employs about 108,000 people in Canada. Although the pandemic has had an impact on every sector of the economy, the decline in the air sector has been the most severe, and its recovery is expected to take relatively longer. Eight months into the pandemic, passenger levels are still down almost 90% from the same period last year.

Canada's air system has been traditionally funded by passengers themselves. Currently, however, we have a user-pay system that has almost no users. Consequently, airlines and airports continue to face significant fixed costs with little or no off-setting revenue.

Inevitably, this has led to efforts by key players to either find new revenue or, more likely, cut costs. There have been widespread layoffs, route suspensions and cancellations by airlines. Airports and the non-profit corporation that provides air navigation services, Nav Canada, have raised rates and fees.

Over and above these negative outcomes, Canadians across the country have received vouchers in lieu of refunds for travel cancelled due to the pandemic, and they are understandably angry.

To mitigate the severe impact and instability caused by the pandemic across all sectors, the government has implemented broad-based measures like the Canada emergency wage subsidy. These have been helpful in providing initial stability for air operators.

In addition, in March, the government waived payments for airport authorities that lease airports from the federal government for the remainder of 2020. The government also took action to ensure service to remote communities that rely on air transport for essential goods and services, with funding of up to $174 million announced in August, and a separate program of $17.3 million announced in April for the territories alone.

However, the impacts on the air sector during COVID-19 are without precedent, and service providers are unable to respond to these ongoing challenges on their own. This threatens the ability of Canadians to access reasonable air transport services at a reasonable cost, and these impacts could have important implications for communities, regions and the wider economy. It also threatens the many jobs in air transport and in the industries that rely upon it.

That is why, on November 8, Minister Garneau announced that in order to protect the interests of Canadians, the government is developing an assistance package for Canadian airlines, airports and the aerospace sector. Yesterday's fall economic statement provided additional information regarding rent and infrastructure support that will be provided to airports.

The minister's statement made it clear that support to air carriers would be dependent on securing real outcomes for Canadians, including the provision of refunds in place of vouchers, maintaining regional connectivity, and remaining good customers of the Canadian aerospace industry.

Helping to ensure the economic viability of the sector, and protecting the interests of Canadians is a necessary but not a sufficient condition for the successful restart of the air industry. It will also be important to ensure that air travel remains safe and secure, and addresses the added public health dimension created by the pandemic.

For that and related issues, I will turn to my colleague, the associate assistant deputy minister of safety and security at Transport, Aaron McCrorie.

The Chair: Mr. McCrorie, the floor is yours.

Mr. Aaron McCrorie (Associate Assistant Deputy Minister, Safety and Security, Department of Transport): Thank you, Mr. Chair.

Good afternoon. It's a pleasure to be here.

I'm Aaron McCrorie, the associate assistant deputy minister for safety and security at Transport Canada.

Since the outbreak of the COVID-19 pandemic, guided by the latest public health advice, Transport Canada has worked hard to respond quickly to ensure that Canadians remain safe while supporting the ongoing flow of critical goods and services across the country.

To reduce the risk of transmission of COVID throughout the aviation sector, Transport Canada has worked with partner departments, public health authorities, provinces and territories and the transportation industry to implement a system of layered measures, guidance, and requirements to ensure that transportation operations are safe for workers and passengers.

These include health screening measures and temperature checks to prevent symptomatic passengers from boarding flights to, from and within Canada. Workers at the 15 busiest airports in Canada are also subject to temperature checks before entering restricted areas. In addition, passengers on all flights departing or arriving at Canadian airports must have an appropriate mask or face covering when going through security checkpoints, when boarding and deplaning and on board the aircraft. These requirements also apply to some air crew members and airport workers.

The department also issued a notice restricting most overseas flights to landing at four airports in Canada: Montreal-Trudeau, Toronto-Pearson, Calgary, and Vancouver. This was done to support the work of health authorities to conduct medical assessments of symptomatic passengers and to notify passengers of the need to self-isolate for a period of 14 days. Transport Canada acted quickly to protect Canadians and air travel passengers to reduce the risk of transmission on an aircraft and the risk of importation. Making sure air travel is safe is a key factor in supporting the recovery of the air sector.

On August 14, Transport Canada released “Canada's Flight Plan for Navigating COVID-19”. This document is the foundation for aligning Canada's current and future efforts to address the safety impacts of COVID-19 on the aviation sector and was developed in close collaboration with industry partners. It demonstrates to Canadians the extensive and multi-layered system of measures that have been implemented to support public health, including temperature checks, health checks and face coverings as well as measures implemented by industry such as increased cleaning and disinfecting protocols, enhanced air conditioning and filtration systems and new protocols to encourage physical distancing.

Canada's flight plan is based on the comprehensive standards and recommendations from the International Civil Aviation Organization's Council Aviation Recovery Task Force, or CART, in order to ensure that Canada is aligned with the gold standard of international best practices. This document will be refined as we continue to learn more about COVID-19 and as guidance and public health measures evolve at the local, provincial, national and international levels.

Preventing the spread of the pandemic has been and remains the top priority of the government. The various regulatory requirements that were put in place will likely remain for the foreseeable future; however, there is room for adjustment to support the restart of the air sector. Transport Canada will actively assess orders that have been issued to see what can be done and will be consulting with industry on possible amendments as we move forward.

The department is also working closely with other federal departments to explore risk-based opportunities that will allow Canada to ease travel restrictions and reopen our borders. This includes implementing a sustainable approach to reducing public health risks today and building resilience to safeguard the system against similar risks in the future. For example, by leveraging opportunities for safe, contactless processing of passengers, these approaches will help rebuild public confidence in the safety of air travel.

Health Canada and the Public Health Agency of Canada, working with other key federal departments such as Global Affairs Canada, Transport Canada and the Canadian Border Services Agency, are responsible for making decisions related to the lifting of travel and quarantine restrictions. Presently, testing pilot projects are under way or in development across Canada to establish a good base of evidence for possible reduction of quarantine requirements. For example, Air Canada and the Greater Toronto Airports Authority, in partnership with McMaster University, launched a testing project in September focused on testing passengers arriving in Canada.

The Public Health Agency of Canada, in partnership with the Province of Alberta, launched a testing project in November for passengers and workers arriving by land at Coutts border crossing and by air at the Calgary International Airport.

● (1545)

The Chair: You have one minute, Mr. McCrorie.

Mr. Aaron McCrorie: Thank you, Mr. Chair.

It's clear that ensuring a healthy and safe transportation sector is essential for reopening borders, restarting the tourism industry, and for the safety and security of Canadians at large. Transportation will play a vital role in supporting the country's economic recovery. Continued collaboration and shared insights are crucial in overcoming the challenges this pandemic has brought to the air sector. That is why the department will continue its important engagement with stakeholders and other partners as we work to address challenges faced by the air sector in Canada today and to ensure that we have a strong industry into the future.

Thank you very much.

The Chair: Thank you, Mr. McCrorie, and thank you, Mr. Hanson.

Do we have other witnesses who wish to speak? Is anybody speaking from the CTA?

Mr. Streiner, the floor is yours for five minutes.

You are on mute, Mr. Streiner.

● (1550)

Mr. Scott Streiner (Chair and Chief Executive Officer, Canadian Transportation Agency): Okay: Can you hear me now?

The Chair: You're good to go.

Mr. Scott Streiner: All right. This is our lives now, eh? We have to overcome all these technical issues.

I will start again. Thank you, Mr. Chair.

The Chair: Thank you, Mr. Streiner.

[*Translation*]

Mr. Scott Streiner: I want to thank the committee for inviting my colleagues and me to appear today.

We're living through an unusual and difficult time. I hope all of you and your loved ones have remained healthy and safe over the last nine months. While we have our respective roles to play, we are, first and foremost, fellow citizens.

I have the privilege to lead the Canadian Transportation Agency. The CTA was established in 1904 and is Canada's second-largest independent, quasi-judicial tribunal and regulator.

[*English*]

At no time in the century since the dawn of commercial aviation have airlines and their customers gone through the sorts of events we have witnessed since mid-March. Canadian airlines carried 85% fewer passengers between March and September 2020 than during the same period in 2019. Such a collapse in volumes is without precedent.

Through this turmoil, the Canadian Transportation Agency has worked to protect air passengers. Despite the fact that almost every CTA employee has worked from home since the pandemic struck, the 300 dedicated public servants who make up the organization have spared no effort to continue providing services to Canadians.

Immediately after the crisis began, we updated our website with key information for travellers so that those scrambling to get home would know their rights. We temporarily paused adjudications involving airlines to give them the ability to focus on repatriating the Canadians stranded abroad. We took steps to ensure that no Canadian who bought a non-refundable ticket would be left out-of-pocket for the value of their cancelled flights. We worked around the clock to process and issue the air licences and permits required for emergency repatriation flights and cargo flights to bring urgently needed PPE to Canada.

In the subsequent months, we invested substantial resources and long hours to deal with the unprecedented tsunami of complaints filed since 2019. Between the full coming into force on December 15, 2019, of the air passenger protection regulations, the APPR, and the start of the pandemic three months later, the CTA received around 11,000 complaints—a record. Since then we've received another 11,000.

[*Translation*]

To put these numbers in perspective, in all of 2015, just 800 complaints were submitted. In other words, we've been getting more complaints every two to four weeks than we used to get in a year.

We've already processed 6,000 complaints since the pandemic reached Canada. By early 2021, we'll start processing complaints filed during the pandemic, including those related to the contentious issue of refunds. If the recently announced negotiations between the government and airlines result in the payment of refunds to some passengers, a portion of those complaints may be quickly resolved.

[*English*]

On the topic of refunds, it's important to understand that the reason the air passenger protection regulations don't include a general obligation for airlines to pay refunds when flights are cancelled for reasons outside their control is that the legislation only allows the regulations to require that airlines ensure that passengers can complete their itineraries. As a result, the APPR's refund obligation applies exclusively to flight cancellations within airlines' control.

No one realized at the time how important this gap was. No one foresaw mass, worldwide flight cancellations that would leave passengers seeking refunds frustrated; airlines facing major liquidity issues; and tens of thousands of airline employees without jobs.

Because the statutory framework does not include a general obligation around refunds for flight cancellations beyond airlines' control, any passenger entitlements in this regard depend on the wording of each airline's applicable tariff. Every refund complaint will be examined on its merits, taking the relevant tariff language into account.

● (1555)

The Chair: You have one minute, Mr. Streiner.

Mr. Scott Streiner: Thank you, Mr. Chair.

The APPR rules are among the strongest air passenger protection rules in the world. They cover a wider range of passenger concerns than any other regime, but we now know that the gap highlighted by the pandemic is significant. If and when the CTA is given the authority to fix that gap, we'll act quickly.

Just before wrapping up, Mr. Chair, I'd like to mention one more area where the CTA has been active: accessibility.

Since the groundbreaking accessible transportation regulations came into effect last June, we've been providing guidance to Canadians with disabilities and to industry to ensure that these new rules are well understood and respected, and we've continued to play a leading role in encouraging the aviation sector in Canada and around the world to integrate accessibility into the rebuilding process. Persons with disabilities should not be left behind as air travel gradually recovers.

Let me conclude, Mr. Chair, by noting that because of the CTA's independent status and the quasi-judicial nature of our adjudications, it would not be appropriate for me to comment on government policy or on any matters that are currently before the CTA, but within those limits, my colleagues and I would be happy to respond to any questions the committee may have.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Streiner, and to all our witnesses, thank you.

Are there any more witnesses who would like to speak? I see none.

We're now going to our first round of members' questions for six minutes, starting off with the Conservative Party and Ms. Kusie, followed by the Liberal Party and Mr. Rogers, and then the Bloc Québécois, with Mr. Barsalou-Duval, and the New Democratic Party, with Mr. Taylor Bachrach.

Ms. Kusie, you have six minutes. The floor is yours.

Mrs. Stephanie Kusie (Calgary Midnapore, CPC): Thank you, Chair. I appreciate the opportunity to have these witnesses before us today.

Thank you very much for being here.

I'm going to start by going back to Mr. McCrorie's comments regarding rapid testing.

As he mentioned, there's currently a pilot project going on in my hometown of Calgary, in my home province of Alberta, a project in YYC and Alberta that we are very proud of. What it allows individuals to do, of course is to take the COVID test upon arrival and, if they receive a negative test, to reduce their quarantine going forward.

I'm wondering if I can get some information as to how long it took Transport Canada, as well as other various governmental departments, to get this pilot project under way.

Mr. Aaron McCrorie: Thank you for the question, Mr. Chair.

When it comes to the pilot projects, the testing projects, we've been playing a supporting role. I hate to defer the question, but I think for you to get a sense of the timelines and the level of effort to get it launched, you'd probably be better off asking our colleagues from the Public Health Agency of Canada and Health Canada, who are joining you, I believe, after this session. They were the leads in terms of putting the pilot in place.

I can say that Transport has played a supporting role over the last several months, in particular in working as a liaison between PHAC and Health Canada and the airport authority and the airlines involved and helping to facilitate those relationships. The actual implementation of the test and the design of it fell to our colleagues in the Health portfolio.

Mrs. Stephanie Kusie: Okay. Thank you very much, Mr. Chair.

Can you confirm, though, that you are in the process of implementing this at other airports across the country?

Mr. Aaron McCrorie: Again, when it comes to the implementation of the pilots themselves, typically it's going to be Health Canada and PHAC that are the leads, but there are other pilot projects that are being contemplated. The Vancouver airport is contemplating a pilot project, for example, and I believe Montreal is. There is a series of pilot projects that are being contemplated, and we're doing our best to support them.

Mrs. Stephanie Kusie: Okay. I'm going to go, then, to the announcement yesterday in the fall economic statement, which said:

> To further assist airports to manage the financial implications of reduced air travel, the government proposes to provide $65 million in additional financial support to airport authorities in 2021-22.

Would you, Mr. McCrorie or Mr. Hansen, be able to provide any further information as to how these funds will be distributed and when they'll be distributed, and again, as you mentioned briefly, I believe, in the opening, the conditions tied to the money?

Mr. Lawrence Hanson: Thank you very much, Chair.

With regard to the FES announcement yesterday, I'm not really in a position to give any additional details beyond what the Minister of Finance laid out yesterday. I would note that the conditional points really related more to a potential agreement and support for airlines, as opposed to yesterday's funding, which was more exclusively directed toward airports.

● (1600)

Mrs. Stephanie Kusie: Okay. I appreciate that.

Of course, I'm sure you saw across the media that there was widespread disappointment from the airline sector. It certainly fell significantly short of the October 1 ask of $7 billion.

I was wondering if the government had conducted a comparative analysis of how Canada could support the sector compared with other nations and, if so, what it concluded. Are there supports for the airline sector that we've seen in other nations compared with what was offered to the Canadian airline sector yesterday?

Mr. Lawrence Hanson: Thank you, Chair.

Certainly, we have looked at what other countries have done. The comparisons are different, of course, because sometimes it's in support for individuals versus support for carriers. Some countries have taken equity positions in carriers. We have done those comparisons. It's not always easy to get to an apples to apples comparison.

When it comes to a final comparison with what's done in the airline sector, obviously it will ultimately be dependent on what the eventual terms of an agreement with the air carriers looks like.

Mrs. Stephanie Kusie: Would you be able to table your research and the conclusion up to this point of what has been evaluated versus what was offered yesterday and versus what will be offered in the future?

Mr. Lawrence Hanson: Chair, we would be happy to provide information on what we have learned about other countries' supports. To be candid, we have compiled information that is quite largely publicly available.

Obviously, we can't speculate on what future support might look like here in Canada.

Mrs. Stephanie Kusie: Thank you, Chair.

Mr. Streiner, the APPR gives airlines 30 days to respond to customer complaints. Why can't your own agency meet that standard?

You have said today you have a backlog. Why do you think any Canadian, or anyone for that matter, would complain to your agency and wait when they can complain to a carrier and get an answer in 30 days?

Mr. Scott Streiner: Mr. Chair, I think the folks seeking compensation should and, under the APPR, must turn to the airline to make their claims.

If we're talking about compensation, or the inconvenience associated with flight delays or cancellations, the regulations state that a claim should be made with the airline. But if they can't resolve that claim with the airline, then they can file a complaint with the CTA. We deal with all of those complaints on their merit, as I have said.

As far as the backlog goes, obviously the CTA wants to get through complaints as quickly as it can. As I noted in my opening comments, we received an unprecedented and extraordinary number of complaints after the APPR came into force, 11,000 complaints and another 11,000 since the pandemic began. It's unheard of for a quasi-judicial tribunal to receive 22,000 complaints when just five years earlier it was receiving 800.

We are absolutely mobilizing to get through those complaints as quickly as possible. We have already cleared 6,000 of them since the pandemic began, and we will continue to do everything we can to provide timely service to Canadians.

The Chair: Thank you, Mr. Streiner, and thank you, Ms. Kusie.

Mrs. Stephanie Kusie: Thank you, Mr. Chair.

[*Translation*]

Thank you to the witnesses, too.

[*English*]

The Chair: We're now going to move on for six minutes to Mr. Rogers of the Liberal party.

Mr. Churence Rogers (Bonavista—Burin—Trinity, Lib.): Thank you, Mr. Chair.

I welcome all the guests today.

A few of my questions may fall under transport or the health sector, but I will leave it to our guests to decide if they want to respond to some of the questions.

For the last number of weeks and months, all of us MPs have been meeting with airline officials, airport security people, airport CEOs, regional airlines, large airlines, and many of them have been advocating for support for the industry.

Interestingly enough, rapid testing was certainly a big part of what I was lobbied for by many people. There were other supports such as rent relief and fees that are charged across the country to airports and airlines. Many of these proposed solutions were broad ranging. Ms. Kusie referred to some of the numbers in the area of $7 billion, but also, of course, the industry was suggesting that maybe some of that might be in the form of loan guarantees, non-repayable grants and a whole slew of possible solutions.

I want to focus a little on rapid testing in particular, because interestingly enough, many of the people I talked to really focused on that and said that things like that were more important than some of the money they were requesting.

Can you tell me how many rapid tests have been deployed by the federal government to the provinces so far, and whether or not these are still being deployed across the country?

● (1605)

Mr. Aaron McCrorie: Mr. Chair, perhaps I could take that question.

The Chair: Go ahead, Mr. McCrorie.

Mr. Aaron McCrorie: In terms of the number of tests that have been deployed, we'd have to defer to our colleagues at Health Canada and the Public Health Agency of Canada.

I could note that from a Transport Canada perspective, we saw that the restrictions at the border, obviously at the outset of the pandemic, were very effective in limiting the importation of COVID-19. We are, as I've noted, working with our partners to look at what measures could be put in place to reduce or change some of those border restrictions, in particular via testing. The pilot projects are a great example of gathering evidence to support, perhaps, a national program of testing as an alternative to quarantine. Ultimately, it will be our colleagues in the health sector who will make decisions about which tests are used, when to apply them and how to apply them.

Again, I think we play a really important role from a facilitation point of view. We've done some work with airports to look at what a testing regime would look like logistically and how you would set it up in your airport, for example. We've developed what is called an "operational plan" to support that, if and when a decision for testing is made. We've worked with the International Civil Aviation Organization and other international partners to look at some of the international standards or best practices for a testing regime, if we go down that path.

Again, as I've suggested, we've been working with domestic partners like the Calgary airport and the Vancouver airport as well as the airlines to help them set up the testing pilot projects that are being led by our health colleagues.

Mr. Churence Rogers: I'd like to ask you a follow-up question.

Can rapid testing at airports and other types of border crossings affect traffic? Is rapid testing going to be an option to consider for boosting the tourist industry and attracting international travellers?

Finally, what are the COVID-19 screening best practices at airports around the world that you might be familiar with?

The Chair: You're on mute, Mr. McCrorie.

Mr. Aaron McCrorie: Sorry about that, Mr. Chair. I was hoping I'd go through my career without being told I was on mute, but apparently not.

The Chair: No problem.

Mr. Aaron McCrorie: Again, the idea of the pilot projects is exactly to determine the most effective types of tests to use and where to apply them. There are concerns, obviously, if you're looking at the land border, about what that might mean from a congestion point of view. Consideration is even being given to testing prior to departure so that we can look at reduced congestion at the airport.

I talked a bit about trying to build a touchless journey. What we're really trying to do is to make sure that we can maintain physical distancing in an airport environment and reduce that congestion.

The pilot projects are giving us good information about what tests to use and where to apply them, and we're really proud to be working with our health colleagues on that. In terms of which specific test to use under what circumstances, I'd have to defer to my health colleagues for that.

Mr. Churence Rogers: I have one final question for you.

Based on your experience and that of the travel industry and what you know about rapid testing, do you think it's one of the key solutions for getting people back in the aircrafts and flying again so that we can have people moving across the country for the benefit of the tourism industry?

Mr. Aaron McCrorie: We tried to look at it from an aviation safety and security point of view, or even a transportation safety and security point of view. We look at layers of measures. It's about building layers of measures that protect...but also as we make adjustments, putting in place different layers of measures. Testing of some kind or another, I think, is showing a lot of promise as an alternative to quarantine. We're not there yet, but the pilot projects are helping us build that evidence base that will allow us to make that decision down the road. I think some changing of the measures is going to be key to the successful relaunch of the aviation industry.

● (1610)

The Chair: Thank you, Mr. McCrorie.

Thank you, Mr. Rogers.

We're now going to move on for six minutes to the Bloc Québécois.

Mr. Barsalou-Duval, the floor is yours.

[*Translation*]

Mr. Xavier Barsalou-Duval (Pierre-Boucher—Les Patriotes—Verchères, BQ): Thank you very much, Mr. Chair.

My first question is for Mr. Streiner of the Canadian Transportation Agency.

I'd like to know if you and the Canadian Transportation Agency are very familiar with the Air Transportation Regulations.

Mr. Scott Streiner: Thank you for your question, Mr. Barsalou-Duval. The answer is very short: yes.

Mr. Xavier Barsalou-Duval: Thank you very much, Mr. Streiner.

Actually, I'd like to know if you are familiar with subparagraph 122(c)(xii), which talks about the right to obtain a refund when the carrier fails to provide transportation for any reason.

In your opening remarks, you mentioned that nowhere in the legislation does it state that companies had to make these refunds. However, subparagraph 122(c)(xii) states the opposite:

> (xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason...

Mr. Scott Streiner: In fact, this provision and regulation requires that the carrier or the airline specify its terms and conditions of services. This regulation doesn't specifically require terms and conditions of service. In other words, there is no minimum obligation in this regulation to refund customers in these situations.

Mr. Xavier Barsalou-Duval: Thank you, Mr. Streiner. However, if we read paragraph 122(c) correctly, what I just mentioned is one of the minimum conditions that tariffs must contain. So it's contained in the price of all tickets and in all carrier fares. This regulation applies to everyone, doesn't it?

Mr. Scott Streiner: This regulation applies, but it says that the airline must specify its terms and conditions of service. It does not specify exactly what conditions of service the tariffs must contain. It does not establish a minimum obligation.

Mr. Xavier Barsalou-Duval: Mr. Streiner, paragraph 122(c) states that, “Every tariff shall contain … the following matters, namely”, among which is noted that there must be a refund if the service is not provided. I think it's pretty clear that there has to be a refund.

Mr. Scott Streiner: It's clear that carriers must explain to passengers the terms and conditions of service contained in their tariffs. The interpretation of this regulation is clear. I don't want to repeat myself, but this regulation does not specify the exact content of tariffs.

Mr. Xavier Barsalou-Duval: I think we're playing word games.

Are you able to name a single case in the jurisprudence that supports the interpretation that passengers aren't entitled to a refund in these circumstances?

Mr. Scott Streiner: As a quasi-judicial tribunal, we make decision case by case based on the facts and on the relevant act and regulations. This means that we consider all terms and conditions and all circumstances.

It's a question of interpretation of the legislation. I think all the honourable members understand that it isn't appropriate for me, as chair of the Canadian Transportation Agency, to interpret the legislation here or make formal rulings. There is a legal process for that.

Mr. Xavier Barsalou-Duval: I'd like to know if the people who work at the Canadian Transportation Agency know the provisions of the Quebec civil code relating to consumers.

Mr. Scott Streiner: I suppose some of them do.

It's provincial legislation. We're responsible for applying federal legislation.

Mr. Xavier Barsalou-Duval: According to the Quebec civil code, when a service has not been rendered, it must be refunded. It would be interesting if federal institutions, such as the Canadian Transportation Agency, could recognize and enforce the legislation that already exists.

I have another question. The Canadian Transportation Agency recently released new details about its statement on vouchers. You say that this statement isn't a binding decision. I'm trying to understand.

Does the Canadian Transportation Agency have the power to issue a statement that is unenforceable but in conflict with the legislation?

● (1615)

Mr. Scott Streiner: The agency has the power to issue statements and guidance material on any topic within its scope.

As you specified, the statement does not change the obligations of the airlines or the rights of the passengers. The statement contains suggestions, and only suggestions. It isn't a binding decision.

Mr. Xavier Barsalou-Duval: Does the Canadian Transportation Agency have the power to change the legislation?

Mr. Scott Streiner: Of course not. The legislation exists, and our responsibility is to enforce it, which we always do impartially and objectively.

Mr. Xavier Barsalou-Duval: Don't you think the positions that have been taken by the Canadian Transportation Agency call into question its impartiality?

Mr. Scott Streiner: Not at all.

Mr. Xavier Barsalou-Duval: But that's the impression many people have.

The Canadian Transportation Agency is currently nearly two years behind in processing the various complaints. Last spring, the agency also said that none of the complaints regarding air travel and ticket refunds would be dealt with until September.

What kind of message does it send to the airlines when it says that it won't deal with travel complaints? Are they being told not to issue refunds to their customers, because they're not going to get a slap on the wrist anyway?

Mr. Scott Streiner: With all due respect, I must say that our employees work very hard to deal with all the complaints received. It should be noted that 99% of these complaints were submitted to the agency as of December 15. So there isn't a two-year delay in processing. The processing of complaints takes a long time, I agree. It would be preferable to do it faster, but it's a matter of volume. The volume is unprecedented: we've received 22,000 complaints since December 15. We're working very hard to deal with all these complaints.

With respect to the complaints that were received during the pandemic, we will begin processing them in early 2021. The number of complaints is remarkable and challenging. We're working very hard on it.

Mr. Xavier Barsalou-Duval: I'd like your opinion on the following situation. Let's say that I manage a complaints department—

[*English*]

The Chair: Thank you, Mr. Barsalou-Duval and Mr. Streiner.

We're now going to move to Mr. Bachrach, for six minutes.

Mr. Taylor Bachrach (Skeena—Bulkley Valley, NDP): Thank you, Mr. Chair, and thank you to our witnesses.

During this pandemic, Canadians have been hurt financially in so many ways. I hear from constituents all the time who've lost their income, who are in financial distress and having trouble paying their bills. Now, a relatively modest number of Canadians were in a very specific situation where they bought airplane tickets, some of these very expensive in the thousands of dollars, from airlines that up until the pandemic were doing very well.

The airlines are huge corporations that in 2019 were celebrating billions of dollars in profits, and had access to billions of dollars in liquidity. We're being told by the government that these Canadians, who purchased these airfares, are not able to get a refund, because the government is concerned that the airline corporations are going to go bankrupt.

You're putting citizens in a situation where they're essentially involuntary or unwilling creditors to these huge corporations. To either Mr. Streiner or Mr. Hanson, how could you possibly construe this as a fair situation?

Mr. Lawrence Hanson: Mr. Chair, I'd be happy to take this question.

I would direct the member's attention to the statement by Minister Garneau on November 8, which was quite explicit on this point. Although the government is prepared to consider assistance for air carriers, given the significant pressures on their liquidity, it is not prepared to do so unless Canadians, whose flights were cancelled due to the pandemic, receive a refund rather than a voucher.

● (1620)

The Chair: Mr. Bachrach.

Mr. Taylor Bachrach: Mr. Hanson, is it fair to say the government has been forced into supporting a situation that is profoundly unfair for those Canadians who are out of pocket from an airfare?

Mr. Lawrence Hanson: The government has always recognized the difficult situation, on the one hand, of individuals whose flights were cancelled as a result of the pandemic, and on the other hand, a situation where air carriers themselves have very constrained liquidity and cash flow because their revenues have collapsed. That's why it's come forward with an approach that says that it's prepared to provide support for the airlines, but putting conditionality on it in terms of refunds for passengers.

Mr. Taylor Bachrach: Mr. Streiner, in your opening remarks, if I understood you correctly, you indicated that the CTA was somewhat caught off guard by this gap in the regulation, and that in hindsight, this should have been rectified.

Is it fair to say you weren't aware of a gap in the air passenger protection regulations that could have avoided this situation?

Mr. Scott Streiner: I don't think anybody identified the gap. To be clear, the gap stems from the legislation. The legislation gave the CTA the authority to make the air passenger protection regulations.

If you read the relevant section related to cancellations that are outside the control of airlines, it constrains our ability to make regulations to only requiring that airlines ensure that passengers can complete their itineraries.

Frankly, if the section had been more permissive, we might well have established a refund obligation as we did for cancellations within the control of airlines, but we were constrained by the language of the legislation. I don't think anybody at the time, not parliamentarians, nor consumer rights advocates, recognized that the gap in the legislation and regulations could be as significant as we now realize it is.

Mr. Taylor Bachrach: Mr. Streiner, the reason I mention this is because the organization Air Passenger Rights wrote to the CTA during the crafting of those regulations and said very specifically:

> APR is deeply concerned about the omission of a number of important issues from the Proposed Regulations. This state of affairs creates the incorrect impression that airlines are free to do as they please in these areas. APR strongly believes this was not Parliament's intent.

So here they are; they've identified the gap and they're bringing it to your attention. Was there nothing that the CTA could do to address the situation in the regulations?

Mr. Scott Streiner: In terms of establishing a refund obligation—I assume that's the question—for flight cancellations beyond airline control, the answer is no. The legislation constrained us. There was no way we could establish that obligation in the regulations given the wording of the legislation.

Mr. Taylor Bachrach: Picking up where Mr. Barsalou-Duval left off, I did not get clarity on this in the answers to his questions, so I'm going to ask them again.

Mr. Scott Streiner: Certainly.

Mr. Taylor Bachrach: In the air transportation regulations, it very specifically speaks to the refunds issue, yet the statement on vouchers says, “The law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control.”

If you read the regulations, section 122, which Mr. Barsalou-Duval read earlier, it very clearly says:

> Every tariff shall contain...(xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client’s unwillingness or inability to continue or the air carrier’s inability to provide the service for any reason

These seem to be in direct conflict with each other. How do you explain this?

Mr. Scott Streiner: The air transportation regulations in the section that you and your colleague referred to outline the areas or topics that must be addressed by an airline's tariff. They don't establish the minimum obligations. They don't establish what the terms are; they simply indicate that terms must be established in these areas. Therefore, they don't establish a minimum obligation to pay compensation or to pay refunds in situations beyond airlines' control, only that a tariff has to address those questions.

The Chair: Thank you, Mr. Streiner, and Mr. Bachrach.

We're now going to to our second round of five minutes each from Mr. Soroka of the Conservative Party, as well as Mr. El-Khoury from the Liberal Party, and we have two and a half minutes each for Mr. Barsalou-Duval of the Bloc and Mr. Bachrach of the NDP.

Mr. Soroka, for five minutes you have the floor.

Mr. Gerald Soroka (Yellowhead, CPC): Thank you, Mr. Chair.

I'm not trying to put words in Mr. Hanson's mouth but it sounds like if the federal government gives support to airlines, there will be a condition that they have to refund passengers their money if the passenger wants that. If that's the case, if there's going to be a time frame attached to that, how long will you give airlines to refund all passengers who have had their trips cancelled so that the airlines can comply with the conditions the federal government has set?

● (1625)

Mr. Lawrence Hanson: Yes, I think when we get to the point of the payment of refunds, there would certainly need to be some sort of approach for detailing the manner and timing in which they would be provided.

Mr. Gerald Soroka: But you don't have a time frame right now as to what that will look like. Is it still in its infancy?

Mr. Lawrence Hanson: I don't have a timeline. I think I will that say that a lot of people will be contacted individually. A lot of people, as you are probably aware, purchase their tickets through third-party vendors online, companies like Expedia and Travelocity, etc., but we would obviously be pushing for this to be done in a very timely fashion, because lengthy delays in getting refunds are not consistent with the idea of providing Canadians refunds that they're expecting.

Mr. Gerald Soroka: I recently held a Zoom call with several independent travel advisers. That association has over 1,200 members across Canada and each one of them owns or operates a small business. They are self-employed. Independent travel advisers work on 100% commission and have been hit very hard by COVID. Many in my riding do not qualify for existing CERB programs as well, so does the department have a plan in place to ensure that travel advisers won't be collateral damage from airline passengers getting refunded by airlines clawing back their commissions? Do you think that will be part of the conditions as well when you're negotiating or not?

Mr. Lawrence Hanson: That is a great question. It points out some of the challenges associated with this and the need to get it right, because, as you say, there is a potential spinoff consequence for travel agents who suddenly see a collapse in commissions as a result of a massive wave of air refunds.

What I can tell the member is that we are aware of this issue. We are discussing it with our colleagues at ISED who work more with the sector than we do. Obviously, I can't say what solution we will arrive at, but I can assure the member that it's very much on the radar.

Mr. Gerald Soroka: Yes, it's very good to hear that you're at least aware of that and trying to work towards some kind of solution.

You also spoke about how there could be different types of conditions on travel. Currently we have face masks and temperature checking. Do you think that will now become a standard practice in airports? Is this just an anomaly, or will this continue after the COVID crisis is over?

The Chair: Go ahead, Mr. Hanson.

Mr. Aaron McCrorie: If I may, Mr. Chair, perhaps I could take that question.

The Chair: Go ahead, Mr. McCrorie.

Mr. Aaron McCrorie: We're constantly reassessing the measures that we have put in place from a health point of view, and we're adapting them as we go along based on the latest health guidance that we get. Depending on how the pandemic plays out over the weeks and months to come, and how, for example, a vaccine testing regime is implemented, we may be able to move away from some of these measures as new measures come into place or as the pandemic comes under control, but I think the bottom line is that we have the flexibility to adapt to changing health conditions and respond to the changing health advice.

A good example is how our requirements around face masks have evolved over time. We have adjusted them from the initial requirements in the spring to more recent requirements based on the latest health guidance that has provided more flexibility for parents travelling with younger children when using face masks.

We will evolve over time based on the latest information.

Mr. Gerald Soroka: Okay, that's quite interesting. It kind os sounds like a yes or a no. I know it's a hard decision to come forward right now.

I get a lot of residents with conspiracy theories about vaccinations and all of these kinds of stories. Do you think this will be a condition for travel where, if they do not take the vaccine, they will not be allowed to travel? Is there the potential for that?

Please alleviate my fears, because I have to deal with this on a regular basis.

Mr. Aaron McCrorie: I'm sorry, Mr. Chair, I missed the beginning part of the question, but I think it was if vaccination will be a standing requirement for travel.

The Chair: That's correct.

● (1630)

Mr. Aaron McCrorie: Again, it's premature to know for sure. Our colleagues from Health Canada may have some views on that as well, but it's certainly, I would say, in the repertoire of tools that we can bring to bear to manage the health risk.

For example, we talked about testing looking at people coming into the country and if there would be a requirement for a test prior to departure. Would we be looking for proof of vaccination prior to people getting on an aircraft? Those are certainly all options we're looking at, but it's premature to make any declarations at this point in time.

The Chair: Thank you, Mr. McCrorie.

Thank you, Mr. Soroka.

We're now going to move on to Mr. El-Khoury for five minutes.

Mr. El-Khoury, the floor is yours.

[*Translation*]

Mr. Fayçal El-Khoury (Laval—Les Îles, Lib.): Thank you, Mr. Chair.

I'd like to thank the witnesses. Their being here with us is really important and useful to the committee.

We are in the middle of a really complicated and dangerous situation. The impact of the pandemic on the airline industry is unprecedented. Here, in Canada, we rely heavily on our airline industry, much more so than most other countries.

My first question is for Mr. Streiner.

Mr. Streiner, you explained the provisions of the Air Transportation Regulations regarding the obligation to refund—or not—customers. Could you tell us what happens in case of a force majeure? And can the pandemic be called a force majeure?

Mr. Scott Streiner: I thank the honourable member for his question.

I can't really answer that question, for one simple reason: as a quasi-judicial tribunal, we might have to deal with this issue. It's a matter of interpretation of the situation, the facts and the legislation. In order to maintain our impartiality, it's important to wait for the decision-making process before answering this important question.

Mr. Fayçal El-Khoury: Can you tell us how the pandemic has affected independent travel agents?

Mr. Scott Streiner: If this question is for me, I would say that travel agents aren't under federal jurisdiction. From what we've read in the media, they fall under provincial jurisdiction.

Mr. Fayçal El-Khoury: If you had issued an order stipulating that the airlines had to refund customers, this would still have been legal, given the terms and conditions of service in the airlines' tariffs. I am thinking here of the provisions that apply in cases of a force majeure and the distinction made at the time of purchase between refundable and non-refundable tickets

[*English*]

The Chair: Mr. Streiner.

[*Translation*]

Mr. Scott Streiner: Thank you, Mr. Chair.

It's true that these distinctions can be important. Some Canadians have purchased refundable tickets, while others have purchased non-refundable tickets. The provisions for a force majeure may be relevant to this discussion. That said, all of these issues must be dealt with in a quasi-judicial process of formal decision-making. These are the kinds of issues we will be addressing in our discussions and decision-making processes.

Mr. Fayçal El-Khoury: In the context of this pandemic, in your opinion, Mr. Streiner, what would have happened to the airlines if they had been required to pay cash refunds to all passengers who applied for them? And what might have been the impact on Canadian travellers and communities?

Mr. Scott Streiner: Once again, I think this question should be directed more to my colleagues at Transport Canada, but I'll give a bit of an answer anyway.

We know that this crisis is unprecedented, but we don't know exactly what the consequences might have been in the situation you describe. Our role is simply to determine what the obligations of airlines are and what the rights of air passengers are under the law. These are the issues we are dealing with. I don't want to speculate by commenting on hypothetical situations.

● (1635)

Mr. Fayçal El-Khoury: Why did you issue directives that credits may be an acceptable alternative to cash reimbursement for travellers whose flights have been cancelled due to COVID-19?

Mr. Scott Streiner: The reason is simple: we did it to reduce the risk of air passengers ending up without any compensation. As I said, the legislation refers to this great variability in the conditions of service of different airlines; that's what creates this risk for air passengers. The objective of our Statement on Vouchers was to reduce this risk.

Mr. Fayçal El-Khoury: When you say—

[*English*]

The Chair: Thank you, Mr. Streiner and Mr. El-Khoury.

[*Translation*]

Mr. Fayçal El-Khoury: Thank you.

[*English*]

The Chair: We will now move on for two and a half minutes to Mr. Barsalou-Duval of the the Bloc.

Mr. Barsalou-Duval, the floor is yours.

[*Translation*]

Mr. Xavier Barsalou-Duval: Thank you, Mr. Chair.

Mr. Streiner, it was mentioned earlier that there is currently a long wait for complaints to be processed. I have a question for you. If I ran a complaints department and there was a two-year wait for complaints to be processed, and I hadn't processed any complaints in the last nine months, do you think I would keep my job?

Mr. Scott Streiner: I'm sorry; could you repeat the question?

Mr. Xavier Barsalou-Duval: If I ran a complaints department, had two years of backlogged complaints on my desk, and hadn't processed any complaints in the last nine months, would I lose my job?

Mr. Scott Streiner: For me, the question would be whether all employees work hard and come together to deal with complaints. If it were employees of the Canadian Transportation Agency, the answer would be yes. Everybody is rallying to deal with complaints. As I said, we've managed to handle 6,000 complaints since—

Mr. Xavier Barsalou-Duval: Thank you. I'm sorry for interrupting you, but I have only two and a half minutes.

Mr. Scott Streiner: Yes, that's fine.

Mr. Xavier Barsalou-Duval: You still announced that you wouldn't deal with any complaints about cancelled airline tickets until September 2020, and then you postponed it until 2021.

In March, the Canadian Transportation Agency released the Statement on Vouchers, which was recently revised. I'd like to know if you had any input into this statement.

Mr. Scott Streiner: All statements, guidelines and guidance material are written by the organization and, as head of the organization, I am always involved, of course.

Mr. Xavier Barsalou-Duval: Have there been any communications where the office of the Minister of Transportation has expressed a willingness to consider the direction the agency might take or the issue of ticket refunds?

Mr. Scott Streiner: We have communicated with the office of the Minister of Transportation throughout the crisis. Indeed, coordination is important in a crisis like this. It's a question of transparency. The purpose of these communications wasn't to obtain permissions or receive instructions, but to ensure that we don't create confusion in this time of crisis.

[*English*]

The Chair: Thank you, Mr. Streiner and Mr. Barsalou-Duval.

We're now going to move on to the NDP with Mr. Bachrach, for two and a half minutes.

The floor is yours.

Mr. Taylor Bachrach: Thank you, Mr. Chair.

Mr. Streiner, which individuals authored and approved the March 25 statement on vouchers?

Mr. Scott Streiner: With regard to the statement on vouchers, like all guidance material posted by the CTA—and we post a great deal of non-binding guidance material, policy statements and information—there are many people who participate in its preparation, in its drafting and in its review, so it's a large number of employees who contributed to that.

Mr. Taylor Bachrach: Who approved it?

Mr. Scott Streiner: Ultimately, every statement like this is an expression of the organization's guidance. As I emphasized earlier, the statement on vouchers, like these other documents, was non-binding in nature, and it's an expression of guidance or a suggestion to the travelling public by the institution.

Mr. Taylor Bachrach: An email from a policy adviser at Transport Canada to Member of Parliament Erskine-Smith revealed that the CTA's members, vice-chair and chair would have approved the statement on vouchers, which gave airlines clearance to refuse refunds.

Is this correct?

Mr. Scott Streiner: Mr. Chair, I'm not sure about that email. I haven't seen the email. It's not in front of me.

The office of the Minister of Transport would not have been privy to the internal decision-making processes at the CTA, and I would simply reiterate that every statement—non-binding—that's made by the CTA, every guidance document is a reflection of institutional guidance and of course is reviewed by senior members of the organization.

● (1640)

Mr. Taylor Bachrach: Mr. Streiner, will you commit to providing this committee with all internal documents, memos and emails concerning the March 25 statement on vouchers and the subsequent clarification?

Mr. Scott Streiner: The CTA is subject to the same access to information rules as any other organization. We have a policy of transparency, and so we try to come forward. I will commit to certainly providing the committee with those documents that it's appropriate to provide, but we are a quasi-judicial tribunal, an independent regulator, and certain material is privileged.

Mr. Taylor Bachrach: The challenge here, Mr. Streiner, as I'm sure you can guess from this line of questioning, is that as a quasi-judicial body, the CTA is in a position to fairly and without prejudice adjudicate these complaints that have come in from air passengers. Does this statement on vouchers not prejudice that process? This very clearly sets out the outcome of those complaints related to refunds. You've already said that it's reasonable, so why adjudicate the specific complaint if you've already said that it's a reasonable approach?

Mr. Scott Streiner: I want to give a very clear response to this question. The non-binding statement on vouchers was issued in order to protect passengers from ending up with nothing at all as a result of this situation, in part because of the legislative gap that I spoke about earlier. Nothing in that non-binding statement in any way affected or affects the rights of anybody who brings a complaint before us. The Federal Court of Appeal has already recognized that passengers' rights aren't affected. Right in the body of the statement, we said that every complaint would be considered on its merit. Every complaint will be considered on its merit, impartially, based on the evidence and the law.

The Chair: Thank you, Mr. Streiner and Mr. Bachrach.

Mr. Taylor Bachrach: Thank you, Mr. Chair.

The Chair: Thank you to the witnesses.

[*Translation*]

Mr. Xavier Barsalou-Duval: Excuse me, Mr. Chair.

[*English*]

The Chair: Yes, go ahead.

[*Translation*]

Mr. Xavier Barsalou-Duval: I'd like to put forward a motion about what was discussed. Is it possible to do that now?

[*English*]

The Chair: Go ahead.

[*Translation*]

Mr. Xavier Barsalou-Duval: That's perfect, Mr. Chair.

Actually, I'd like to put forward a motion that has already been tabled at committee on October 26. The motion is as follows:

> That, pursuant to Standing Order 108(1)(a), an Order of the Committee do issue for correspondence between Transport Canada, including the Minister of Transport and his staff, and the Canadian Transportation Agency regarding cancelled plane tickets and the right of air passengers to be reimbursed, and that these documents be provided to the Committee Clerk within 15 days following the adoption of this motion.

[*English*]

The Chair: Okay, I'm assuming, Mr. Barsalou-Duval, that this is the motion you presented a few days ago, which you distributed.

Do you want to put on the table right now?

[*Translation*]

Mr. Xavier Barsalou-Duval: Mr. Chair, it is not the motion on Air Transat, it's actually the one about the Canadian Transportation Agency. So it's a different motion and it pertains to today's meeting.

The motion I have just read to you has already been introduced, but the committee has not discussed it.

[*English*]

The Chair: Mr. Clerk, does the committee have a copy of that motion?

The Clerk of the Committee (Mr. Michael MacPherson): I'm just going to double-check, but I do believe that it was distributed.

The Chair: Members, while we check, I would like to get some clarification from Mr. Hanson regarding Mr. Soroka's question, even though this might not be the norm for a chair to do. Mr. Soroka asked a question about travel agents, and it's within this committee's interest. The importance of this issue has been discussed previously, too, by members of the committee because sometimes it can fall through the cracks, or these folks, travel agents, maybe seemed to have fallen through the cracks. I thought Mr. Soroka brought up a great point, a great question, with respect to that. I just want to get clarity from you to declare the travel agents.... Do you see them in a similar way as you would see the passengers who are unable to get refunds?

Mr. Lawrence Hanson: Thanks. It's a very fair question, Mr. Chair. I don't know if I'm in a position where I could declare that it would be policy to see them as analogous. That would be for someone other than me. I think what I can say is that the reality is that a mass kind of series of refunds done all at the same time would have implications for those travel agents. I think we need to understand that better, but I think I would kind of be creating policy on the fly to say that it is analogous to something else. I think I would really just be saying that we absolutely recognize that this issue is a consequence of the refund issue and that we have to be looking at it. I'm sorry that I can't be more precise than that, Mr. Chair.

The Chair: Okay. Thank you, Mr. Hanson.

Thank you to all of the other witnesses too.

We're now going to suspend for five minutes. Thank you, ladies and gentlemen.

● (1640)

_____(Pause)_____

● (1640)

The Chair: We have that notice of motion by Mr. Barsalou-Duval that was distributed Monday, October 26, 2020.

Mr. Barsalou-Duval, is that the motion you are putting on the floor?

[*Translation*]

Mr. Xavier Barsalou-Duval: Yes, Mr. Chair.

[*English*]

The Chair: Thank you, Mr. Barsalou-Duval.

Mr. Clerk, I am going to be asking for a vote by the committee to actually debate this now, as it is now being placed on the floor.

Members of the committee, Mr. Barsalou-Duval wishes to place this on the floor for debate. I'll take it, first of all, as a motion to debate it. First off, I'm going to be asking for a vote to place it on the floor for debate. All those in favour?

The clerk is telling me that we don't need a vote to get it on the floor. That's fine.

Debate has begun for this motion. Mr. Barsalou-Duval, I'll give you the floor.

● (1650)

[*Translation*]

Mr. Xavier Barsalou-Duval: Thank you very much, Mr. Chair.

The discussions we had today with the official from the Canadian Transportation Agency actually support the reason why this motion was introduced. The goal of the motion is to better understand where the agency's statement on travel credits came from. It will tell us what interaction it had with the government and whether any directives were given during those interactions. Specifically, it would be helpful to find out whether there was a desire on the government's part to influence a judicial or quasi-judicial tribunal. That would be most unwelcome.

This is something that has an impact on thousands of families. Thousands of dollars are at stake. This has been a highly publicized issue. I hope that all members of the committee will want to obtain that information.

[*English*]

The Chair: Thank you, Mr. Barsalou-Duval.

I will now go to Mr. Sidhu.

Mr. Sidhu, you have the floor.

Mr. Maninder Sidhu (Brampton East, Lib.): Thank you, Mr. Chair.

Yes, I do understand the importance, but I also understand the importance of the witnesses being here. We're ready to ask them the questions that we have. There's a lot of important information. I know my constituents are waiting on answers in terms of rapid testing and a lot of other important matters.

With respect to our witnesses, we need to hear from them. They took the time; we prepared our questions. I think that's what we need to do here.

Thank you.

The Chair: Thank you, Mr. Sidhu.

I have Mrs. Kusie, Mr. El-Khoury and Ms. Jaczek.

Mrs. Kusie, the floor is yours.

Mrs. Stephanie Kusie: I support what Mr. Sidhu said, in particular, in the light that the witnesses from the first hour were.... When I say were not prepared, I mean did not feel comfortable responding to questions better directed to the Department of Health and the Public Health Agency.

I would ask that we return to the witnesses at this time. As well, I would ask the clerk if he could possibly redistribute the motion, if he has not done so already. I am attempting to locate it within my documents, and I'm struggling to do that. I would go out on a limb and say that I'm not alone.

Thank you.

● (1655)

The Chair: Thank you, Mrs. Kusie.

I have Mr. Bittle, followed by Mr. El-Khoury, Ms. Jaczek and Mr. Bachrach.

Mr. Bittle, the floor is yours.

Mr. Chris Bittle (St. Catharines, Lib.): I thank Mrs. Kusie, and I agree with her sentiment. I move that debate now be adjourned.

The Chair: Thank you, Mr. Bittle.

With no questions or no debate on that motion, Mr. Clerk, perhaps you can do roll call.

(Motion agreed to: yeas 9; nays 2)

The Chair: Thank you, Mr. Clerk, and thank you, members.

We're now going to move on to our next session.

Mr. Clerk, I believe all witnesses are on board.

While we're waiting, the next round is going to start with the Conservatives with Mrs. Kusie for six minutes, followed by Ms. Jaczek for six minutes for the Liberal Party, followed by the Bloc and Mr. Barsalou-Duval for six minutes and Mr. Bachrach of the NDP for six minutes as well.

Once we get the witnesses on board and the sound checks done, we'll be ready to go.

Mr. Clerk, I'll leave it to you.

I will suspend for three minutes.

● (1655)

_____(Pause)_____

● (1700)

The Chair: We are now going to be entering the second part of our session.

From the Department of Health we have Ms. Frison, the acting assistant deputy minister, programs and implementation. From the Public Health Agency of Canada we have Ms. Diogo, vice president, health security infrastructure branch.

I'm going to ask both witnesses to be brief because we only have half an hour and I'm being told by the House that we have until 5:30 because we have 6:30 committees and we don't want to take away the resources from them. If you can be as brief as possible that will allow for more questions from members and that would be wonderful.

Ms. Frison, go ahead. The floor is yours.

Ms. Monique Frison (Acting Assistant Deputy Minister, Programs and Implementation, Department of Health): Thank you, Mr. Chair.

I want to begin by thanking the committee for the opportunity to speak to you today.

I work at Health Canada in the testing, contact tracing and data management secretariat. We know that COVID-19 has had devastating impacts right across the country, and the aviation sector is no exception. I'm sure the efforts of this committee to examine the consequences of this pandemic will undoubtedly shape the efforts to strengthen that sector, which is so vital to the Canadian economy and the lives of Canadians.

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Marcia.

Thanks.

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:40 AM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: push button ready

Thanks.

-------- Original message --------
From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Date: 2020-03-25 10:36 a.m. (GMT-05:00)
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>, Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>, Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: push button ready

Mr. Streiner,

Valérie

Nadine Landry

From: Marcia Jones
Sent: Wednesday, March 25, 2020 1:55 PM
To: Renée Langlois
Cc: Tim Hillier; Vincent Turgeon; Valérie Lagacé; Caitlin Hurcomb
Subject: FW: Statement
Attachments: Statement.docx

Over to you! ☺

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:35 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: Statement

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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

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

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

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

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

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

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

Nadine Landry

From: Tim Hillier
Sent: Wednesday, March 25, 2020 2:30 PM
To: Matilde Perrusclet
Cc: Vincent Turgeon; Cynthia Jolly; Simon Fecteau Labbé
Subject: RE: Go live

Great!!

Tim

From: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:29 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: RE: Go live

☺
CTA services should also appear in the quick links very soon, once the cache is cleared.

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:27 PM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: RE: Go live

THANKS!!!!!!!!!!!!!

From: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:25 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: RE: Go live

It's LIVE, here are the links:

FR: https://otc-cta.gc.ca/fra/information-importante-pour-voyageurs-pour-periode-covid-19
ENG: https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19

https://otc-cta.gc.ca/eng/statement-vouchers
https://otc-cta.gc.ca/fra/message-concernant-credits

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:10 PM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: Go live

Thanks,

Tim

Tim Hillier
Directeur, Communications, Direction générale de l'analyse et de la liaison
Office des transports du Canada / Gouvernement du Canada
Tim.Hillier@otc-cta.gc.ca / Tél: 819-953-8926 / ATS: 1-800-669-5575
Suivez-nous : Twitter / YouTube

Tim Hillier
Director, Communications, Analysis and Outreach Branch
Canadian Transportation Agency / Government of Canada
Tim.Hillier@otc-cta.gc.ca / Tel: 819-953-8926 / TTY: 1-800-669-5575
Follow us: Twitter / YouTube

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

THE STAR

BUSINESS

Email raises questions about potential bias at transport regulator

By **Christopher Reynolds** The Canadian Press
Wed., Oct. 7, 2020 | 2 min. read

Questions about potential bias at the Canadian Transportation Agency came to the fore this week after a government official acknowledged that CTA board members greenlit the regulator's stance in favour of travel vouchers over refunds.

Transport Canada policy adviser Blake Oliver said in an Oct. 5 email to Liberal MP Nathaniel Erskine-Smith that the agency's members, vice-chair and chair would have approved its statement on vouchers, which has been cited by airlines and financial institutions to refuse reimbursements and chargebacks.

The March 25 statement said vouchers or flight credits — as opposed to refunds — for travellers generally amount to an appropriate response by airlines following flight cancellations prompted by the COVID-19 pandemic.

Since then, the CTA has received more than 8,000 complaints, some of which are likely to come before board members for adjudications on refund claims.

The agency's code of conduct says board members should not express an opinion about potential cases in order to avoid creating "a reasonable apprehension of bias."

The agency has said the statement on vouchers is not legally binding, and was posted in light of the risk that some passengers would receive nothing at all following a cancelled flight and amid the "severe liquidity crisis" facing airlines.

Erskine-Smith agreed to share the email, which he sent at the request of the Air Passenger Rights advocacy group.

CTA members who endorsed a statement that comes down on one side of a dispute now arising in thousands of complaints could be seen as biased when overseeing the adjudications that those complaints would result in, said Air Passenger Rights founder Gabor Lukacs.

"A judge cannot comment on a case that is before them or likely to come before them. If they do, it is likely to create a reasonable apprehension of bias," Lukacs said, drawing a comparison with the CTA board.

"They have pronounced their views without hearing evidence, without hearing both sides," he said. "Effectively they are already discouraging people from pursuing their rights."

The CTA disagrees with that view.

"As indicated on our website and as we have said publicly on multiple occasions, if passengers think they're entitled to a refund and the airline refuses to provide one or offers a voucher with conditions passengers don't want to accept, they can file a complaint with the CTA, which will determine if the airline complied with the terms of its tariff. Each case is decided on its merits. The voucher statement did not affect anyone's right," the CTA said in an email in August.

The agency acknowledged Wednesday that "the statement represents the position of the CTA."

Last week, a Federal Court of Appeal judge dismissed an attempt by the regulator to prevent a hearing on its voucher statement after Air Passenger Rights asked the court in April to order its removal from the website.

The appeal court said in an earlier ruling that "the statements on the CTA website...do not determine the right of airline passengers to refunds where their flights have been cancelled by airlines for pandemic-related reasons...It thus remains open to affected passengers to file complaints with the CTA."

This report by The Canadian Press was first published Oct. 7, 2020.

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Nadine Landry

From: Timothy Zarins
Sent: Wednesday, March 11, 2020 10:50 AM
To: Caitlin Hurcomb
Subject: RE: by way of example

Hi Cait,

[redacted]

Ireland has adapted CAA's guidance and added a small FAQ table: https://www.aviationreg.ie/news/covid-19-related-advice-%e2%80%93-guidance-on-regulation-ec2612004-.947.html

US DOT has so far issued an Enforcement Notice informing the public that airlines may deny boarding if they are traveling to the US from a country with a CDC travel health notice: https://www.transportation.gov/individuals/aviation-consumer-protection/enforcement-notice-regarding-denying-boarding-airlines

[redacted]

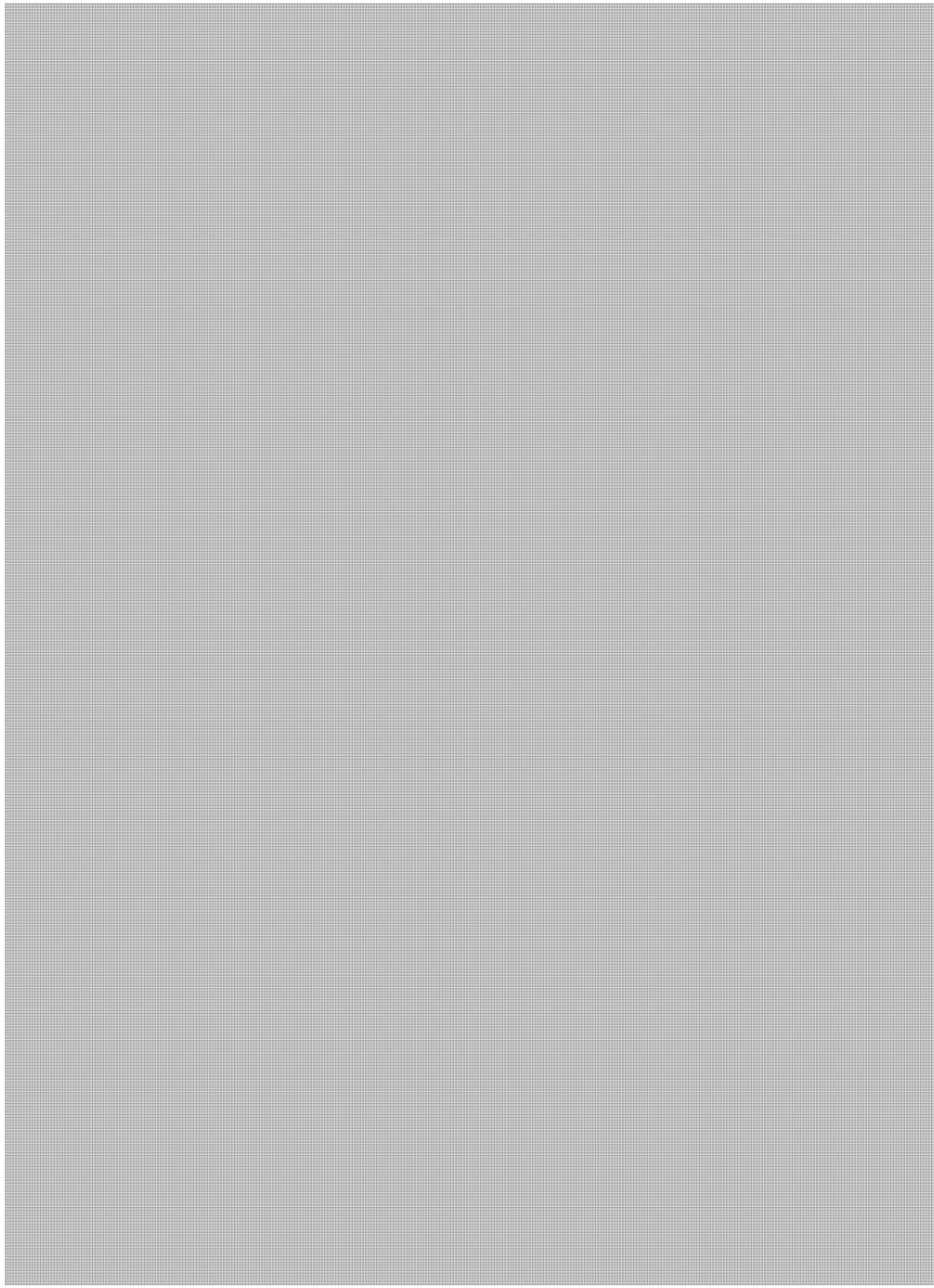
Tim

Tim Zarins
819-953-9903

> **From:** Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
> **Sent:** Wednesday, March 11, 2020 10:04
> **To:** Timothy Zarins <Timothy.Zarins@otc-cta.gc.ca>
> **Subject:** FW: by way of example
>
> Hi Tim,
> [redacted] Thanks!
>
> > **From:** Marcia Jones
> > **Sent:** Wednesday, March 11, 2020 9:59 AM
> > **To:** Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
> > **Cc:** Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
> > **Subject:** FW: by way of example
> >
> > Cait [redacted] - thanks
> >
> > > **From** [redacted]@westjet.com>
> > > **Sent:** Wednesday, March 11, 2020 9:48 AM
> > > **To:** Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
> > > **Subject:** by way of example

s.20(1)(b)

s.20(1)(c)



s.19(1)
s.20(1)(b)
s.20(1)(c)

[redacted]

[redacted] Government Relations and Regulatory Affairs
116 Lisgar Street, Suite 600
Ottawa,ON
K2P 0C2

P [redacted] | W westjet.com

WESTJET
Love Where You're Going

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Nadine Landry

From: Marcia Jones
Sent: Thursday, March 12, 2020 11:41 AM
To: Caitlin Hurcomb; Valérie Lagacé
Subject: FW: APPR Guidelines - COVID-19

FYI – does not quite capture accurately what I stated we would do, and I will respond to clarify, but you can see that refund is also an issue for the carriers, and also alternative travel arrangements.

From: George Petsikas <George.Petsikas@transat.com>
Sent: Thursday, March 12, 2020 11:18 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Bernard Bussières <Bernard.Bussieres@transat.com>; Karen Abugaber <Karen.Abugaber@transat.com>; Howard Liebman <Howard.Liebman@transat.com>
Subject: APPR Guidelines - COVID-19

Marcia

Many thanks again for taking time out of your busy schedule to speak with me this morning re the above-mentioned matter.

As discussed and agreed, we are in an unprecedented situation regarding travel market demand caused by the COVID-19 situation and the related growing list of travel bans and quarantines. As you undoubtedly also saw yesterday, the WHO has now formally declared a pandemic so we can expect many more challenges in this regard.

Consequently, we are strenuously attempting to deal with this situation in a manner that minimizes travel disruptions and customer inconvenience, but also in a way that ensures the continued viability of our company and avoids potential impact on employment levels. We are obviously not alone in this task.

We are therefore heartened to learn that the Agency is working on issuing guidelines by end of business tomorrow that will assist industry and consumers in better understanding their respective rights and obligations per the APPR *within the context of this extraordinary situation*. As we are actively managing scheduling and capacity in an effort to minimize negative impacts on our business in the face of enormous downward pressures on demand per the above, we would especially appreciate clarity with respect to the application of the APPR provisions dealing with cancellations and resulting refund and alternative travel arrangement requirements.

As I will be out of the loop for the first half of tomorrow, I would greatly appreciate if you would ensure that your staff copies myself as well as my colleagues copied herein when you go live with this tomorrow. As you can imagine, time is of the essence in managing this rapidly evolving matter so we would like to make sure we don't lose any valuable time to this end.

Thanks again for your assistance and please don't hesitate should you have any questions or require any additional info re the above.

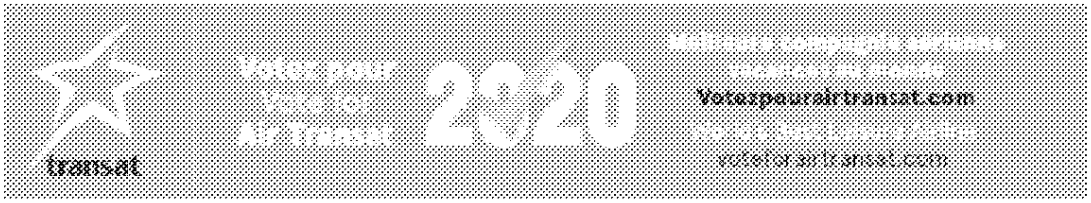
Kind regards.

George Petsikas

Directeur principal Affaires gouvernementales et de l'industrie
Senior Director, Government and Industry Affairs

T 514-842-9612
C [redacted]

s.19(1)



Transat A.T. inc.
300, rue Léo-Pariseau, bureau 600
Montréal (Québec) H2X 4C2

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Nadine Landry

From: Millette, Vincent <vincent.millette@tc.gc.ca>
Sent: Tuesday, March 24, 2020 12:40 PM
To: Caitlin Hurcomb
Subject: RE: CTA announcement tomorrow

thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Tuesday, March 24, 2020 12:31 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

[redacted]

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Tuesday, March 24, 2020 12:28 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

[redacted]

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Tuesday, March 24, 2020 12:25 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,

[redacted]

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Tuesday, March 24, 2020 12:07 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Cait – [redacted]

Thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Monday, March 23, 2020 11:04 AM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,

[redacted]

[redacted]

Cait

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Monday, March 23, 2020 10:20 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

[redacted]

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Monday, March 23, 2020 10:15 AM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,

[redacted]

Cait

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Monday, March 23, 2020 10:02 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Cait - [redacted]

Thanks

s.21(1)(a)
s.21(1)(b)

From: Millette, Vincent
Sent: Sunday, March 22, 2020 2:22 PM
To: 'Caitlin Hurcomb' <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: CTA announcement tomorrow

Hi Cait,

Thanks!

Sent from my BlackBerry 10 smartphone on the Rogers network.

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Gmail

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

1 message

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

Air Transat sent you a Direct Message.

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

is appropriate given the current situation. Jessica_AirTransat

Reply

sunwing

Travel Agent Special Update

March 27, 2020

Dear travel agents,

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

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

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

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

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

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

Please continue to check our website for important updates.

Thank you for your continued support and stay well.

sunwing

Travel Agent Special Update
March 27, 2020

COVID-19 Frequently Asked Questions

Where can I find more information about COVID-19?

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

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

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

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

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

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

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

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

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

sunwing

COVID-19 Frequently Asked Questions

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

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

When will booking cancellations be processed?

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

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

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

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

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

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

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

When will I receive my commission?

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

Is my commission protected with future travel credits?

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

Can my clients still make a future booking?

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

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

Good day Mr. Belisle,

Thank you for your email.

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

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

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

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

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

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

Best regards,

Nancy

AC_logo

Medical Desk/ Bureau Médical

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

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

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

ACmedical@aircanada.ca

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

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

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

I've attached the law

Kind Regards,

Ahren Belisle

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

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

Air Canada's good will policy is applicable.

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

You must begin travel by 18 December 2020.

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

You may refer to your booking reference N4N4C when rebooking.

Best regards,

Linda

Medical Desk/ Bureau Médical

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

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

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

ACmedical.aircanada.ca

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

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

Reservation code n4n4ca

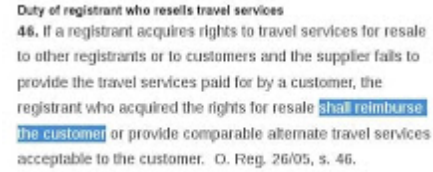
Last name Belisle.

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

cheers,

Ahren Belisle

3 attachments


Duty of registrant who resells travel services

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

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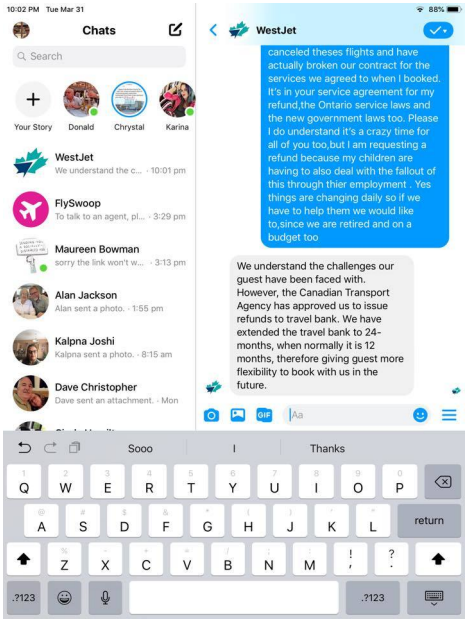
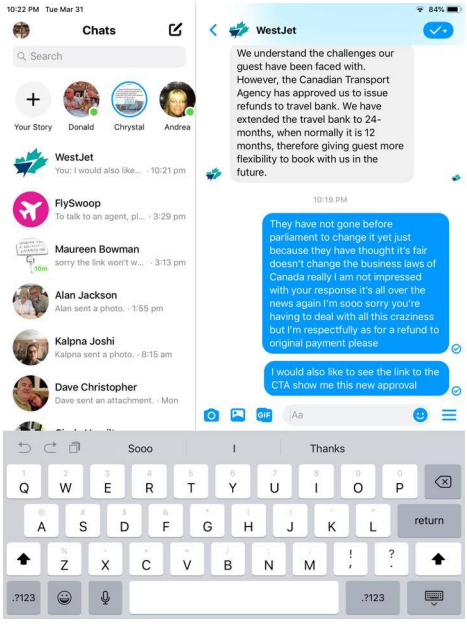
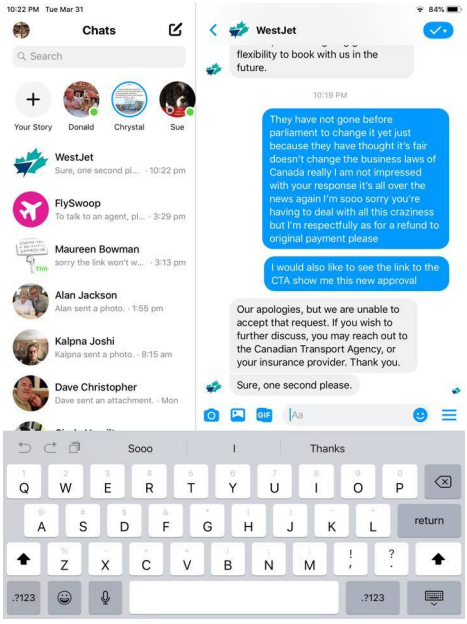

10:02 PM Tue Mar 31
Chats
Search
Your Story
Donald
Chrystal
Karina
WestJet
We understand the c... · 10:01 pm
FlySwoop
To talk to an agent, pl... · 3:29 pm
Maureen Bowman
sorry the link won't w... · 3:13 pm
Alan Jackson
Alan sent a photo. · 1:55 pm
Kalpna Joshi
Kalpna sent a photo. · 8:15 am
Dave Christopher
Dave sent an attachment. · Mon
88%
WestJet
canceled theses flights and have actually broken our contract for the services we agreed to when I booked. It's in your service agreement for my refund,the Ontario service laws and the new government laws too. Please I do understand it's a crazy time for all of you too,but I am requesting a refund because my children are having to also deal with the fallout of this through thier employment . Yes things are changing daily so if we have to help them we would like to,since we are retired and on a budget too
We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to travel bank. We have extended the travel bank to 24-months, when normally it is 12 months, therefore giving guest more flexibility to book with us in the future.
Aa
Sooo
I
Thanks
return
.?123
.?123


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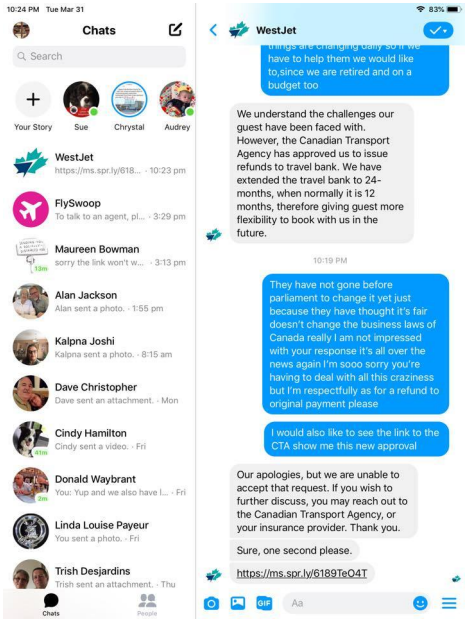
I would also like to see the link to the CTA show me this new approval
Our apologies, but we are unable to accept that request. If you wish to further discuss, you may reach out to the Canadian Transport Agency, or your insurance provider. Thank you.
Sure, one second please.
Aa
Sooo
I
Thanks
return
.?123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


10:24 PM Tue Mar 31
Chats
Search
Your Story
Sue
Chrystal
Audrey
WestJet
https://ms.spr.ly/618... · 10:23 pm
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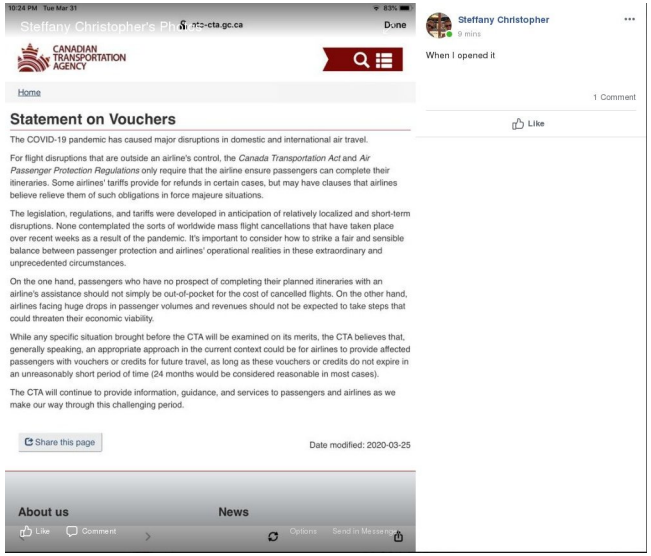
Kalpna Joshi
Kalpna sent a photo. · 8:15 am
Dave Christopher
Dave sent an attachment. · Mon
Cindy Hamilton
Cindy sent a video. · Fri
Donald Waybrant
You: Yup and we also have l... · Fri
Linda Louise Payeur
You sent a photo. · Fri
Trish Desjardins
Trish sent an attachment. · Thu
Chats
People
83%
WestJet
have to help them we would like to,since we are retired and on a budget too
We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to travel bank. We have extended the travel bank to 24-months, when normally it is 12 months, therefore giving guest more flexibility to book with us in the future.
10:19 PM
They have not gone before parliament to change it yet just because they have thought it's fair doesn't change the business laws of Canada really I am not impressed with your response it's all over the news again I'm sooo sorry you're having to deal with all this craziness but I'm respectfully as for a refund to original payment please
I would also like to see the link to the CTA show me this new approval
Our apologies, but we are unable to accept that request. If you wish to further discuss, you may reach out to the Canadian Transport Agency, or your insurance provider. Thank you.
Sure, one second please.
https://ms.spr.ly/6189TeO4T
GIF
Aa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Steffany Christopher's Phone
otc-cta.gc.ca
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CANADIAN TRANSPORTATION AGENCY
Home
Statement on Vouchers
The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.
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Comment
Options
Send in Messenger
Steffany Christopher
9 mins
When I opened it
1 Comment
Like

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

Hello / Bonjour Mr. Foulkes,

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

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

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

Kind Regards.

Yda

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

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

Thank you for your prompt reply.

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

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

Michael Foulkes

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

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

Hello / Bonjour Mr. Foulkes,

Thank you for contacting the Air Canada Concierge Desk.

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

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

Please let me know how you will like to proceed.

Kind Regards.

Yda

Air Canada

Concierge Desk / Bureau Concierge
concierge@aircanada.ca

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

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

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

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

Thank you.

Michael Foulkes
718-542-434

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

Begin forwarded message:

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

Web version

AIR CANADA

VERSION FRANÇAISE

Confirm or cancel your booking

Booking reference: MMHHTM

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

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

CONFIRM MY BOOKING

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

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

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

I purchased a flight only:

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

CANCEL MY BOOKING

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

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

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

ENGLISH VERSION ↑

Confirmation ou annulation de votre réservation

Numéro de réservation : MMHHTM

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

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

CONFIRMER MA RÉSERVATION

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

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

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

J'ai uniquement acheté un billet d'avion :

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

ANNULER MA RÉSERVATION

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

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

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

Air Canada, PO Box 64239, RPO Thorncliffe, Calgary, Alberta, T2K 6J7

Pour assurer la livraison de vos courriels, veuillez ajouter communications@Mail.aircanada.com à votre carnet d'adresses ou liste de contacts.

Ce courriel de service a été envoyé par Air Canada à MICHAEL.FOULKES@ROGERS.COM parce que vous avez acheté un vol Air Canada et il vous fournit d'importants renseignements sur votre vol. Ce courriel de service n'est pas un courriel promotionnel.

Votre vie privée est importante pour nous. Pour savoir comment Air Canada collecte, utilise et protège les informations privées que vous nous transmettez, veuillez consulter la politique d'Air Canada sur la protection des renseignements personnels.

Veuillez ne pas répondre à ce courriel, car cette boîte de réception n'est pas surveillée. Si vous avez des questions, veuillez visiter aircanada.com.

Air Canada, C.P. 64239, RPO Thorncliffe, Calgary (Alberta) T2K 6J7.

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Source: *Canadian Life and Health Insurance Association*

April 01, 2020 16:34 ET

Advisory: Travel cancellation insurance and airline vouchers or credits

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

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

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

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

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

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

About the CLHIA

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

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

For more information:

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

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

178

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

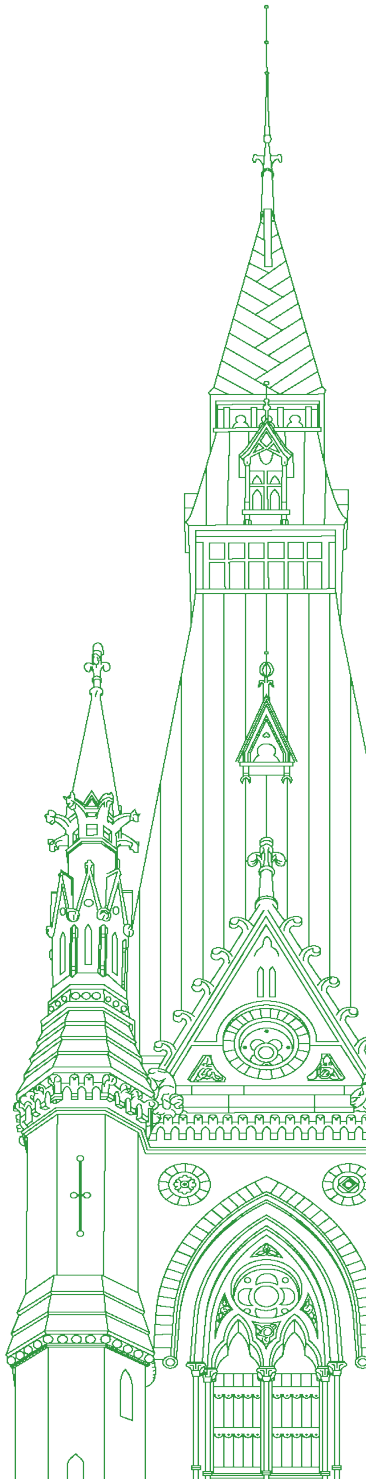
43rd PARLIAMENT, 1st SESSION

Special Committee on the COVID-19 Pandemic

EVIDENCE

NUMBER 013

Thursday, May 28, 2020



Chair: The Honourable Anthony Rota

At the beginning of the crisis, the government called on entrepreneurs in Quebec and Canada, inviting them to set an example in the situation we are experiencing. Many of them turned to the supplemental unemployment benefit (SUB) plan to maintain the employment relationship and to preserve some security, enabling their employees to get through this difficult period with more peace of mind.

However, on May 22, despite the fact that these entrepreneurs had made sure that the SUB program would still be in place when the CERB was introduced, they were surprised. Employees were told at that time that they would have to repay the CERB because of the alleged gains they had made under the SUB program. At SOPREMA, one of the large employers in the Drummondville region, 150 employees are affected. At Bridgestone, in Joliette, 1,100 employees are affected by this decision. At Goodyear, in Valleyfield, 150 employees are affected, and there are dozens more.

Does the minister intend to correct this mistake so that employers who are able and willing to do so can treat their employees better during this difficult period?

● (1315)

[*English*]

Hon. Carla Qualtrough: When we put in place the Canada emergency response benefit, the underlying goal was to make sure that every worker who needed it had access to income support as they were losing their employment for COVID reasons. We understood that meant some workers would not have access moving forward, although let me clarify that SUB plans that existed prior to March 15 are definitely in place. We consider the fact that workers have access to $1,000 a month in addition to CERB—and we've spoken with employers about this—to permit employers to assist their employees in an equitable way.

[*Translation*]

The Chair: Mr. Champoux, you have 15 seconds for your question.

Mr. Martin Champoux: Mr. Chair, employers received absolutely no news from the government before this measure was implemented, despite the fact that they were assured that this measure would be transferred to the CERB. That's not an answer when those folks acted honestly and in good faith. They feel cheated, and rightly so.

Does the government intend to fix this mistake, which would simply be the right thing to do?

[*English*]

Hon. Carla Qualtrough: Mr. Chair, I can assure the member opposite that the SUB plans that were in place prior to March 15 are indeed in place now. In addition, employees who are now on the CERB as an alternative have access to $1,000 of income in addition to their CERB. We are working with employers to perhaps provide the $1,000 in lieu of the SUB plans.

[*Translation*]

The Chair: We will continue with you, Mr. Barsalou-Duval.

Mr. Xavier Barsalou-Duval (Pierre-Boucher—Les Patriotes—Verchères, BQ): Thank you, Mr. Chair.

On April 27, Option consommateurs sent a letter to the Minister of Transport to warn him that the airlines' refusal to reimburse their customers for cancelled flights was contrary to Quebec's laws.

What is the minister going to do to put an end to this situation?

Hon. Marc Garneau (Minister of Transport): Mr. Chair, I sympathize with the people who would have preferred to get a refund, and I understand their frustration. It is not an ideal situation. The airlines are going through a very difficult time right now. If they were forced to refund their customers immediately, many of them would go bankrupt.

Mr. Xavier Barsalou-Duval: Mr. Chair, the minister sounds like a broken record.

A few hours ago, the following motion was passed unanimously: "THAT the National Assembly ask the Government of Canada to order airlines and other carriers under federal jurisdiction to allow customers whose trips have been cancelled because of the current pandemic to obtain a refund."

What will the Minister of Transport tell the National Assembly of Quebec?

Hon. Marc Garneau: Mr. Chair, as my hon. colleague knows, the Canadian Transportation Agency has ruled on this issue and has ruled that, in the present circumstances and in a non-binding way, it is acceptable for airlines to offer credits for up to two years. In the case of Air Canada, the credit has no expiry date.

The Chair: Mr. Barsalou-Duval, you have about 15 seconds for a question.

Mr. Xavier Barsalou-Duval: Mr. Chair, I find it rather odd that the Minister of Transport and the Canadian Transportation Agency are telling the airlines that Quebec's regulations and laws are not important and that they can override them. It seems to me that this is a strange way to operate. Theoretically, under the famous Canadian Constitution, which they imposed on us, that is not how it should work.

Can they uphold their own constitution?

The Chair: The hon. minister can answer in 15 seconds or less, please.

Hon. Marc Garneau: Mr. Chair, as my hon. colleague probably knows, the Canadian Transportation Agency is a quasi-judicial body that operates at arm's length from Transport Canada and the Government of Canada.

The Chair: We will now take a short break.

[*English*]

We're going to take a short break to allow employees supporting the meeting to switch in safety, including myself.

The Acting Chair (Mr. Bruce Stanton (Simcoe North, CPC)): We will now carry on with Mr. Baker for Etobicoke Centre.

Mr. Baker, go ahead.

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

CANADIAN TRANSPORTATION AGENCY

FAQs: Statement on Vouchers

The CTA has been asked a number of questions about its Statement on Vouchers. Below are answers to the most frequently-posed questions.

What is the purpose of the Statement on Vouchers?

The Statement on Vouchers, although not a binding decision, offers suggestions to airlines and passengers in the context of a once-in-a-century pandemic, global collapse of air travel, and mass cancellation of flights for reasons outside the control of airlines.

This unprecedented situation created a serious risk that passengers would simply end up out-of-pocket for the cost of cancelled flights. That risk was exacerbated by the liquidity challenges faced by airlines as passenger and flight volumes plummeted.

For flights cancelled for reasons beyond airlines' control, the *Air Passenger Protection Regulations*, which are based on legislative authorities, require that airlines ensure passengers can complete their itineraries but do not obligate airlines to include refund provisions in their tariffs.

The statement indicated that the use of vouchers could be a reasonable approach in the extraordinary circumstances resulting from the COVID-19 pandemic, when flights are cancelled for reasons outside airlines' control and passengers have no prospect of completing their itineraries. Vouchers for future travel can help protect passengers from losing the full value of their flights, and improve the odds that over the longer term, consumer choice and diverse service offerings -- including from small and medium-sized airlines -- will remain in Canada's air transportation sector. Of course, as noted in the statement, passengers can still file a complaint with the CTA and each case will be decided on its merits.

Why did the CTA talk about vouchers when US and EU regulators have said that airlines should give refunds?

The American and European legislative frameworks set a minimum obligation for airlines to issue refunds when flights are cancelled for reasons outside their control. Canada's doesn't. That's the reason for the difference in the statements.

Some jurisdictions have relaxed the application or enforcement of requirements related to refunds in light of the impacts of the COVID-19 pandemic, including European countries that have approved the issuance of vouchers instead of refunds.

Do I have to accept a voucher if I think I'm owed a refund?

The Statement on Vouchers suggests what could be an appropriate approach in extraordinary circumstances, but doesn't affect airlines' obligations or passengers' rights.

Some airline tariffs might not provide for a refund and others might include *force majeure* exceptions to

refund provisions.

If you think that you're entitled to a refund for a flight that was cancelled for reasons related to the COVID-19 pandemic and you don't want to accept a voucher, you can ask the airline for a refund.

Sometimes, the airline may offer a voucher that can be converted to a refund if the voucher hasn't been used by the end of its validity period. This practice reflects the liquidity challenges airlines are facing as a result of the collapse of air travel while giving passengers added protection in the event that they ultimately can't take advantage of the voucher.

If you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, you can file a complaint with the CTA, which will determine if the airline complied with the terms of its tariff. Each case will be decided on its merits.

Date modified:
2020-04-22

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

CANADIAN TRANSPORTATION AGENCY

Home

Statement on Vouchers

This non-binding statement on vouchers was issued on March 25, 2020, in the face of unprecedented and extraordinary circumstances impacting domestic and international air travel. Because the law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control, there was a real risk that many passengers would end up getting nothing for cancelled flights. This statement was intended to help ensure that didn't happen.

This statement changes nothing with respect to airline obligations and passenger rights under individual airline tariffs. Any passenger who believes they're owed a refund under the relevant tariff and hasn't received one can file a complaint with us. All complaints are dealt with on their merits.

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

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

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

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

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

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

FAQs: Statement on Vouchers

The CTA has been asked a number of questions about its Statement on Vouchers. Below are answers to the most frequently-posed questions.

What is the purpose of the Statement on Vouchers?

The Statement on Vouchers, although not a binding decision, offers suggestions to airlines and passengers in the context of a once-in-a-century pandemic, global collapse of air travel, and mass cancellation of flights for reasons outside the control of airlines.

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Some airline tariffs might not provide for a refund and others might include force majeure exceptions to refund provisions.

If you think that you're entitled to a refund for a flight that was cancelled for reasons related to the COVID-19 pandemic and you don't want to accept a voucher, you can ask the airline for a refund.

Sometimes, the airline may offer a voucher that can be converted to a refund if the voucher hasn't been used by the end of its validity period. This practice reflects the liquidity challenges airlines are facing as a result of the collapse of air travel while giving passengers added protection in the event that they ultimately can't take advantage of the voucher.

If you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, you can file a complaint with the CTA, which will determine if the airline complied with the terms of its tariff. Each case will be decided on its merits.

Date modified:

2020-03-25

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Office des transports du Canada

Canadian Transportation Agency

By Email: FCARegistry-CAFGreffe@cas-satj.gc.ca

August 20, 2020

The Judicial Administrator
Federal Court of Appeal
90 Sparks Street, 5th Floor
Ottawa, Ontario
K1A 0H9

Dear Sir/Madam:

Re: ***Air Passenger Rights v Canadian Transportation Agency***
Court File No.: A-102-20

We are writing in response to the Applicant's request which purports to be made under Rule 317 of the *Federal Courts Rules* SOR/98-106.[1]

Given that the application does not relate to an "order" of a tribunal, Rule 317 does not apply. The Canadian Transportation Agency will therefore not be transmitting any documents.

We trust the foregoing is satisfactory.

Yours truly,

Allan Matte
Senior Counsel
Legal Services Directorate
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec
K1A 0N9

Tel: (819) 953-0611
Fax: (819) 953-9269

[1] Notice of Application dated April 6, 2020, pp.14.
Court File A-102-20, Recorded Entry No. 1

Email: Allan.Matte@otc-cta.gc.ca
Email: Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca

c.c.: Simon Lin
Counsel for the Applicant, Air Passenger Rights

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

evolink LAW

Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6

p. 604 620 2666
info@evolinklaw.com
www.evolinklaw.com

August 25, 2020

Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario K1A 0H9

Dear Registry Officer,

RE: Air Passenger Rights v. Canadian Transportation Agency (A-102-20)

We are counsel for the Applicant, Air Passenger Rights. Please kindly bring this letter to the attention of Boivin, J.A. By Order dated August 18, 2020, Boivin, J.A. is seized of this file.

This letter relates to the letter dated August 20, 2020 from the Respondent, the Canada Transportation Agency ("**Agency**"), delivered in accordance with Rule 318(2), raising a single objection to the Applicant's request for records pursuant to Rule 317. The Agency has not raised any other objections. By way of this letter, the Applicant provides its response to the Agency's sole objection and further seeks directions from the Court under Rule 318(3) on the procedure for making submissions to address the Agency's single objection.[1]

The Agency's sole objection under Rule 318(2) is, the Agency claims, that there was no "order" of a tribunal. The Agency has overlooked that "order" (*ordonnance*) is broadly defined under Rule 2 of the *Federal Courts Rules* using the word "includes" rather than "means". Moreover, "ordonnance" specifically includes "*autre mesure prise par un office federal,*" (emphasis added), clearly confirming that Rule 317 captures more than simply "decisions or orders".

The Agency has failed to substantiate how the impugned Publications is not a "mesure" of the Agency. Indeed, in the previous motions,[2] the Agency has taken the position that the impugned Publications were "policies" or "guidance" that were part of the Agency's actions or responses in respect to the COVID-19 pandemic.

Notably, the Federal Court has previously ruled that Rule 317-8 is sufficiently flexible to permit the court to order that relevant materials for judicial review of an administrative agency's "policies, practices, or actions" be disclosed as part of the procedure in Rule 318.[3] Those Federal Court rulings are consistent with Stratas, J.A.'s more recent guidance on the flexible interpretation of Rule 318[4] and that orders under Rule 318 comes in "any shape and size, limited only by the

[1] *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 3-4
[2] Including the Applicant's motion for interlocutory injunctions and the Agency's motion to strike
[3] *Renova Holdings Ltd. v. Canadian Wheat Board*, 2006 FC 1505 at paras. 13 and 17-19; *Airth v. Canada (National Revenue)*, 2007 FC 415 at paras. 5-8
[4] *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at para. 14

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p. 604 620 2666
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www.evolinklaw.com

creativity and imagination of counsel and courts" with the goal of furthering and reconciling as much as possible the objectives of:[5]

(1) meaningful review of administrative decisions in accordance with Rule 3 of the *Federal Courts Rules* and s. 18.4 of the *Federal Courts Act* and the principles discussed at paras. 6-7 of *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103;

(2) procedural fairness; and

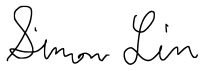
(3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court's principles in *Sierra Club*.

In this instance, the Applicant submits that the Court could consider directing the Agency to provide short written submissions on why their narrow technical objection (i.e., their objection that there being no "order") should not be dismissed, assuming the Agency still intends to pursue that technical objection. The Applicant further submits that this Honourable Court could also direct the parties to provide, as part of their Rule 318 submissions, short written submissions on the issuance of a subpoena under Rule 41 against the chief executive officer of the Agency[6] to produce the materials the Applicant has requested[7] in its Notice of Application.

The Applicant submits that a streamlined procedure would be the most suitable for this judicial review considering the materials that the Applicant requests clearly relates to the RAB Ground and/or Misinformation Ground for judicial review.

Should the Court have any directions, we would be pleased to comply.

Yours truly,
EVOLINK LAW GROUP



SIMON LIN

Cc: Mr. Allan Matte, counsel for the Respondent, Canada Transportation Agency

---

[5] *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 15 and 18; see also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 78-9 and 83

[6] Under section 13 of the *Canada Transportation Act*, the Chairperson has supervision over the work of all staff and members.

[7] See *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 103 where Stratas, J.A. provided some guidance on Rule 41 as a possible option for an applicant to obtain records.

Office des transports du Canada
Canadian Transportation Agency

By Email: FCARegistry-CAFGreffe@cas-satj.gc.ca

August 27, 2020

The Judicial Administrator, Federal Court of Appeal
90 Sparks Street, 5th Floor,
Ottawa, Ontario K1A 0H9

Dear Sir/Madam:

Re: ***Air Passenger Rights v Canadian Transportation Agency***
Court File No.: A-102-20

We are writing in response to the Applicant's letter to the Court dated August 25, 2020.

In this letter, the Applicant makes submissions regarding the Canadian Transportation Agency's objection to the request for documents purportedly filed pursuant to Rule 317 of the *Federal Courts Rules.* We will not address the submissions made in this letter regarding the request for documents on the merits. Our arguments in response to these submissions are more properly reserved for the procedure that the Court directs pursuant to Rule 318(3), if deemed necessary.

Having said this, it is noteworthy that the Applicant now maintains that there *is* an "order" at stake in this case, to support its request pursuant to Rule 317. This is a complete reversal of its previous position taken on the motion for an interlocutory injunction where the Applicant conceded that the statements on the Agency's website "do not reflect decisions, determinations, **orders** or legally binding rulings on the part of the Agency"[1] (emphasis added).

This change in position brings into question the basis for the application for judicial review itself. The Applicant is asking the Court to issue a Declaration that the Agency's statement **is not** a decision, order, determination, or any other ruling of the Agency.[2] If the Applicant wants the Court to declare that the statement is not an order, then one wonders why the Applicant now says that it *is* an order.

There is no indication that the Applicant intends to amend the Notice of Application in this regard. If the Applicant now maintains that the statement is an order of the Agency, then presumably the proper procedure would have been to proceed by way of an appeal, for which leave is required.[3]

Put simply, the main premise of the application for judicial review is that the Agency's statement is not an order, and the Applicant asks that the Court declare that it is not an order. However, the Applicant

[1] *Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 21.
[2] Notice of Application issued the 8th day of April, 2020.
[3] *Canada Transportation Act*, S.C. 1986, c. 10, subs 41(1).

is now telling the Court that it is an order. It would be useful for the Applicant to explain these inconsistent positions.

Subsection 18.1(1) of the *Federal Courts Act*[4] provides for judicial review in respect of a "matter". This Court has determined that judicial review is not available in this case[5], that there is no "matter" which can be made subject to judicial review. Rule 317 refers more narrowly to an "order". It is difficult to understand how the Applicant intends to argue that while there is no "matter" at stake in this case, there is an "order" upon which it can base a Rule 317 request for documents.

In light of this development, the Agency submits that submissions with respect to the Rule 317 request proceed by way of motion. We submit that the Applicant should be required to file a motion in writing justifying the request for documents, including relevance, and addressing how it proposes to reconcile its positions taken on whether the statement at issue is an "order". We would then propose that the Agency submit a responding motion record outlining its objection to the request within ten (10) days.

In its letter to the Court, the Applicant attempts to characterize the Agency's objection to the request to produce documents as raising only the single issue of whether there is an "order" pursuant to Rule 317. If the Applicant intends now to argue that the Agency's statement is an "order", then the Agency will argue in the alternative that the documents requested are not relevant, may be subject to privilege, and that the Applicant is on a fishing expedition which the Court should not permit.

Rule 42 has no relevance to the current controversy of whether the Court should issue directions pursuant to Rule 318(3) of the *Federal Court Rules.*

Currently pending before the Court is the Agency's motion to strike the application for judicial review, precisely for the reason outlined above – the Agency's statement is not amenable to judicial review. We would therefore submit that it would be appropriate that the Court await a determination of the motion to strike before issuing directions pursuant to Rule 318(3) of the *Federal Courts Rules*, since if the motion is granted any order under Rule 318(3) would be rendered moot.

We trust the foregoing is satisfactory.

Yours truly,

Allan Matte
Senior Counsel
Canadian Transportation Agency

[4] R.S.C. 1985, c. F-7
[5] *Air Passenger Rights v. Canada (Transportation Agency), supra*, note 1, at para. 20.

Office des transports du Canada
Canadian Transportation Agency

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Gatineau, Quebec K1A 0N9

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c.c.: Simon Lin
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August 31, 2020

Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario K1A 0H9

Dear Registry Officer,

RE: Air Passenger Rights v. Canadian Transportation Agency (A-102-20)

We are counsel for the Applicant, Air Passenger Rights. Please kindly bring this letter to the attention of Boivin, J.A. By Order dated August 18, 2020, Boivin, J.A. is seized of this file.

This letter is in response to the Agency's letter dated August 27, 2020. At the eleventh hour to resurrect its motion to strike, the Agency is seeking to infuse further confusion by making an unfounded allegation that the Applicant has taken an "inconsistent position". The Agency further alleges that the Applicant should, instead of a judicial review, seek leave to appeal an "order" under s. 41 of the *Canada Transportation Act*. The Agency's allegations are grossly misleading.

An "Order" under the *Federal Courts Rules*

The Agency's faulty allegations resolve around the word "order" and is easily answered with a basic principle of statutory interpretation – **defined terms**. The word "order" is not a defined term under the *Canada Transportation Act* [*CTA*], nor the *Federal Courts Act* [*FCA*]. Hence, "order" under the *FCA* and *CTA* would be guided by the ordinary meaning of that term.

On the other hand, the *Federal Courts Rules* [*FCR*] defines "order" in a non-exhaustive manner in Rule 2 using the expression "includes", which extends the ordinary meaning of the term "order".[1]

Definitions	***Définitions***
2 *The following definitions apply in these Rules.*	***2*** *Les définitions qui suivent s'appliquent aux présentes règles.*
order *includes* ***(a)*** *a judgment;* ***(b)*** *a decision or other disposition of a tribunal; and* ***(c)*** *a determination of a reference under section 18.3 of the Act.*	***ordonnance*** *Sont assimilés à une ordonnance :* ***a)*** *un jugement;* ***b)*** *une décision ou autre mesure prise par un office fédéral;* ***c)*** *une décision rendue dans le cadre d'un renvoi visé à l'article 18.3 de la Loi.*

[1] Statutory Interpretation 3/e, Ruth Sullivan at page 79-81 **(enclosed)**

In essence, "order" (as used under the *FCR* only) is broader than the ordinary term "order" (as used in the *FCA* or *CTA*), as evidenced by the fact that the Rules Committee specifically included "autre mesure" in the defined term. Accordingly, the Applicant submits that the broadly defined term "order" in the *FCR* would extend to the underlying Publications (the "policy" and "guidance" that is the subject of this judicial review).

The Applicant has not changed its position, nor adopted any inconsistent position. The Applicant's Rule 317 request was already included in its April 9, 2020 Notice of Application. It is the Agency that has failed to appreciate the statutory frameworks and the above basic principle of statutory interpretation. The Applicant's position has always been that the impugned Publications could not be an "order" (in the ordinary sense). However, the Publications could fall within the extended meaning of an "order" (as that term is broadly defined in the *FCR*), which would trigger the application of Rule 317. Hence, the Applicant has made its request for materials under Rule 317.

The Agency's Rule 318(2) Objection

In its letter, the Agency purports to change the reasons for objection that they already provided under Rule 318(2) on August 20, 2020, or otherwise bootstrap every other imaginable reason for objection (i.e., relevance, privilege, and/or fishing).

It was imperative for the Agency to bring their "best foot forward" when they stated their reasons for objection under Rule 318(2) on the deadline of August 20, 2020. Indeed, the Agency has had nearly four months to carefully consider any reason it wishes to rely upon, as opposed to the standard 20-days. The Agency's belated attempt to assert every imaginable reason for objection, and without any further explanation or elaboration, is odd and not supported by the *Rules*.

Furthermore, the Applicant submits that it would be inappropriate to indefinitely defer the Rule 318(3) determination and/or the Rule 41 subpoena request until the Agency's motion to strike is finally determined, which may be many months later when a hearing could be scheduled before a three or five judge panel. Judicial reviews should be decided with due dispatch (*FCA* s. 18.4).

It is also in the Agency's interest for this Court to render a prompt determination of the judicial review *on the merits* to "clear the air". Part of the Applicant's judicial review is an allegation that the Agency's members exhibited a reasonable apprehension of bias by participating in the impugned actions. A prompt disclosure of the relevant records, assuming the Agency's members were not involved in the impugned actions, would be a substantial step in "clearing the air" and significantly advancing this judicial review to the merits stage. It is inexplicable why the Agency is seeking to raise a myriad of objections that would inevitably delay the merits hearing and, potentially, a vindication of the allegations that they are contesting against.

In these circumstances, the Applicant submits that the most appropriate course would be for the Court to summarily dismiss the Agency's objection(s) for lack of any specificity. Alternatively, the Court could consider directing the Agency substantiate their objection on a proper evidentiary basis by bringing a motion under Rule 369, followed by the Applicant's response.

> *[8] Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).*
>
> *[9] In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.*
>
> *[10] In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.*[2]
>
> [emphasis added]

An Applicant should not be the moving party in such a motion and be placed in a position to have to address every imaginable objection that may, or could, be raised in a Rule 317 request, which is precisely what the Agency is seeking to advance in this instance.

Should the Court have any directions, we would be pleased to comply.

Yours truly,
EVOLINK LAW GROUP

Simon Lin
SIMON LIN

Cc: Mr. Allan Matte, counsel for the Respondent, Canada Transportation Agency

[2] *Lukács v. Canada (Transportation Agency),* 2016 FCA 103 at paras. 8-10; *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35 at para. 12; see also the directions of de Montigny, J.A., that also involved the Agency and a similar circumstance relating to Rule 317-8 (A-431-17 Dr. Gábor Lukács v. Canadian Transportation Agency and Air Transat A.T. Inc.) **(enclosed)**

ESSENTIALS OF
CANADIAN LAW

STATUTORY INTERPRETATION

THIRD EDITION

RUTH SULLIVAN

IRWIN LAW

1) Statutory Definitions

Many statutes and regulations begin with a section or subsection, sometimes quite a long one, setting out definitions of words or expressions that are used in the Act. Definitions may also be found at the beginning of divisions, parts, or individual sections.[21] Because the legislature is sovereign, it may assign meanings to words that bear little or no relation to their ordinary meaning. It can deem "red" to mean blue or "land" to include sky and ocean. But legislatures generally have little interest in major departures from conventional usage, and most definitions incorporate, clarify, or only slightly modify the ordinary meaning, or in some cases the technical meaning, of the defined words.

The federal *Interpretation Act*[22] sets out a number of rules applicable to statutory definitions:

> **15** (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.
>
> (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> (*a*) as being applicable only if a contrary intention does not appear; and
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> **16.** Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

Similar rules apply to provincial and territorial legislation as well.

a) Exhaustive versus Non-exhaustive Definitions

It is important to distinguish between statutory definitions that are exhaustive and those that are non-exhaustive.

Exhaustive definitions are usually introduced by the word "means" followed by a definition that comprises the sole meaning the word may bear throughout the statute and throughout any regulations made under it, for example:

---

21 Section 8 of the Uniform Law Conference Drafting Conventions says, "Definitions should be set out in the first section of the Act, unless they apply only to a particular Part, section or group of sections. In that case, they should be placed at the beginning of the passage in question." In older Acts and in some jurisdictions, definitions are set out at the end of Acts, parts, or sections.

22 RSC 1985, c I-21.

In this section,

"fishing gear" means any tackle, netting, or other device designed or adapted to catch fish or marine mammals.

Unless a drafting error has occurred, the meaning assigned to "fishing gear" by this definition may not be varied or supplemented by ordinary usage or by other convention.

Non-exhaustive definitions are usually introduced by the expression "includes," or "does not include," followed by a directive which adds to or subtracts from the ordinary (or technical) meaning of the defined term, for example:

In this Part,

"nets" includes crab pots and lobster traps but does not include gill nets.

This definition presupposes that the interpreter knows or will be able to determine the ordinary meaning of "nets" in this context. The point of the definition is not to fix the meaning of "nets" but to ensure that the provisions governing the use of nets apply equally to crab pots and lobster traps, which are functional equivalents, and do not apply to gill nets, which are meant to be governed by different rules.

Note that definitions in legislation sometimes use the word to be defined as part of the definition. This generally is done to limit the scope of the defined term and does not indicate a lack of skill on the part of the drafter; it simply reflects the fact that statutory definitions have a different function than dictionary definitions.

b) Uses of Statutory Definitions

Statutory definitions are used for a variety of purposes. One important use is to create a short form of reference for lengthy or awkward expressions, for example:

In this Act,

"investigation" means an investigation carried out by the Competition Commissioner pursuant to s. 19 of the *Competition Act*;

"Minister" means the Minister of Employment and Immigration.

When readers come across the term "investigation" or "Minister" in the Act, they are expected to fill in the details identifying the relevant investigation or minister. This avoids having to repeat these details each time a reference is made.

Statutory definitions are also used to narrow the usual scope of a word or expression, for example:

In this Part,

"grain" does not include rice or wild rice;

"employee" means an employee who is not a member of a union;

"will" means a will made before 1 January 1957.

These definitions rely on the ordinary (or technical) meanings of the defined terms, which are then narrowed by excluding things that might normally fall within the meaning (the first example above) or by adding qualifying words or expressions that describe a subclass within the meaning (the next two examples).

Statutory definitions are also used to expand the usual scope of a word or expression, for example:

In this section,

"fish" includes shell fish, crustaceans, and marine mammals;

"sale" includes a promise to sell;

"will" means any writing signed by a person, whether witnessed or not, that contains a direction respecting the disposition of their property to take effect after their death.

In these examples, the statutory definition enlarges the ordinary (or technical) meaning of the defined terms by including things that might normally be thought to fall outside their denotation. The first two examples are non-exhaustive; the verb "includes" is used to extend the defined term to the things singled out for special mention—shell fish and some mammals, mere promises to sell—so that they are subject to the same rules as the things within the ordinary scope of the terms—standard types of fish, enforceable contracts of sale. In the third example, an exhaustive definition is used to expand the defined term to writings that are not ordinarily considered wills—an insurance contract naming the beneficiary of life insurance, for example.

Finally, statutory definitions are used to resolve possible doubt or ambiguity:

In this Act,

"mammal" includes whales and other marine mammals;

"fruit" does not include tomatoes;

"counsel" means a member of the Law Society of Upper Canada;

"vehicle" means any car, cart, truck, motorcycle, tractor, or other conveyance capable of travelling on roadways at a speed of 30 k.p.h. or more.

These definitions are meant to clarify rather than qualify the ordinary (or technical) meaning of the defined terms—to create precise meanings and sharp distinctions, to resolve doubt. They are often included by drafters in an effort to anticipate and resolve the interpretation issues that are likely to arise in the application of the legislation. Sometimes they are added to legislation by way of amendment in response to complaints or unsatisfactory judicial interpretations.

As these examples indicate, statutory definitions do not necessarily lighten the interpreter's load. Many simply add to the ordinary or technical meaning of the defined term, which must still be determined in the usual way. And since all consist of words, all require interpretation, like any other legislative text. In the definition of "vehicle" set out above, for example, although the interpreter is given help in determining the scope of the defined term, he or she must now tackle "conveyance," "roadway," and "capable."

2) Interpretation Acts

Each Canadian jurisdiction has an Act that applies to all the legislation enacted by that jurisdiction. Most are called "Interpretation Act," but Ontario's is called the *Legislation Act* because it applies to other legislative matters as well.

Although there are some significant variations in the Acts of the different jurisdictions, in many respects they are similar or identical. All include provisions about enactment, the coming into force of legislation, and its temporal and territorial application; all have a smattering of interpretation rules. In addition, some have rules for making appointments, conferring powers, tabling reports, taking oaths, computing time, and other miscellaneous matters. And finally, there are numerous definitions of particular words—words like "Act," "bank," "contravene," "standard time," "writing," and the auxiliary verbs "may" and "shall" or "must"—that might occur in legislation dealing with any subject.

In the federal Act, for example, "person" is defined to include corporations while "corporation" is defined to exclude partnerships, even partnerships that are considered separate legal entities under provincial law. This means that each time the word "person" is used in a federal enactment, it is presumed to refer to individuals and corporations but not to partnerships.

Interpretation Acts apply generally unless a "contrary intention" is either expressed or implied in the legislation being interpreted. For example, section 3 of the federal *Interpretation Act* says:

Federal Court of Appeal | Cour d'appel fédérale

TO : Appeal Registry

FROM : de Montigny J.A.

DATE : March 13, 2018

RE : A-431-17
Dr. Gábor Lukács v. Canadian Transportation Agency and Air Transat A.T. Inc.

DIRECTION

The applicant has sought directions, pursuant to Rule 318(3) of the *Federal Courts Rules*, S.O.R. 98/106, with respect to the procedure to be followed for making submissions in relation to the Canadian Transportation Agency's failure and/or objection to transmit records. Having reviewed the record, and more particularly the exchange of letters dated February 6, 8 and 12, 2018 between the parties, I have come to the conclusion that the issue ought to be decided on the basis of a written motion under Rule 369. The Canadian Transportation Agency shall therefore file a Motion Record under that Rule, complete with evidence and written representations, to assert its objections to the requested material in the Notice of Application. Such motion shall be filed within 10 days of this Direction, and the time limits set out in Rule 369 shall apply for the Canadian Transportation Agency's record and for the reply. If the Agency wishes part of its Motion Record to be sealed pursuant to Rules 151-152, it shall make such a request in its Notice of Motion and provide evidence to support the request.

"YdM"

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Government of Canada / Gouvernement du Canada

Access to Information and Personal Information Request Service

Confirm request details

Request

Request type	Access to Information Request

Institution

Institution	Canadian Transportation Agency

Request details

Eligibility	Canadian citizen
Request label	Statement on Vouchers
Request description	All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (https://otc-cta.gc.ca/eng/statement-vouchers). The time period we request is March 11, 2020 to April 9, 2020.
Format of request	Electronic copy (The institution may provide the records via Email, CD or DVD depending on size)

Edit request details

Attached documents

Edit documents

Contact information

Family name	Lukacs
Given name	Gabor
Address	
Country	Canada
Province	Nova Scotia
City	Halifax
Postal code	
Phone	
Email	lukacs@AirPassengerRights.ca
Requester type	Member of the public

Edit contact information

Previous Next

Version:
2.1.0.0

Transaction Receipt - Do Not Reply

TBS - CIOB / IPPD <esp_receipt@moneris.com> Tue, Aug 25, 2020 at 4:12 PM
To: lukacs@airpassengerrights.ca

TBS - CIOB / IPPD

ATIP Online Request Service Service de demande AIPRP en ligne

TRANSACTION APPROVED - THANK YOU

PAYMENT DETAILS

TYPE	PURCHASE
DATE	2020-08-25 15:12:07
ORDER ID	2020_013463
AMOUNT(CAD)	$5.00
CARDHOLDER	Dr. Gabor Lukacs
CARD NUM	**** **** **** 7949
ACCOUNT	MC
REF NUM	664278010016230220
AUTH CODE	06249Z

ITEM DETAILS

DESCRIPTION	PRODUCT CODE	QUANTITY	ITEM AMOUNT
ATI Request		1	$5.00

TOTAL(CAD) **$5.00**

Please keep this email as your transaction receipt.
This receipt has been sent from an unmonitored email account.
Do not reply to this email.

Confirmation of your access to information request

noreply-nepasrepondre-atip-aiprp@tbs-sct.ca <noreply-nepasrepondre-atip-aiprp@tbs-sct.ca> Tue, Aug 25, 2020 at 4:12 PM
To: lukacs@airpassengerrights.ca

Successfully submitted!

Thank you for your access to information request submission.

Your request "Statement on Vouchers" to Canadian Transportation Agency has been successfully submitted. Your AORS reference number is **2020_013463**.

Our ability to respond to requests within the timelines mandated by the Access to Information Act and the Privacy Act may be affected by the exceptional measures put in place to curb the spread of the novel coronavirus (COVID-19) and protect the health and safety of Canadians. Access to information and personal information requests received from the public continue to be important to us. We will continue to make best efforts to respond to requests, in accordance with operational realities and the necessity to comply with direction concerning measures to mitigate the spread of COVID19 and to protect the health and well-being of federal employees and the public.

Thank you in advance for your patience and understanding as we all navigate these unprecedented challenges.

For more information about the request process, refer to the "How access to information and personal information requests work" page.

To contact the institution about your request, refer to the list of access to information and privacy coordinators.

ATIP Online Request Service - Client Support
Treasury Board of Canada Secretariat / Government of Canada
atip-web-aiprp@tbs-sct.gc.ca

Service de demande d'AIPRP en ligne - Services à la clientèle
Secrétariat du Conseil du Trésor du Canada / Gouvernement du Canada
atip-web-aiprp@tbs-sct.gc.ca

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

AI-2020-00002 - Access to Information Act Request

OTC.AIPRP-ATIP.CTA <OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca> Thu, Sep 3, 2020 at 8:51 AM
To: "lukacs@AirPassengerRights.ca" <lukacs@airpassengerrights.ca>

Dear Gabor Lukacs:

We have received your request under the *Access to Information Act.*

Should you have any questions or concerns, please do not hesitate to contact our ATIP Office at OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies

Office des transports du Canada / Gouvernement du Canada

Myriame.Cote@otc-cta.gc.ca / Tél. : 819-934-9966

ATIP Coordinator, Information Management & Technology Services Directorate

Canadian Transportation Agency / Government of Canada

Myriame.Cote@otc-cta.gc.ca / Tel. : 819-934-9966

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

RE: AI-2020-00002 - Access to Information Act Request

Myriame Côté <Myriame.Cote@otc-cta.gc.ca> Mon, Sep 28, 2020 at 2:35 PM
To: "lukacs@AirPassengerRights.ca" <lukacs@airpassengerrights.ca>
Cc: Myriame Côté <Myriame.Cote@otc-cta.gc.ca>, Nadine Landry <Nadine.Landry@otc-cta.gc.ca>

Dear Gabor Lukacs:

Please note that we are closing this request AI-2020-00002 and will process your request under a formal access request. We will provide you with the new request number by tomorrow.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies

Office des transports du Canada / Gouvernement du Canada

Myriame.Cote@otc-cta.gc.ca / Tél. : 819-934-9966

ATIP Coordinator, Information Management & Technology Services Directorate

Canadian Transportation Agency / Government of Canada

Myriame.Cote@otc-cta.gc.ca / Tel. : 819-934-9966

De : OTC.AIPRP-ATIP.CTA
Envoyé : 3 septembre 2020 07:51
À : lukacs@AirPassengerRights.ca
Objet : AI-2020-00002 - Access to Information Act Request

Dear Gabor Lukacs:

We have received your request under the *Access to Information Act.*

Should you have any questions or concerns, please do not hesitate to contact our ATIP Office at OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies

Office des transports du Canada / Gouvernement du Canada

Myriame.Cote@otc-cta.gc.ca / Tél. : 819-934-9966

ATIP Coordinator, Information Management & Technology Services Directorate

Canadian Transportation Agency / Government of Canada

Myriame.Cote@otc-cta.gc.ca / Tel. : 819-934-9966

From lukacs@AirPassengerRights.ca Mon Sep 28 14:51:31 2020
Date: Mon, 28 Sep 2020 14:51:30 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Myriame Côté <Myriame.Cote@otc-cta.gc.ca>
Cc: Nadine Landry <Nadine.Landry@otc-cta.gc.ca>
Subject: RE: AI-2020-00002 - Access to Information Act Request

    [The following text is in the "ISO-8859-15" character set.]
    [Your display is set for the "ISO-8859-2" character set.]
    [Some special characters may be displayed incorrectly.]

Dear Ms. Cote:

On August 25, 2020, I made a ***formal*** request under the Access to Information Act:

> All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (https://otc-cta.gc.ca/eng/statement-vouchers). The time period we request is March 11, 2020 to April 9, 2020.

I also paid the ATIP fee.

On September 3, 2020, you advised me that "We have received your request under the Access to Information Act" and assigned file no. AI-2020-00002 to the request.

You are now telling me that you are closing that file number, assigning a new file number, and that you would process it under a formal access request.

Could you please what did you do between September 3, 2020 and now in terms of processing my request?

Given that the request was filed on August 25, 2020, the records are already overdue.

Kindly please advise when I may expect to receive the requested records.

Best wishes,
Dr. Gabor Lukacs

--
Dr. Gabor Lukacs, President (Founder and Coordinator)
Air Passenger Rights
Tel   : (647) 724 1727
Web   : http://AirPassengerRights.ca
Twitter : @AirPassRightsCA
Facebook: https://www.facebook.com/AirPassengerRights/

On Mon, 28 Sep 2020, Myriame Côté wrote:

>
> Dear Gabor Lukacs:
>

>
>
> Please note that we are closing this request AI-2020-00002 and will process your re
quest under a formal access request. We will provide you with the new request number
by tomorrow.
>
>
>
> Sincerely,
>
>
>
> Myriame Côté
>
>
>
> Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies
>
> Office des transports du Canada / Gouvernement du Canada
>
> Myriame.Cote@otc-cta.gc.ca / Tél. : 819-934-9966
>
>
>
> ATIP Coordinator, Information Management & Technology Services Directorate
>
> Canadian Transportation Agency / Government of Canada
>
> Myriame.Cote@otc-cta.gc.ca / Tel. : 819-934-9966
>
>
>
> De : OTC.AIPRP-ATIP.CTA
> Envoyé : 3 septembre 2020 07:51
> ? : lukacs@AirPassengerRights.ca
> Objet : AI-2020-00002 - Access to Information Act Request
>
>
>
> Dear Gabor Lukacs:
>
> We have received your request under the Access to Information Act.
>
> Should you have any questions or concerns, please do not hesitate to contact our AT
IP Office at OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca.
>
> Sincerely,
>
> Myriame Côté
>
>
>
> Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies
>
> Office des transports du Canada / Gouvernement du Canada
>
> Myriame.Cote@otc-cta.gc.ca / Tél. : 819-934-9966
>
>
>
> ATIP Coordinator, Information Management & Technology Services Directorate
>

> Canadian Transportation Agency / Government of Canada
>
> Myriame.Cote@otc-cta.gc.ca / Tel. : 819-934-9966
>
>
>
>
>

Request A-2020-00029 (formerly AI-2020-00002)

OTC.AIPRP-ATIP.CTA <OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca> Tue, Sep 29, 2020 at 6:32 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>

September 29, 2020

PROTECTED A

Our file: A-2020-00029 (formerly AI-2020-00002)

Dear Dr. Lukacs:

This is further to your access request received at our office on August 25, 2020. We note that, pursuant to the *Access to Information Act*, you wish to obtain the following records:

> **All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (https://otc-cta.gc.ca/eng/statement-vouchers). The time period we request is March 11, 2020 to April 9, 2020.**

As discussed by telephone with Myriame Côté, your request was inadvertently recorded as an informal request for information due to an administrative error. We have corrected the error and entered the request in our system as a formal ATIA request. Your file number is 2020-A-00029. Under normal circumstances we would have requested an extension of time to process this request, however the time to respond has already expired, so we are unable to do so.

We will do our best to process the request in a timely fashion however it should be noted that we are experiencing a combination of issues processing files due to the COVID-19 telework realities and the large number of formal requests currently with our office. We will contact you October 13, 2020 to provide you with an update on your request.

Should you have any questions, please do not hesitate to contact the ATIP office by email at OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca.

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)

1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

Patrice Bellerose

Directrice, Direction générale des services juridiques et des services du Secrétariat

Office des transports du Canada / Gouvernement du Canada

patrice.bellerose@otc-cta.gc.ca / Tél. : 819-994-2564 / ATS : 1-800-669-5575

Director, Legal & Secretariat Services Branch

Canadian Transportation Agency / Government of Canada

patrice.bellerose@otc-cta.gc.ca / Tel. : 819-994-2564 / TTY : 1-800-669-5575

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Office des transports du Canada | Canadian Transportation Agency

Secure Mail Reply to Sender

From Nadine.Landry@otc-cta.gc.ca

Sent On 2020/10/16 10:36:24 AM

Subject A-2020-00029 - Your Access to Information request with the Canadian Transportation Agency (response letter - first installment)

Message

October 16, 2020

PROTECTED A

Our file: A-2020-00029

Dear Gabor Lukacs:

This is further to your request received at our office on August 25th, 2020 and submitted under the *Access to Information Act* (Act) for the following records:

"All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (https://otc-cta.gc.ca/eng/statement-vouchers). The time period we request is March 11, 2020 to April 9, 2020."

Please find enclosed the first installment of the records relevant to your request and disclosed under the authority of the Act. Please be advised that certain records or portions thereof have been withheld under the following dispositions of the Act:

19(1)	personal information
21(1)(a)	advice or recommendations
21(1)(b)	consultations or deliberations
23	solicitor-client privilege information

Feel free to review the above dispositions of the Act at https://laws-lois.justice.gc.ca/eng/acts/A-1/page-1.html.

The second installment of the records (pages 82-85) will be provided to you once the consultation with Transport Canada is completed. Should you have any questions, please do not hesitate to contact the ATIP office by email at OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca.

Please be advised that you are entitled to complain to the Information Commissioner of Canada concerning the processing of your request within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3
Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies

Office des transports du Canada / Gouvernement du Canada

Myriame.Cote@otc-cta.gc.ca / Tél. : **819-743-7259**

ATIP Coordinator, Information Management & Technology Services Directorate

Canadian Transportation Agency / Government of Canada

Myriame.Cote@otc-cta.gc.ca / Tel. : **819-743-7259**

Attachments *(click on the file name to download)*

File	Size
A-2020-00029 - Release copy.pdf	34.07 MB

From lukacs@AirPassengerRights.ca Fri Oct 16 13:06:59 2020
Date: Fri, 16 Oct 2020 13:06:57 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Myriame Côté <Myriame.Cote@otc-cta.gc.ca>
Cc: Nadine Landry <Nadine.Landry@otc-cta.gc.ca>
Subject: Re: A-2020-00029 - Your Access to Information request with the Canadian Tran
sportation Agency (response letter - first installment)

[The following text is in the "ISO-8859-15" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dear Ms. Cote,

I am writing in relation to the release received today.

I was perplexed by the records sent to me, because I was unable to find any reference therein to the Statement on Vouchers.

As you know the Statement on Vouchers, which was explicitly referenced in my access request, states among other things that:

> [...] the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> https://otc-cta.gc.ca/eng/statement-vouchers

I was unable to find any reference to these sentences or views in the records you sent me. Nor was I able to find any correspondence relating to discussions or approval of this statement or instructions to post them on the CTA's website. We do know that they were approved by the Members (it was confirmed to MP Erskine-Smith), so some form of email correspondence or minutes must exist.

I was wondering if you might be available for a call today.

Best wishes,
Dr. Gabor Lukacs

--
Dr. Gabor Lukacs, President (Founder and Coordinator)
Air Passenger Rights
Tel : (647) 724 1727
Web : http://AirPassengerRights.ca
Twitter : @AirPassRightsCA
Facebook: https://www.facebook.com/AirPassengerRights/

On Fri, 16 Oct 2020, Nadine Landry wrote:

>
> TRANSFERT PROTéGé DE L'OTC
>
>
> Les fichiers suivants vous ont été envoyés par Nadine.Landry@otc-cta.gc.ca.

> Pour les télécharger, veuillez copier le mot de passe et cliquer sur le lien
> suivant.
>
> Télécharger les documents
>
> A-2020-00029 - Release copy.pdf
> 34.07 MB
> Si le lien ci-dessus ne s'ouvre pas, veuillez copier-coller le URL suivant
> dans votre navigateur Web :
> https://tfs-sft.otc-cta.gc.ca/pkg?token=933aacd1-7d93-45e8-a197-3a042f3eeef
> d
>
>
> Si vous n'?tes pas le destinataire prévu de ce courriel, veuillez détruire
> toute copie du message initial.
>
> Cet avis vous a été envoyé par l'Office des transports du Canada.
>
>
>
> _____
>
>
> CTA SECURE DELIVERY
>
>
> The following file(s) have been sent to you from
> Nadine.Landry@otc-cta.gc.ca. To download, please copy the password and click
> on the following link.
>
> Click here to download the file(s) listed below
>
> A-2020-00029 - Release copy.pdf
> 34.07 MB
> If the link above does not open, please copy and paste the following URL
> into your browser:
> https://tfs-sft.otc-cta.gc.ca/pkg?token=933aacd1-7d93-45e8-a197-3a042f3eeef
> d
>
>
> If you are not the intended recipient of this email, please destroy all
> copies of the original message.
>
> This notification has been sent to you by the Canadian Transportation
> Agency.
>
>
>

RE: A-2020-00029 - Your Access to Information request with the Canadian Transportation Agency (response letter - first installment)

Myriame Côté <Myriame.Cote@otc-cta.gc.ca> Mon, Oct 19, 2020 at 2:57 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: Nadine Landry <Nadine.Landry@otc-cta.gc.ca>, Myriame Côté <Myriame.Cote@otc-cta.gc.ca>

Dear Gabor Lukacs:

As requested, as a follow-up to the phone conversation we just had, please note that the documents we sent you in response to your request were provided to you as a courtesy. These documents were initially disclosed in response to the ATIP request A-2020-00002. The wording of your request and the request A-2020-0002 were practically similar and this is for this reason we kindly decided to send them to you.

For reference below the wording of the request A-2020-00002:

Clarification (received june 4 2020):

simply mean records not on CTA website or published initial request: Provide the unpublished background meetings, notes and exchanges that lead to CTA March 13/2020 ruling to temporarily suspend certain provisions in the air passenger bill of rights such as on cancellations/disruptions and to its subsequent March 25/20 statement on vouchers and the its subsequent FAQ answers on vouchers and refunds. Only include unpublished notes and exchanges at CTA. TIMEFRAME June 1, 2019 to March 25, 2020."

As mentioned, we are currently processing your request A-2020-000029. We are working on completing the retrieval stage of the records. As promised, I will contact you next Thursday October 29th, 2020 to give you the status of you request and when you could expect to receive the documents responsive to your request A-2020-00029.

Also, I will send you today a revised version of the response letter we sent you on Oct.15, 2020 in order to highlight the fact that the documents provided to you were provided as a courtesy and should not be considered a response to your request.

Please let me know if I missed some points of our discussion.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies
Office des transports du Canada / Gouvernement du Canada
Myriame.Cote@otc-cta.gc.ca / Tél. : 819-743-7259

ATIP Coordinator, Information Management & Technology Services Directorate
Canadian Transportation Agency / Government of Canada
Myriame.Cote@otc-cta.gc.ca / Tel. : 819-743-7259

-----Message d'origine-----
De : Myriame Côté
Envoyé : 16 octobre 2020 14:00
À : Gabor Lukacs <lukacs@AirPassengerRights.ca>

Cc : Nadine Landry <Nadine.Landry@otc-cta.gc.ca>; Myriame Côté <Myriame.Cote@otc-cta.gc.ca>
Objet : RE: A-2020-00029 - Your Access to Information request with the Canadian Transportation Agency (response letter - first installment)

Dear Gabor Lukacs:

Yes, it is fine with me.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies
Office des transports du Canada / Gouvernement du Canada
Myriame.Cote@otc-cta.gc.ca / Tél. : 819-743-7259

ATIP Coordinator, Information Management & Technology Services Directorate
Canadian Transportation Agency / Government of Canada
Myriame.Cote@otc-cta.gc.ca / Tel. : 819-743-7259

-----Message d'origine-----
De : Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
Envoyé : 16 octobre 2020 12:55
À : Myriame Côté <Myriame.Cote@otc-cta.gc.ca>
Cc : Nadine Landry <Nadine.Landry@otc-cta.gc.ca>
Objet : RE: A-2020-00029 - Your Access to Information request with the Canadian Transportation Agency (response letter - first installment)

Dear Ms. Cote:

Would 1pm ET on Monday work for you?

Best wishes,
Gabor

On Fri, 16 Oct 2020, Myriame Côté wrote:

> Dear Gabor Lukacs:
>
> Further to your email, please note that I will be available on Monday October 19, 2020 in the afternoon. You can call me at 819-743-7259.
>
>
> Sincerely,
>
>
>
>
>
> Myriame Côté
>
> Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies
> Office des transports du Canada / Gouvernement du Canada
> Myriame.Cote@otc-cta.gc.ca / Tél. : 819-743-7259
>
> ATIP Coordinator, Information Management & Technology Services Directorate
> Canadian Transportation Agency / Government of Canada
> Myriame.Cote@otc-cta.gc.ca / Tel. : 819-743-7259

>
> -----Message d'origine-----
> De : Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
> Envoyé : 16 octobre 2020 12:07
> ? : Myriame Côté <Myriame.Cote@otc-cta.gc.ca>
> Cc : Nadine Landry <Nadine.Landry@otc-cta.gc.ca>
> Objet : Re: A-2020-00029 - Your Access to Information request with the Canadian Transportation Agency (response letter - first installment)
>
> Dear Ms. Cote,
>
> I am writing in relation to the release received today.
>
> I was perplexed by the records sent to me, because I was unable to find
> any reference therein to the Statement on Vouchers.
>
> As you know the Statement on Vouchers, which was explicitly referenced in
> my access request, states among other things that:
>
> [...] the CTA believes that, generally speaking, an appropriate
> approach in the current context could be for airlines to provide
> affected passengers with vouchers or credits for future travel, as
> long as these vouchers or credits do not expire in an unreasonably
> short period of time (24 months would be considered reasonable in
> most cases).
>
> https://otc-cta.gc.ca/eng/statement-vouchers
>
> I was unable to find any reference to these sentences or views in the
> records you sent me. Nor was I able to find any correspondence relating to
> discussions or approval of this statement or instructions to post them on
> the CTA's website. We do know that they were approved by the Members (it
> was confirmed to MP Erskine-Smith), so some form of email correspondence
> or minutes must exist.
>
> I was wondering if you might be available for a call today.
>
> Best wishes,
> Dr. Gabor Lukacs
>
> --
> Dr. Gabor Lukacs, President (Founder and Coordinator)
> Air Passenger Rights
> Tel : (647) 724 1727
> Web : http://AirPassengerRights.ca
> Twitter : @AirPassRightsCA
> Facebook: https://www.facebook.com/AirPassengerRights/
>
>
>
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>
> On Fri, 16 Oct 2020, Nadine Landry wrote:
>
>>
>> TRANSFERT PROTéGé DE L'OTC
>>
>>
>> Les fichiers suivants vous ont été envoyés par Nadine.Landry@otc-cta.gc.ca.
>> Pour les télécharger, veuillez copier le mot de passe et cliquer sur le lien

>> suivant.
>>
>> Télécharger les documents
>>
>> A-2020-00029 - Release copy.pdf
>> 34.07 MB
>> Si le lien ci-dessus ne s'ouvre pas, veuillez copier-coller le URL suivant
>> dans votre navigateur Web :
>> https://tfs-sft.otc-cta.gc.ca/pkg?token=933aacd1-7d93-45e8-a197-3a042f3eeef
>> d
>>
>>
>> Si vous n'?tes pas le destinataire prévu de ce courriel, veuillez détruire
>> toute copie du message initial.
>>
>> Cet avis vous a été envoyé par l'Office des transports du Canada.
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>> CTA SECURE DELIVERY
>>
>>
>> The following file(s) have been sent to you from
>> Nadine.Landry@otc-cta.gc.ca. To download, please copy the password and click
>> on the following link.
>>
>> Click here to download the file(s) listed below
>>
>> A-2020-00029 - Release copy.pdf
>> 34.07 MB
>> If the link above does not open, please copy and paste the following URL
>> into your browser:
>> https://tfs-sft.otc-cta.gc.ca/pkg?token=933aacd1-7d93-45e8-a197-3a042f3eeef
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>>
>> If you are not the intended recipient of this email, please destroy all
>> copies of the original message.
>>
>> This notification has been sent to you by the Canadian Transportation
>> Agency.
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>

TR: A-2020-00029 - Access to Information

Myriame Côté <Myriame.Cote@otc-cta.gc.ca> Mon, Oct 19, 2020 at 3:52 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: Myriame Côté <Myriame.Cote@otc-cta.gc.ca>, Nadine Landry <Nadine.Landry@otc-cta.gc.ca>

REVISED VERSION –

To disregard the letter of October 15, 2020

October 19 2020

PROTECTED A

Our file: A-2020-00029

Dear Gabor Lukacs:

This is further to your request received at our office on August 25th, 2020 and submitted under the *Access to Information Act* (Act) for the following records:

"All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (https://otc-cta.gc.ca/eng/statement-vouchers). The time period we request is March 11, 2020 to April 9, 2020."

Given that your request A-2020-00029 is still being processed and that the request A-2020-00002's processing was completed and similar to your request, we thought of providing you with a copy of those records which you may find of a certain interest. The attached documents indicates A-2020-00029, but the documents are those of A-2020-00002. The request reads as follows:

> ***Clarification (received june 4 2020):***
>
> ***simply mean records not on CTA website or published initial request: Provide the unpublished background meetings, notes and exchanges that lead to CTA March 13/2020 ruling to temporarily suspend certain provisions in the air passenger bill of rights such as on cancellations/disruptions and to its subsequent March 25/20 statement on vouchers and the its subsequent FAQ answers on vouchers and refunds. Only include unpublished notes and exchanges at CTA. TIMEFRAME June 1, 2019 to March 25, 2020."***

As a courtesy, please find enclosed the first installment of the records relevant to the ATIP request A-2020-00002 disclosed under the authority of the Act. Please note that certain

records or portions thereof have been withheld under the following dispositions of the Act listed below. Feel free to review the above dispositions of the Act at https://laws-lois.justice.gc.ca/eng/acts/A-1/page-1.html.

19(1)	personal information
21(1)(a)	advice or recommendations
21(1)(b)	consultations or deliberations
23	solicitor-client privilege information

If you are not interested in receiving the attached records of the request A-2020-00002, please disregard this email. Otherwise and upon request, we will provide you with the second installment of the records (pages 82-85) once the consultation with Transport Canada is completed.

Should you have any questions, please do not hesitate to contact the ATIP office by email at OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca.

Please be advised that you are entitled to complain to the Information Commissioner of Canada concerning the processing of your request A-2020-00029 within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3
Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies

Office des transports du Canada / Gouvernement du Canada

Myriame.Cote@otc-cta.gc.ca / Tél. : **819-743-7259**

ATIP Coordinator, Information Management & Technology Services Directorate

Canadian Transportation Agency / Government of Canada

Myriame.Cote@otc-cta.gc.ca / Tel. : **819-743-7259**

De : Nadine Landry

Envoyé : 15 octobre 2020 08:06
À : Myriame Côté <Myriame.Cote@otc-cta.gc.ca>
Objet : A-2020-00029 - Access to Information

October 14 2020

PROTECTED A

Our file: A-2020-00029

Dear Gabor Lukacs:

This is further to your request received at our office on August 25th, 2020 and submitted under the *Access to Information Act* (Act) for the following records:

"All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (https://otc-cta.gc.ca/eng/statement-vouchers). The time period we request is March 11, 2020 to April 9, 2020."

Please find enclosed the first installment of the records relevant to your request and disclosed under the authority of the Act. Please be advised that certain records or portions thereof have been withheld under the following dispositions of the Act:

19(1)	personal information
21(1)(a)	advice or recommendations
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23	solicitor-client privilege information

Feel free to review the above dispositions of the Act at https://laws-lois.justice.gc.ca/eng/acts/A-1/page-1.html.

The second installment of the records (pages 82-85) will be provided to you once the consultation with Transport Canada is completed. Should you have any questions, please do not hesitate to contact the ATIP office by email at OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca.

Please be advised that you are entitled to complain to the Information Commissioner of Canada concerning the processing of your request within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3
Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies

Office des transports du Canada / Gouvernement du Canada

Myriame.Cote@otc-cta.gc.ca / Tél. : **819-743-7259**

ATIP Coordinator, Information Management & Technology Services Directorate

Canadian Transportation Agency / Government of Canada

Myriame.Cote@otc-cta.gc.ca / Tel. : **819-743-7259**

RDIM-2249776-A-2020-00029 - Release copy-R.PDF
34891K

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

A-2020-00029 re: the status of your request

Myriame Côté <Myriame.Cote@otc-cta.gc.ca> Thu, Oct 29, 2020 at 2:19 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: Myriame Côté <Myriame.Cote@otc-cta.gc.ca>

Dear Gabor Lukacs,

I just tried to call you but your line is busy.

As promised, I was calling you about the status of your request A-2020-00029. We have completed the search of the records. Our system has generated a large volume of 10 000 pages approximately. As the ATIP office is currently receiving many requests and I am the only analyst to review them, It may takes me a few weeks to complete the processing of your request. I will do my best to provide you with a response within 2-4 weeks.

Please let me know if you want to discuss.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies

Office des transports du Canada / Gouvernement du Canada

Myriame.Cote@otc-cta.gc.ca / Tél. : **819-743-7259**

ATIP Coordinator, Information Management & Technology Services Directorate

Canadian Transportation Agency / Government of Canada

Myriame.Cote@otc-cta.gc.ca / Tel. : **819-743-7259**

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

Nadine Landry

From: Sébastien Bergeron
Sent: Friday, March 20, 2020 7:30 PM
To: Alysia Lau
Cc: Lesley Robertson
Subject: TR: EC March 20 - Decisions and Follow-ups

Praises for you, Alysia (see below) ! Have a great weekend to you two !

Seb

Sébastien Bergeron
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 20 mars 2020 17:00
À : Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Objet : RE: EC March 20 - Decisions and Follow-ups

Great work, Alysia.

Thanks,

S

From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Sent: Friday, March 20, 2020 4:49 PM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Subject: TR: EC March 20 - Decisions and Follow-ups

Scott,

Pages 2 to / à 3

are withheld pursuant to sections

sont retenues en vertu des articles

21(1)(a), 21(1)(b)

of the Access to Information Act

de la Loi sur l'accès à l'information

Nadine Landry

From: Alysia Lau
Sent: Friday, March 20, 2020 4:07 PM
To: Sébastien Bergeron; Lesley Robertson
Subject: EC March 20 - Decisions and Follow-ups

Hi Seb,

[redacted]

Thanks,
Alysia

[redacted]

Page 5

is withheld pursuant to sections

est retenue en vertu des articles

21(1)(a), 21(1)(b)

of the Access to Information Act

de la Loi sur l'accès à l'information

Nadine Landry

From: Patrice Bellerose
Sent: Thursday, March 26, 2020 8:44 AM
To: Vincent Turgeon; Marcia Jones; Tim Hillier
Cc: Caitlin Hurcomb; Valérie Lagacé; Matilde Perrusclet; Renée Langlois; Caroline Joly; Sébastien Bergeron
Subject: RE: Statement - problem
Attachments: RDIM-2127049-Statement__on_Vouchers_-_French-1.DOCX.DRF

[redacted]

Thank you.
PB

From: Patrice Bellerose
Sent: Thursday, March 26, 2020 8:24 AM
To: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>; Renée Langlois <Renee.Langlois@otc-cta.gc.ca>; Caroline Joly <Caroline.Joly@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement - problem

[redacted]

PB

From: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Sent: Thursday, March 26, 2020 8:18 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Subject: RE: Statement - problem

[redacted]

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Thursday, March 26, 2020 8:01 AM
To: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Cc: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: Fwd: Statement - problem

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-26 7:34 AM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>, Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement - problem

[redacted] Thanks.

From: Scott Streiner
Sent: Thursday, March 26, 2020 7:30 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Statement - problem

Hi, Marcia and Seb. [redacted]

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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

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

Les différentes dispositions législatives, réglementaires et tarifaires ont été rédigées pour des perturbations à court terme relativement localisées. Aucune n'a été envisagée

sont survenues au cours des dernieres semaines en consequence de la pandemie. Il est important de tenir compte de la façon dont nous devrons établir un équilibre qui soit

opérationnelles des compagnies aériennes dans ces circonstances extraordinaires et sans précédent.

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

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

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

Nadine Landry

From: Scott Streiner
Sent: Thursday, March 26, 2020 8:24 AM
To: Marcia Jones; Sébastien Bergeron
Subject: RE: Statement - problem

[redacted]

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Thursday, March 26, 2020 8:09 AM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Re: Statement - problem

[redacted]

Marcia

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-26 8:05 AM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>, Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement - problem

[redacted]Thanks.

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Thursday, March 26, 2020 8:03 AM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Re: Statement - problem

Scott, [redacted]

Marcia

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-26 7:58 AM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>, Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement - problem

[redacted]

Thanks.

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Thursday, March 26, 2020 7:57 AM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Re: Statement - problem

Scott, [redacted]

Marcia

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-26 7:29 AM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>, Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Statement - problem

Hi, Marcia and Seb. [redacted]

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada

Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Nadine Landry

From: Marcia Jones
Sent: Thursday, March 26, 2020 7:56 AM
To: Patrice Bellerose; Tim Hillier; Vincent Turgeon
Cc: Caitlin Hurcomb; Valérie Lagacé; Sébastien Bergeron
Subject: Fwd: Statement - problem
Attachments: Statement.docx

Importance: High

Hi there,

Thanks,
Marcia

Sent from my Bell Samsung device over Canada's largest network.

Nadine Landry

From: Caitlin Hurcomb
Sent: Wednesday, March 25, 2020 2:30 PM
To: Marcia Jones
Subject: RE: push button ready
Attachments:

From: Marcia Jones
Sent: Wednesday, March 25, 2020 2:29 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: push button ready

From: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:27 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: push button ready

From: Marcia Jones
Sent: Wednesday, March 25, 2020 2:17 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: push button ready

Thanks,

From: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:13 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: push button ready

From: Marcia Jones
Sent: Wednesday, March 25, 2020 2:12 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: push button ready

Thanks –

From: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:08 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: push button ready

From: Marcia Jones
Sent: Wednesday, March 25, 2020 2:07 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: push button ready

From: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:03 PM
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>; Renée Langlois <Renee.Langlois@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready

From: Sébastien Bergeron
Sent: Wednesday, March 25, 2020 1:59 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>; Renée Langlois <Renee.Langlois@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready

Sébastien Bergeron
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Envoyé : 25 mars 2020 13:55
À : Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>; Renée Langlois <Renee.Langlois@otc-cta.gc.ca>
Cc : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Objet : RE: push button ready

[redacted]

From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:53 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>; Renée Langlois <Renee.Langlois@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted]

thanks
PB

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:49 PM
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted]

Marcia

From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:37 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready

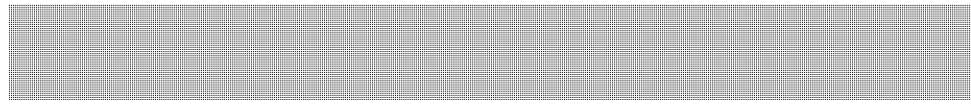
[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Date: 2020-03-25 1:35 PM (GMT-05:00)
To: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>, Tim Hillier <Tim.Hillier@otc-cta.gc.ca>, Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>, Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>, Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>, Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: push button ready

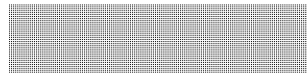
[redacted]

From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:27 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready

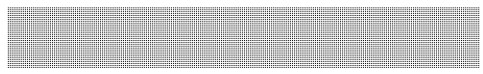


From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:23 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Cc: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready
Importance: High

From: Marcia Jones
Sent: Wednesday, March 25, 2020 1:11 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: FW: push button ready
Importance: High



From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 12:47 PM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: push button ready



Marcia,

Thanks.

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:40 AM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: push button ready

Thanks.

-------- Original message --------
From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Date: 2020-03-25 10:36 a.m. (GMT-05:00)
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>, Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>, Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: push button ready

Mr. Streiner,

Valérie

Nadine Landry

From: Tim Hillier
Sent: Wednesday, March 25, 2020 2:30 PM
To: Matilde Perrusclet
Cc: Vincent Turgeon; Cynthia Jolly; Simon Fecteau Labbé
Subject: RE: Go live

Great!!

Tim

From: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:29 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: RE: Go live

☺
CTA services should also appear in the quick links very soon, once the cache is cleared.

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:27 PM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: RE: Go live

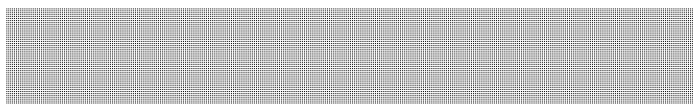
THANKS!!!!!!!!!!!!!

From: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:25 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: RE: Go live

It's LIVE, here are the links:

FR: https://otc-cta.gc.ca/fra/information-importante-pour-voyageurs-pour-periode-covid-19
ENG: https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19

https://otc-cta.gc.ca/eng/statement-vouchers
https://otc-cta.gc.ca/fra/message-concernant-credits



s.21(1)(a)
s.21(1)(b)

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:10 PM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: Go live

[redacted]

Thanks,

Tim

Tim Hillier
Directeur, Communications, Direction générale de l'analyse et de la liaison
Office des transports du Canada / Gouvernement du Canada
Tim.Hillier@otc-cta.gc.ca / Tél: 819-953-8926 / ATS: 1-800-669-5575
Suivez-nous : Twitter / YouTube

Tim Hillier
Director, Communications, Analysis and Outreach Branch
Canadian Transportation Agency / Government of Canada
Tim.Hillier@otc-cta.gc.ca / Tel: 819-953-8926 / TTY: 1-800-669-5575
Follow us: Twitter / YouTube

s.21(1)(a)
s.21(1)(b)

Nadine Landry

From: Marcia Jones
Sent: Wednesday, March 25, 2020 2:29 PM
To: Tim Hillier
Cc: Caitlin Hurcomb; Vincent Turgeon
Subject: RE: Go live

Wonderful, thanks again for your efforts and the team's efforts. [redacted]

[redacted]

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 2:26 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Subject: FW: Go live

We are live

Duplicate

[redacted]

Page 22

is a duplicate

est un duplicata

Nadine Landry

From: Tim Hillier
Sent: Wednesday, March 25, 2020 2:02 PM
To: Matilde Perrusclet
Cc: Vincent Turgeon
Subject: FW: Statement re passenger refunds
Attachments: RDIM-2127038-COVID-19_APPR_Statement-2.DOCX.DRF; RDIM-2127049-COVID-19_APPR_Statement_-_French-1.DOCX.DRF

Here it is.

TIm

From: Tim Hillier
Sent: Wednesday, March 25, 2020 10:55 AM
To: Matilde Perrusclet (Matilde.Perrusclet@otc-cta.gc.ca) <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé (Simon.FecteauLabbe@otc-cta.gc.ca) <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly (Cynthia.Jolly@otc-cta.gc.ca) <Cynthia.Jolly@otc-cta.gc.ca>
Subject: FW: Statement re passenger refunds

[redacted]

Tim

From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:34 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement re passenger refunds

Hello,

[redacted]

Thanks
PB

From: Patrice Bellerose
Sent: Tuesday, March 24, 2020 12:18 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement re passenger refunds

Hi Tim,

[redacted]

thank you.
PB

From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 10:13 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement re passenger refunds

[redacted] Thank you.
PB

-------- Original message --------
From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Date: 2020-03-24 8:53 AM (GMT-05:00)
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>, Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>, Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Subject: RE: Statement re passenger refunds

Hello,

[redacted]

Thank you.
PB

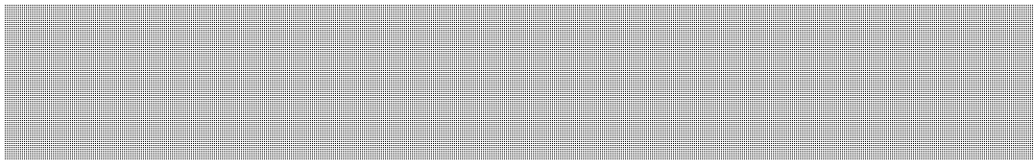
From: Patrice Bellerose
Sent: Monday, March 23, 2020 12:46 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: Statement re passenger refunds

[redacted]

Thanks
PB

From: Patrice Bellerose
Sent: Monday, March 23, 2020 12:43 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>

Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: Statement re passenger refunds



PB

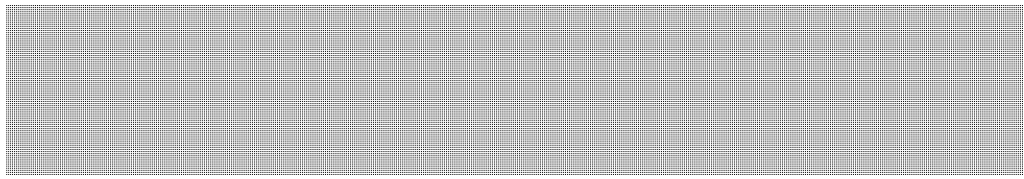
From: Patrice Bellerose
Sent: Monday, March 23, 2020 12:30 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: Statement re passenger refunds

Hello,

PB

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 12:24 PM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Subject: Statement re passenger refunds

Hi Valérie,



Thanks,

Tim

Tim Hillier
Directeur, Communications, Direction générale de l'analyse et de la liaison
Office des transports du Canada / Gouvernement du Canada
Tim.Hillier@otc-cta.gc.ca / Tél: 819-953-8926 / ATS: 1-800-669-5575
Suivez-nous : Twitter / YouTube

Tim Hillier
Director, Communications, Analysis and Outreach Branch
Canadian Transportation Agency / Government of Canada
Tim.Hillier@otc-cta.gc.ca / Tel: 819-953-8926 / TTY: 1-800-669-5575
Follow us: Twitter / YouTube

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

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

Les différentes dispositions législatives, réglementaires et tarifaires ont été rédigées pour des perturbations à court terme relativement localisées. Aucune n'a été envisagée [redacted] sont survenues au cours des dernières semaines en conséquence de la pandémie. Il est important de tenir compte de la façon dont nous devrons établir un équilibre qui soit [redacted] opérationnelles des compagnies aériennes dans ces circonstances extraordinaires et sans précédent.

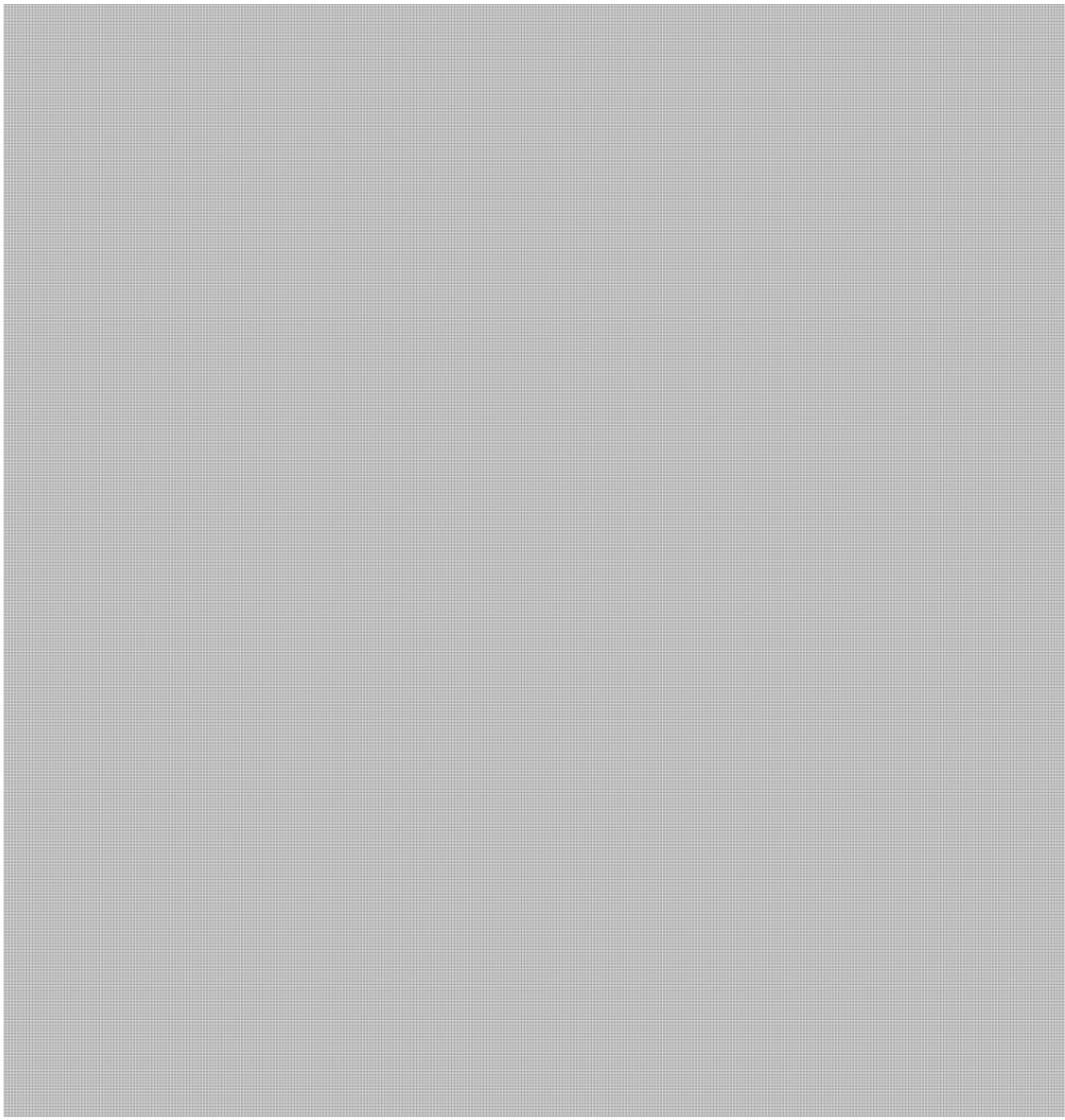
D'une part, les passagers qui n'ont aucune possibilité d'effectuer au complet l'itinéraire prévu avec l'assistance d'une compagnie aérienne ne devraient pas avoir à assumer des dépenses pour des vols annulés. D'autre part, on ne peut pas s'attendre à ce que les compagnies aériennes qui voient leurs volumes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

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

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

Nadine Landry

From: Matilde Perrusclet
Sent: Wednesday, March 25, 2020 1:58 PM
To: Tim Hillier; Vincent Turgeon
Subject: FW: Statement
Attachments: Statement.docx



[redacted]

Tim

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 9:57 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Cc: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: FW: Statement

[redacted] **Duplicate**

[redacted]

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

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in

such obligations in *force majeure* situations.

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

unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned

not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

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

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

Nadine Landry

From: Caitlin Hurcomb
Sent: Wednesday, March 25, 2020 1:53 PM
To: Tim Hillier; Marcia Jones
Cc: Vincent Turgeon
Subject: RE: push button ready

[redacted]

From: Tim Hillier
Sent: Wednesday, March 25, 2020 1:47 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted]

Tim

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:44 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted]

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:41 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted]

[redacted]

Tim

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:35 PM
To: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted]

From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:27 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted]

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:23 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Cc: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: push button ready
Importance: High

[redacted]

From: Marcia Jones
Sent: Wednesday, March 25, 2020 1:11 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: FW: push button ready
Importance: High

Hello, [redacted]

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 12:47 PM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted]

Thanks.

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:40 AM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: push button ready

[redacted] Thanks.

-------- Original message --------
From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Date: 2020-03-25 10:36 a.m. (GMT-05:00)
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>, Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>, Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: push button ready

Mr. Streiner,

[redacted]

Valérie

Nadine Landry

From: Tim Hillier
Sent: Wednesday, March 25, 2020 1:44 PM
To: Matilde Perrusclet; Simon Fecteau Labbé; Cynthia Jolly; Vincent Turgeon; Martine Maltais
Subject: FW: Statement
Attachments:

Hi Matilde,

Tim

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:36 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: FW: Statement

Thanks again, everyone.

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:35 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: Statement

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Nadine Landry

From: Matilde Perrusclet
Sent: Wednesday, March 25, 2020 12:24 PM
To: Tim Hillier; Martine Maltais; Simon Fecteau Labbé; Cynthia Jolly; Vincent Turgeon
Subject: RE: A few more changes

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Date: 2020-03-25 12:05 p.m. (GMT-05:00)
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>, Martine Maltais <Martine.Maltais@otc-cta.gc.ca>, Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>, Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>, Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Subject: RE: A few more changes

[redacted]

Tim

> **From:** Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
> **Sent:** Wednesday, March 25, 2020 11:52 AM
> **To:** Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
> **Subject:** RE: A few more changes
>
> [redacted]
>
> **From:** Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
> **Sent:** Wednesday, March 25, 2020 11:37 AM
> **To:** Martine Maltais <Martine.Maltais@otc-cta.gc.ca>; Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly

<Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Subject: RE: A few more changes

[redacted]

Tim

From: Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 11:32 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Subject: RE: A few more changes

[redacted]

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 11:30 AM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Subject: RE: A few more changes

[redacted]

Tim

From: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 11:29 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Subject: RE: A few more changes

Hi Tim,

[redacted]

Matilde

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 11:24 AM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Subject: A few more changes

s.21(1)(a)
s.21(1)(b)

Hi Matilde,

[redacted]

Thanks,

Tim

Nadine Landry

From: Matilde Perrusclet
Sent: Wednesday, March 25, 2020 11:30 AM
To: Tim Hillier
Subject: RE: Text on refunds and other revisions to important information page

[redacted]

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:36 AM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Cc: Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>
Subject: FW: Text on refunds and other revisions to important information page

[redacted]

Tim

From: Tim Hillier
Sent: Wednesday, March 25, 2020 10:23 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: Text on refunds and other revisions to important information page

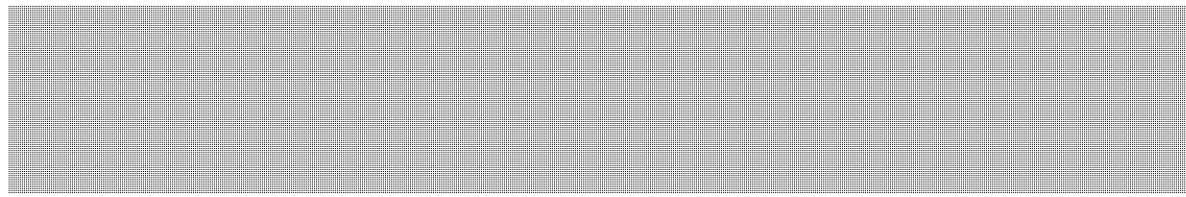
[redacted]

Tim

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:17 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Subject: RE: Text on refunds and other revisions to important information page

Hi Tim, [redacted]

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:03 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: FW: Text on refunds and other revisions to important information page



Tim

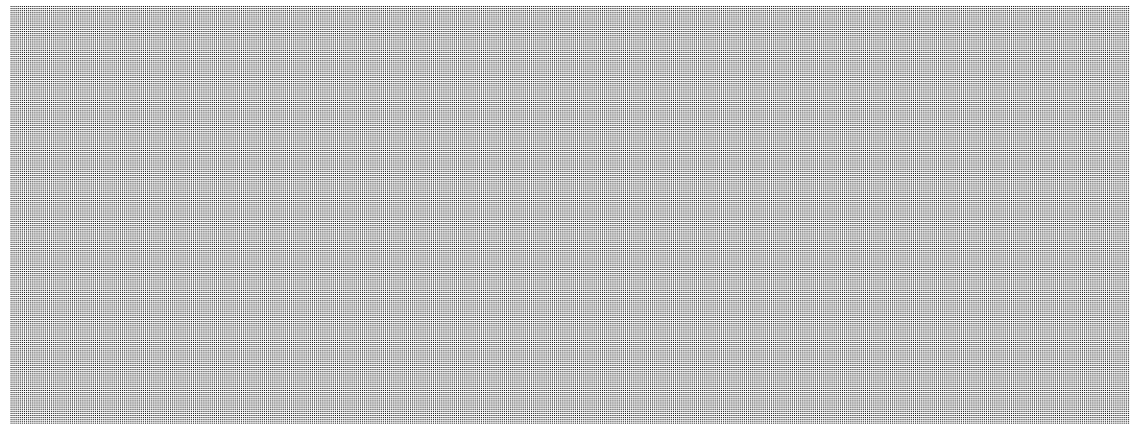
From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 9:45 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: Text on refunds and other revisions to important information page

Hi Tim,

Valérie

De : Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Envoyé : 25 mars 2020 09:36
À : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc : Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Objet : FW: Text on refunds and other revisions to important information page

Hi Valérie,



Thanks,

Tim

From: Tim Hillier
Sent: Tuesday, March 24, 2020 4:42 PM
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Alysia Lau <Alysia.Lau@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Cynthia Jolly (Cynthia.Jolly@otc-cta.gc.ca) <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon (Vincent.Turgeon@otc-cta.gc.ca) <Vincent.Turgeon@otc-cta.gc.ca>; Matilde Perrusclet (Matilde.Perrusclet@otc-cta.gc.ca) <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé (Simon.FecteauLabbe@otc-cta.gc.ca) <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: Text on refunds and other revisions to important information page

Hi Sébastien,

Cheers,

Tim

Nadine Landry

From: Sébastien Bergeron
Sent: Wednesday, March 25, 2020 11:27 AM
To: Marcia Jones
Subject: RE: Answer

Thanks.

Sébastien Bergeron
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Envoyé : 25 mars 2020 11:26
À : Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Objet : RE: Answer

[redacted]

From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 11:11 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: Answer

[redacted]

Sébastien Bergeron
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Envoyé : 25 mars 2020 11:10
À : Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Objet : FW: Answer

[redacted]

s.21(1)(a)
s.21(1)(b)

From: Marcia Jones
Sent: Wednesday, March 25, 2020 11:10 AM
To: Martine Maltais <Martine.Maltais@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: Answer

Hi,

From: Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:15 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: Answer

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:00 AM
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: FW: Answer

Hi

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 9:53 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: RE: Answer

Hi, Marcia

Thanks.

s.21(1)(a)
s.21(1)(b)

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 8:53 PM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Answer

Hi Scott,

[redacted]

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 7:34 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Answer

Hi, [redacted]

Thanks.

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Nadine Landry

From: Liz Barker
Sent: Wednesday, March 25, 2020 11:04 AM
To: Scott Streiner
Subject: RE: Answer

[redacted]

Liz

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: March-25-20 10:43 AM
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: RE: Answer

[redacted]

-------- Original message --------
From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Date: 2020-03-25 10:26 a.m. (GMT-05:00)
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>, Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: RE: Answer

Scott,

[redacted]

Seb

Sébastien Bergeron

Chef de cabinet | Bureau du président et premier dirigeant

Office des transports du Canada | Gouvernement du Canada

sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer

Canadian Transportation Agency | Government of Canada

Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Duplicate

Pages 47 to / à 48

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Nadine Landry

From: Caitlin Hurcomb
Sent: Wednesday, March 25, 2020 10:47 AM
To: Tim Hillier
Subject: RE: Text on refunds and other revisions to important information page

[redacted]

Thanks!

From: Tim Hillier
Sent: Wednesday, March 25, 2020 10:38 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: FW: Text on refunds and other revisions to important information page

Hi Cait,

Marcia [redacted]

Thanks,

Tim

Duplicate

[redacted]

Pages 50 to / à 55

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s.21(1)(a)
s.21(1)(b)

Nadine Landry

From: Patrice Bellerose
Sent: Wednesday, March 25, 2020 10:42 AM
To: Marcia Jones; Tim Hillier
Cc: Valérie Lagacé; Martine Maltais; Sébastien Bergeron
Subject: RE: Statement re passenger refunds

[redacted]

PB

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:37 AM
To: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement re passenger refunds

Hi,

[redacted]

Marcia

Duplicate

[redacted]

Pages 57 to / à 61

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s.21(1)(b)

Nadine Landry

From: Matilde Perrusclet
Sent: Wednesday, March 25, 2020 10:20 AM
To: Tim Hillier; Simon Fecteau Labbé; Cynthia Jolly
Subject: RE: Statement

[redacted]

Matilde

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 10:07 AM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>
Subject: FW: Statement **Duplicate**

[redacted]

Page 63

is a duplicate

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Nadine Landry

From: Scott Streiner
Sent: Wednesday, March 25, 2020 9:45 AM
To: Valérie Lagacé
Cc: Marcia Jones; Tom Oommen; Sébastien Bergeron; Lesley Robertson
Subject: Statement
Attachments: Statement.docx

Hi, all.

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in

such obligations in *force majeure* situations.

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

unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned

not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

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

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

Nadine Landry

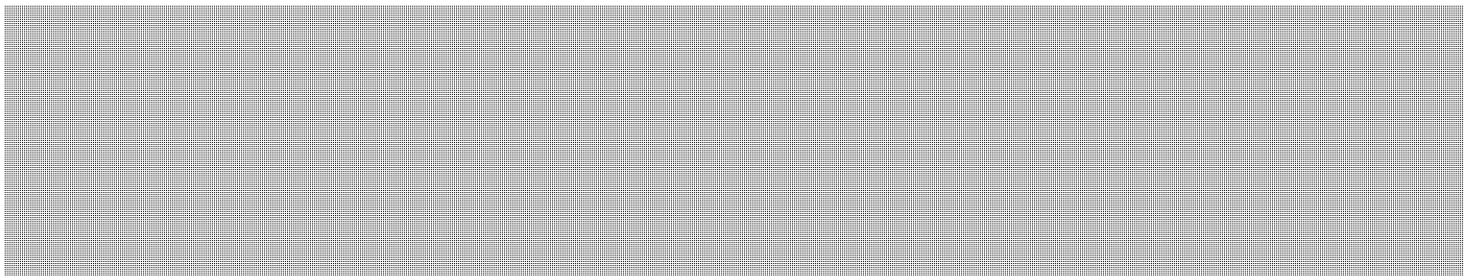
From: Valérie Lagacé
Sent: Wednesday, March 25, 2020 9:45 AM
To: Tim Hillier
Cc: Marcia Jones
Subject: RE: Text on refunds and other revisions to important information page

Hi Tim,

Valérie

De : Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Envoyé : 25 mars 2020 09:36
À : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc : Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Objet : FW: Text on refunds and other revisions to important information page

Hi Valérie,



Thanks,

Tim

From: Tim Hillier
Sent: Tuesday, March 24, 2020 4:42 PM
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Alysia Lau <Alysia.Lau@otc-cta.gc.ca>
Cc: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Cynthia Jolly (Cynthia.Jolly@otc-cta.gc.ca) <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon (Vincent.Turgeon@otc-cta.gc.ca) <Vincent.Turgeon@otc-cta.gc.ca>; Matilde Perrusclet (Matilde.Perrusclet@otc-cta.gc.ca) <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé (Simon.FecteauLabbe@otc-cta.gc.ca) <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: Text on refunds and other revisions to important information page

s.21(1)(a)
s.21(1)(b)

Hi Sébastien,

Cheers,

Tim

Nadine Landry

From: Valérie Lagacé
Sent: Wednesday, March 25, 2020 9:38 AM
To: Tim Hillier
Subject: RE: Text on refunds and other revisions to important information page

[redacted]

Duplicate

[redacted]

Page 69

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Nadine Landry

From: Sébastien Bergeron
Sent: Tuesday, March 24, 2020 5:52 PM
To: Tim Hillier; Alysia Lau
Cc: Marcia Jones; Cynthia Jolly; Vincent Turgeon; Matilde Perrusclet; Simon Fecteau Labbé
Subject: RE: Text on refunds and other revisions to important information page

Tim,

[redacted]

seb

Sébastien Bergeron
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

Duplicate

[redacted]

Page 71

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Nadine Landry

From: Marcia Jones
Sent: Tuesday, March 24, 2020 5:45 PM
To: Sébastien Bergeron; Vincent Turgeon
Cc: Alysia Lau; Tim Hillier; Martine Maltais
Subject: RE: Question urgente de La Presse

[redacted]

From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 5:23 PM
To: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Alysia Lau <Alysia.Lau@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Subject: RE: Question urgente de La Presse

Vincent,

[redacted]

Sébastien Bergeron
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Envoyé : 24 mars 2020 17:19
À : Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Cc : Alysia Lau <Alysia.Lau@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Objet : RE: Question urgente de La Presse
Importance : Haute

[redacted]

Vincent

From: Vincent Turgeon
Sent: Tuesday, March 24, 2020 5:13 PM

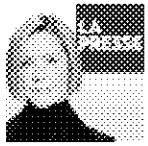
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Cc: Alysia Lau <Alysia.Lau@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Subject: FW: Question urgente de La Presse
Importance: High

Hi, the media request below [redacted]

Vincent

From: Grammond, Stéphanie [mailto:sgrammond@lapresse.ca]
Sent: Tuesday, March 24, 2020 4:17 PM
To: Media Relations / Relations Medias <media@tc.gc.ca>
Subject: Question urgente de La Presse

Bonjour,
Au lieu de rembourser les clients dont les vols sont annulés à cause de la COVID-19, plusieurs transporteurs leur offrent un crédit valide pour 12-24 mois. En ces temps difficiles, les consommateurs qui sont nombreux à avoir perdu leur emploi préfèreraient avoir l'argent dans leurs poches.
Avez-vous beaucoup de plaintes à cet égard?
Est-il légal de la part des transporteurs de refuser de rembourser les clients à qui ils n'ont pas fourni le vol prévu?
Merci de me revenir d'ici la fin de la journée,
SG



Stéphanie Grammond
Chroniqueuse
La Presse, Affaires

T 514 285-7000, poste [redacted]
750, boulevard Saint-Laurent, Montréal (Québec) H2Y 2Z4

sgrammon@lapresse.ca
LaPresse.ca | LaPressePlus.ca

Nadine Landry

From: Caitlin Hurcomb
Sent: Tuesday, March 24, 2020 3:52 PM
To: Marcia Jones
Subject: RE: FAQs for review

[redacted]

From: Marcia Jones
Sent: Tuesday, March 24, 2020 3:51 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: Re: FAQs for review

Hi Cait - [redacted]

Marcia

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Date: 2020-03-24 3:47 PM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: FAQs for review

Hi Marcia,

[redacted]

From: Martine Maltais
Sent: Tuesday, March 24, 2020 3:44 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: FAQs for review

Marcia,

[redacted]

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 1:42 PM
To: Martine Maltais <Martine.Maltais@otc-cta.gc.ca>

s.21(1)(a)
s.21(1)(b)

Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Subject: RE: FAQs for review

Thanks, Martine,

Thanks,
Marcia

From: Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 1:17 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Subject: FAQs for review

Marcia,

Martine

From: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 10:50 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Martine Maltais <Martine.Maltais@otc-cta.gc.ca>
Subject: RE: heads up

Hi Marcia,

Vincent

s.21(1)(a)
s.21(1)(b)

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 10:28 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Subject: RE: heads up

Thanks Marcia,

[redacted]

Thanks,

Tim

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 10:26 AM
To: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Subject: RE: heads up

[redacted]

Marcia

From: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 9:50 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Subject: RE: heads up

[redacted]

Vincent

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 9:37 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: RE: heads up

[redacted]

Marcia

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 9:30 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: RE: heads up

[redacted]

Tim

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 8:44 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: heads up
Importance: High

Hi Tim, [redacted]

Marcia Jones
Dirigeante principale, Stratégies/Chief Strategy Officer
Office des transports du Canada/Canadian Transportation Agency
15, rue Eddy/15 Eddy Street
Gatineau, QC, K1A 0N9
(819) 953-0327
marcia.jones@otc-cta.gc.ca

Nadine Landry

From: Millette, Vincent <vincent.millette@tc.gc.ca>
Sent: Tuesday, March 24, 2020 12:40 PM
To: Caitlin Hurcomb
Subject: RE: CTA announcement tomorrow

thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Tuesday, March 24, 2020 12:31 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

[redacted]

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Tuesday, March 24, 2020 12:28 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

[redacted]

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Tuesday, March 24, 2020 12:25 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,

[redacted]

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Tuesday, March 24, 2020 12:07 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Cait –

[redacted]

Thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Monday, March 23, 2020 11:04 AM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,

[redacted]

[redacted]

Cait

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Monday, March 23, 2020 10:20 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

[redacted]

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Monday, March 23, 2020 10:15 AM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,

[redacted]

Cait

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Monday, March 23, 2020 10:02 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Cait -[redacted]

Thanks

s.21(1)(a)
s.21(1)(b)

From: Millette, Vincent
Sent: Sunday, March 22, 2020 2:22 PM
To: 'Caitlin Hurcomb' <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: CTA announcement tomorrow

Hi Cait,

Thanks!

Sent from my BlackBerry 10 smartphone on the Rogers network.

Nadine Landry

From: Tim Hillier
Sent: Tuesday, March 24, 2020 11:38 AM
To: Matilde Perrusclet
Cc: web
Subject: RE: heads up

[redacted]

Tim

From: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 11:28 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: web <web@otc-cta.gc.ca>
Subject: RE: heads up

Hi Tim,

[redacted]

Items ready to publish

[redacted]

- Modification of the 'Suspension of all air dispute resolution activities' on each page it,s already published – including APPR
- Statement text in French and English on the Important Information page
- Add the CTA services section on all landing pages.

I'll be waiting for your confirmation to publish.

Matilde

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 11:06 AM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Cc: web <web@otc-cta.gc.ca>
Subject: RE: heads up

s.21(1)(a)
s.21(1)(b)

[redacted]

Tim

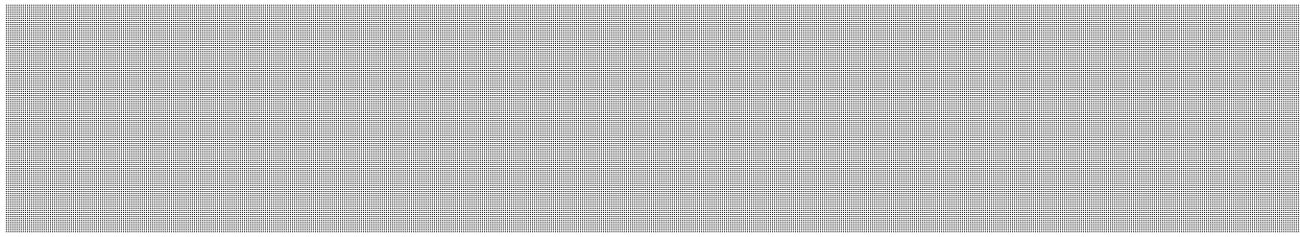
[redacted]

From: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 10:42 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>

s.21(1)(a)
s.21(1)(b)

Cc: web <web@otc-cta.gc.ca>
Subject: RE: heads up

Hi Tim,



Matilde

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 10:11 AM
To: Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>
Cc: web <web@otc-cta.gc.ca>
Subject: FW: heads up

Tim

From: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 10:03 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: RE: heads up

s.21(1)(a)
s.21(1)(b)

[redacted]

From: Marcia Jones
Sent: Tuesday, March 24, 2020 9:57 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: RE: heads up

Hi [redacted]

Page 86

is withheld pursuant to sections

est retenue en vertu des articles

21(1)(a), 21(1)(b)

of the Access to Information Act

de la Loi sur l'accès à l'information

[redacted]

Marcia

From: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 9:16 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: RE: heads up

[redacted]

Tim

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 8:50 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: RE: heads up

Hi, here is the final version of the statement on vouchers going online, [redacted]

Thanks,
Marcia

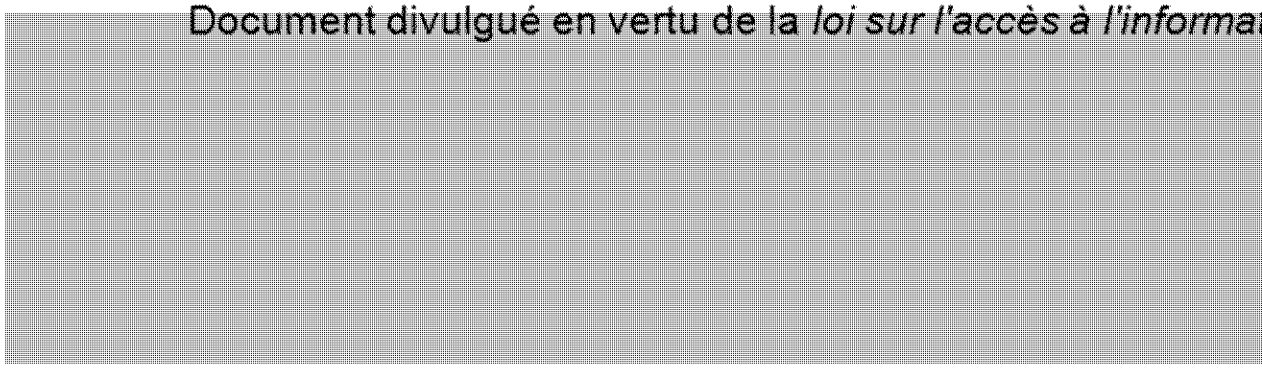
From: Marcia Jones
Sent: Tuesday, March 24, 2020 8:44 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: heads up
Importance: High

Hi Tim, just a heads up that we are preparing to post/issue the following **today**:

- The statement on vouchers – [redacted]
- The determination exempting carriers from the obligation to provide 120 days' advance notice before discontinuing or reducing a domestic route;

[redacted]

s.21(1)(a)
s.21(1)(b)



Marcia Jones
Dirigeante principale, Stratégies/Chief Strategy Officer
Office des transports du Canada/Canadian Transportation Agency
15, rue Eddy/15 Eddy Street
Gatineau, QC, K1A 0N9
(819) 953-0327
marcia.jones@otc-cta.gc.ca

s.21(1)(a)
s.21(1)(b)

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

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in

obligations in *force majeure* situations.

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

unprecedented circumstances.

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

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

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

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

En ce qui concerne les perturbations de vol indépendantes de la volonté de la compagnie aérienne, la *Loi sur les transports au Canada* et le *Règlement sur la protection des passagers aériens* exigent seulement que la compagnie aérienne veille à ce que les passagers effectuent leur itinéraire au complet. Certains tarifs de compagnies aériennes prévoient des remboursements dans certaines situations, mais renferment habituellement des articles qui peuvent dégager la compagnie aérienne de telles obligations dans des cas de force majeure.

Les différentes dispositions législatives, réglementaires et tarifaires ont été rédigées pour des perturbations à court terme relativement localisées. Aucune n'a été envisagée pour les types d'annulations massives de vols à l'échelle de la planète qui sont survenues au cours des dernières semaines en conséquence de la pandémie. Il est important de tenir compte de la façon dont nous devrons établir un équilibre qui soit

[redacted]

les réalités opérationnelles des compagnies aériennes dans ces circonstances extraordinaires et sans précédent.

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

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

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

Nadine Landry

From: Marcia Jones
Sent: Tuesday, March 24, 2020 8:50 AM
To: Tim Hillier
Cc: Vincent Turgeon; Cynthia Jolly; Caitlin Hurcomb; Allan Burnside
Subject: RE: heads up
Attachments: Statement.docx

Hi, here is the final version of the statement on vouchers going online [redacted]

Thanks,
Marcia

From: Marcia Jones
Sent: Tuesday, March 24, 2020 8:44 AM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>; Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>; Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
Subject: heads up
Importance: High

Hi Tim, just a heads up that we are preparing to post/issue the following **today**:

- The statement on vouchers - [redacted]

[redacted]

Marcia Jones
Dirigeante principale, Stratégies/Chief Strategy Officer
Office des transports du Canada/Canadian Transportation Agency
15, rue Eddy/15 Eddy Street
Gatineau, QC, K1A 0N9
(819) 953-0327
marcia.jones@otc-cta.gc.ca

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

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in [redacted] in *force majeure* situations.

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

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

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

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

Nadine Landry

From: Scott Streiner
Sent: Tuesday, March 24, 2020 8:40 AM
To: Marcia Jones; Valérie Lagacé
Cc: Sébastien Bergeron
Subject: RE: Statement
Attachments: Statement.docx

[redacted]

From: Scott Streiner
Sent: Tuesday, March 24, 2020 8:38 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement

[redacted]

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 8:35 AM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement

Good morning,

[redacted]

Thanks,
Marcia

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 7:40 AM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Statement

Bon matin [redacted]

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Nadine Landry

From: Valérie Lagacé
Sent: Monday, March 23, 2020 12:12 PM
To: Patrice Bellerose
Cc: Sébastien Bergeron
Subject: TR: Revised statement
Attachments: Statement.docx

HI Patrice, [redacted]

thanks

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valérie

[redacted]

Nadine Landry

From: Scott Streiner
Sent: Monday, March 23, 2020 12:09 PM
To: Valérie Lagacé
Cc: Liz Barker; Marcia Jones
Subject: RE: Revised statement

[redacted] Thanks.

-------- Original message --------
From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Date: 2020-03-23 12:07 p.m. (GMT-05:00)
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>, Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: Revised statement

[redacted]

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 23 mars 2020 12:00
À : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc : Liz Barker <Liz.Barker@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Objet : RE: Revised statement

[redacted]

From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 11:43 AM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: RE: Revised statement

[redacted] Valérie

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 23 mars 2020 11:37
À : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc : Liz Barker <Liz.Barker@otc-cta.gc.ca>
Objet : RE: Revised statement

Hi, Valérie. [redacted]

Thanks,

S

From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 9:23 AM
To: Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC < EC@otc-cta.gc.ca>
Subject: RE: Revised statement

[redacted]

De : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:21
À : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC < EC@otc-cta.gc.ca>
Objet : RE: Revised statement

[redacted]

Tom

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-23 9:09 AM (GMT-05:00)
To: +_EC < EC@otc-cta.gc.ca>
Subject: RE: Revised statement

Hi again, everyone [redacted]

Thanks,

S

From: Scott Streiner
Sent: Sunday, March 22, 2020 2:57 PM
To: + EC < EC@otc-cta.gc.ca>
Subject: Revised statement

Hi all

[redacted]

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Nadine Landry

From: Liz Barker
Sent: Monday, March 23, 2020 11:59 AM
To: Scott Streiner
Subject: RE: Revised statement

[redacted]

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: March-23-20 11:56 AM
To: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: FW: Revised statement

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Pages 100 to / à 101

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Nadine Landry

From: Caitlin Hurcomb
Sent: Monday, March 23, 2020 11:05 AM
To: Marcia Jones
Subject: FW: CTA announcement tomorrow

FYI – my response to TC

From: Caitlin Hurcomb
Sent: Monday, March 23, 2020 11:04 AM
To: 'Millette, Vincent' <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

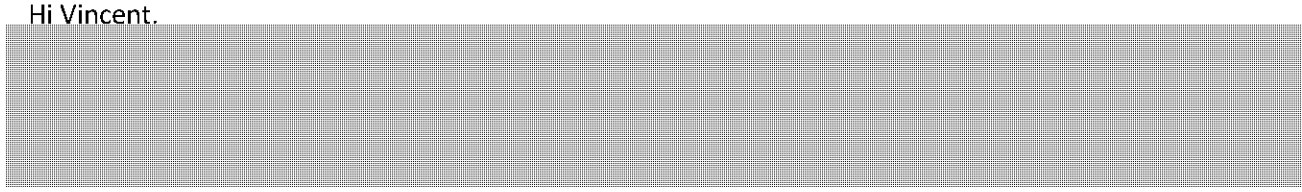
Hi Vincent.

Cait

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Monday, March 23, 2020 10:20 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Monday, March 23, 2020 10:15 AM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent.



s.21(1)(a)
s.21(1)(b)

[redacted]

Cait

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Monday, March 23, 2020 10:02 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Cait [redacted]

Thanks

From: Millette, Vincent
Sent: Sunday, March 22, 2020 2:22 PM
To: 'Caitlin Hurcomb' <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: CTA announcement tomorrow

Hi Cait - [redacted]

Thanks!

Sent from my BlackBerry 10 smartphone on the Rogers network.

Nadine Landry

From: Caitlin Hurcomb
Sent: Monday, March 23, 2020 10:46 AM
To: Marcia Jones
Subject: RE: CTA announcement tomorrow

[redacted]

From: Marcia Jones
Sent: Monday, March 23, 2020 10:45 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: Re: CTA announcement tomorrow

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Date: 2020-03-23 10:23 AM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

[redacted]

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Page 105

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Nadine Landry

From: Caitlin Hurcomb
Sent: Monday, March 23, 2020 10:40 AM
To: Millette, Vincent
Subject: RE: CTA announcement tomorrow

Hi Vincent,
I'm in a meeting right now, but will get back to you soon.

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Page 107

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Nadine Landry

From: Liz Barker
Sent: Monday, March 23, 2020 9:52 AM
To: Marcia Jones; Sébastien Bergeron; Valérie Lagacé; Tom Oommen; Scott Streiner; +_EC
Subject: RE: Revised statement

[redacted]

Liz

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: March-23-20 9:47 AM
To: Liz Barker <Liz.Barker@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

Hi all, [redacted]

Thanks,
Marcia

From: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 9:38 AM
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

[redacted]

From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Sent: March-23-20 9:29 AM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

[redacted]

Seb

Sébastien Bergeron
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:23
À : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC < EC@otc-cta.gc.ca>
Objet : RE: Revised statement

[redacted]

De : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:21
À : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC < EC@otc-cta.gc.ca>
Objet : RE: Revised statement

[redacted]

Tom

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-23 9:09 AM (GMT-05:00)
To: +_EC < EC@otc-cta.gc.ca>
Subject: RE: Revised statement

Hi again, everyone. [redacted]

s.21(1)(a)
s.21(1)(b)
s.23

[redacted]

Thanks,

S

From: Scott Streiner
Sent: Sunday, March 22, 2020 2:57 PM
To: +_EC < EC@otc-cta.gc.ca>
Subject: Revised statement

Hi, all. [redacted]

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Nadine Landry

From: Valérie Lagacé
Sent: Monday, March 23, 2020 9:50 AM
To: Simon-Pierre Lessard
Subject: TR: Revised statement
Attachments: Statement.docx

De : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Envoyé : 22 mars 2020 21:21
À : Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Cc : Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Objet : Fwd: Revised statement

Bonsoir sebastian,

[redacted]

Merci!

Valérie

Sent from my Bell Samsung device over Canada's largest network.

Duplicate

[redacted]

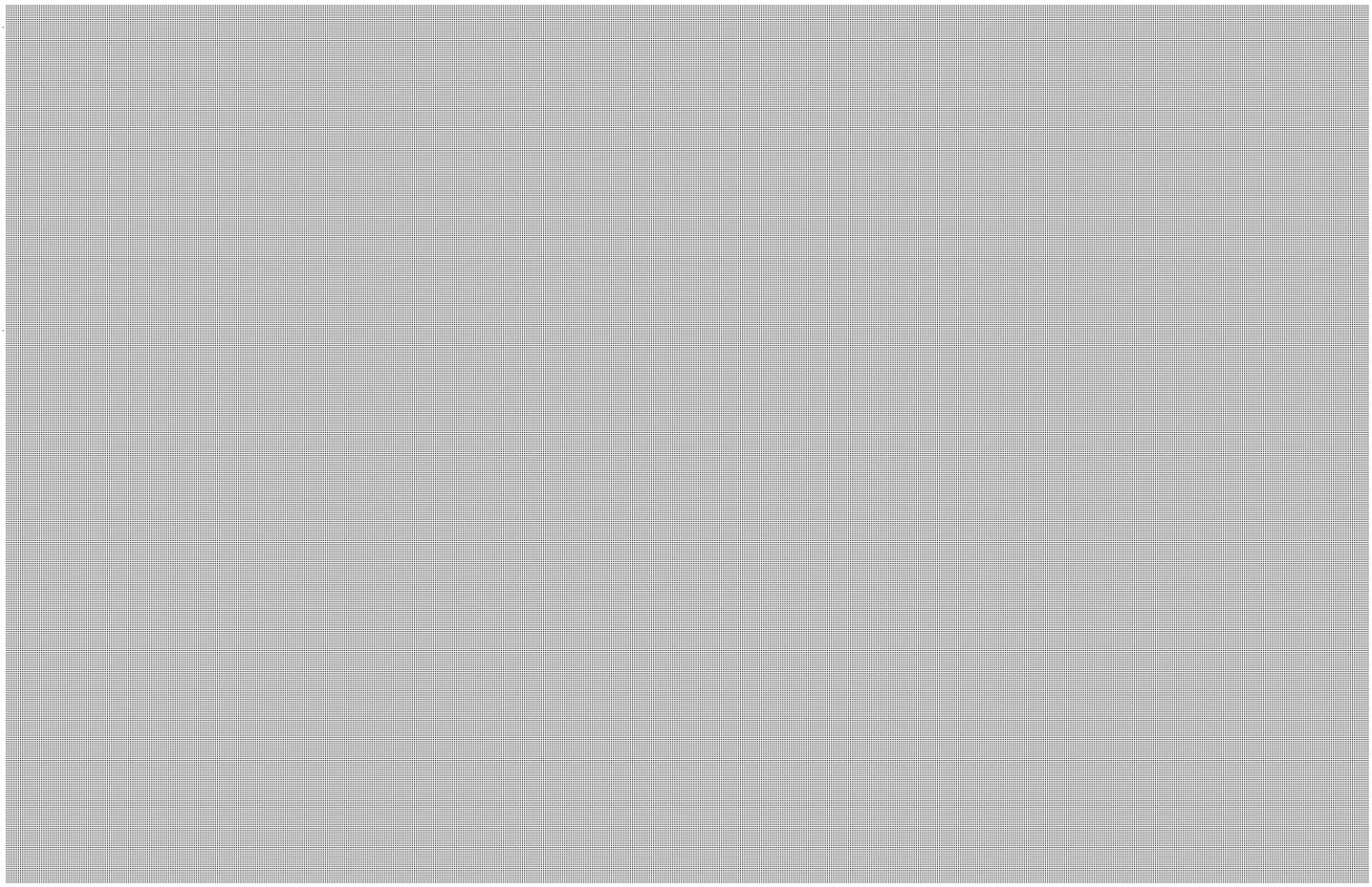
Nadine Landry

From: Marcia Jones
Sent: Monday, March 23, 2020 9:47 AM
To: Liz Barker; Sébastien Bergeron; Valérie Lagacé; Tom Oommen; Scott Streiner; +_EC
Subject: RE: Revised statement
Attachments:

Hi all,

Thanks,
Marcia

Duplicate



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Nadine Landry

From: Marcia Jones
Sent: Monday, March 23, 2020 9:41 AM
To: Valérie Lagacé; Tom Oommen; Scott Streiner; +_EC
Subject: RE: Revised statement

Hi,

[redacted]

Marcia

From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 9:23 AM
To: Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

[redacted]

De : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:21
À : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Objet : RE: Revised statement

[redacted] Tom

Sent from my Bell Samsung device over Canada's largest network.

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Nadine Landry

From: Simon Fecteau Labbé
Sent: Monday, March 23, 2020 9:33 AM
To: Cynthia Jolly
Subject: FW: Current drafts
Attachments: [redacted]; Statement.docx

Importance: High

Do you want me to post the statement on the website once it's done ?
I can coordinate with Maxime for Cision and Canada.ca

From: Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>
Sent: March-23-20 8:38 AM
To: Michael Parsons <Michael.Parsons@otc-cta.gc.ca>; Catherine Pirie <Catherine.Pirie@otc-cta.gc.ca>; Karen Jacob <Karen.Jacob@otc-cta.gc.ca>; Matilde Perrusclet <Matilde.Perrusclet@otc-cta.gc.ca>; Simon Fecteau Labbé <Simon.FecteauLabbe@otc-cta.gc.ca>
Subject: FW: Current drafts
Importance: High

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Sunday, March 22, 2020 3:31 PM
To: Tim Hillier <Tim.Hillier@otc-cta.gc.ca>
Cc: Cynthia Jolly <Cynthia.Jolly@otc-cta.gc.ca>; Vincent Turgeon <Vincent.Turgeon@otc-cta.gc.ca>
Subject: Fwd: Current drafts
Importance: High

Hi, just a heads up you will be asked to post on Monday, a statement and a decision.

The statement deals with passenger refunds via vouchers.

[redacted]

Marcia

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-22 12:42 PM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>

Subject: Current drafts

s.21(1)(a)
s.21(1)(b)

[redacted]

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Nadine Landry

From: Cynthia Jolly
Sent: Monday, March 23, 2020 8:38 AM
To: Michael Parsons; Catherine Pirie; Karen Jacob; Matilde Perrusclet; Simon Fecteau Labbé
Subject: FW: Current drafts
Attachments: [redacted]Statement.docx

Importance: High

Categories: To do

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[redacted]

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Nadine Landry

From: Tom Oommen
Sent: Sunday, March 22, 2020 6:53 PM
To: John Dodsworth; Martin Dalpé; John Touliopoulos
Cc: Valérie Lagacé
Subject: RE: Debrief from Sunday EC

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>
Date: 2020-03-22 6:48 PM (GMT-05:00)
To: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>, John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>, Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: Debrief from Sunday EC

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>
Date: 2020-03-22 18:37 (GMT-05:00)
To: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>, John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>, Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: Debrief from Sunday EC

[redacted]

Martin

From: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>
Sent: Sunday, March 22, 2020 6:21 PM
To: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>; John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>; Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: Debrief from Sunday EC

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>
Date: 2020-03-22 18:19 (GMT-05:00)
To: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>, John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>, Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: Debrief from Sunday EC

Martin Dalpé
Gestionnaire, Licences et affrètements
Manager, Licences and Charters
Office des transports du Canada (OTC)
Canadian Transportation Agency (CTA)
Tel. 819 953-9788 Cel. 819 635-6311

-------- Original message --------
From: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>
Date: 2020-03-22 6:06 p.m. (GMT-05:00)
To: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>, John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>, Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: Debrief from Sunday EC

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>
Date: 2020-03-22 18:00 (GMT-05:00)
To: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>, John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>, Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Cc: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Subject: RE: Debrief from Sunday EC

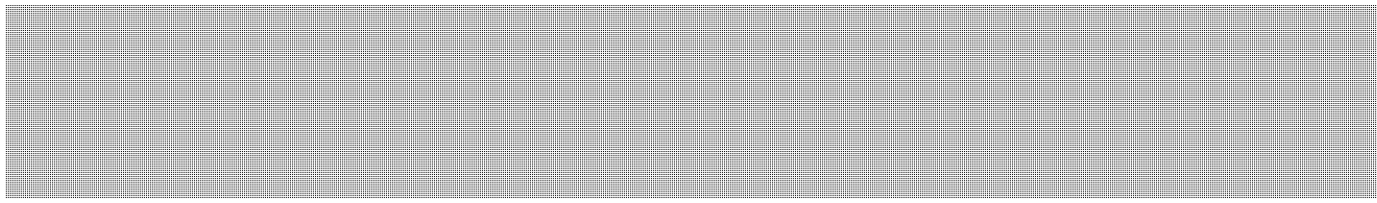
[redacted]

Martin

Martin Dalpé
Gestionnaire, Licences et affrètements
Manager, Licences and Charters
Office des transports du Canada (OTC)
Canadian Transportation Agency (CTA)
Tel. 819 953-9788 Cel. 819 635-6311

-------- Original message --------
From: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>
Date: 2020-03-22 5:49 p.m. (GMT-05:00)
To: John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>, Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Cc: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>, Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>

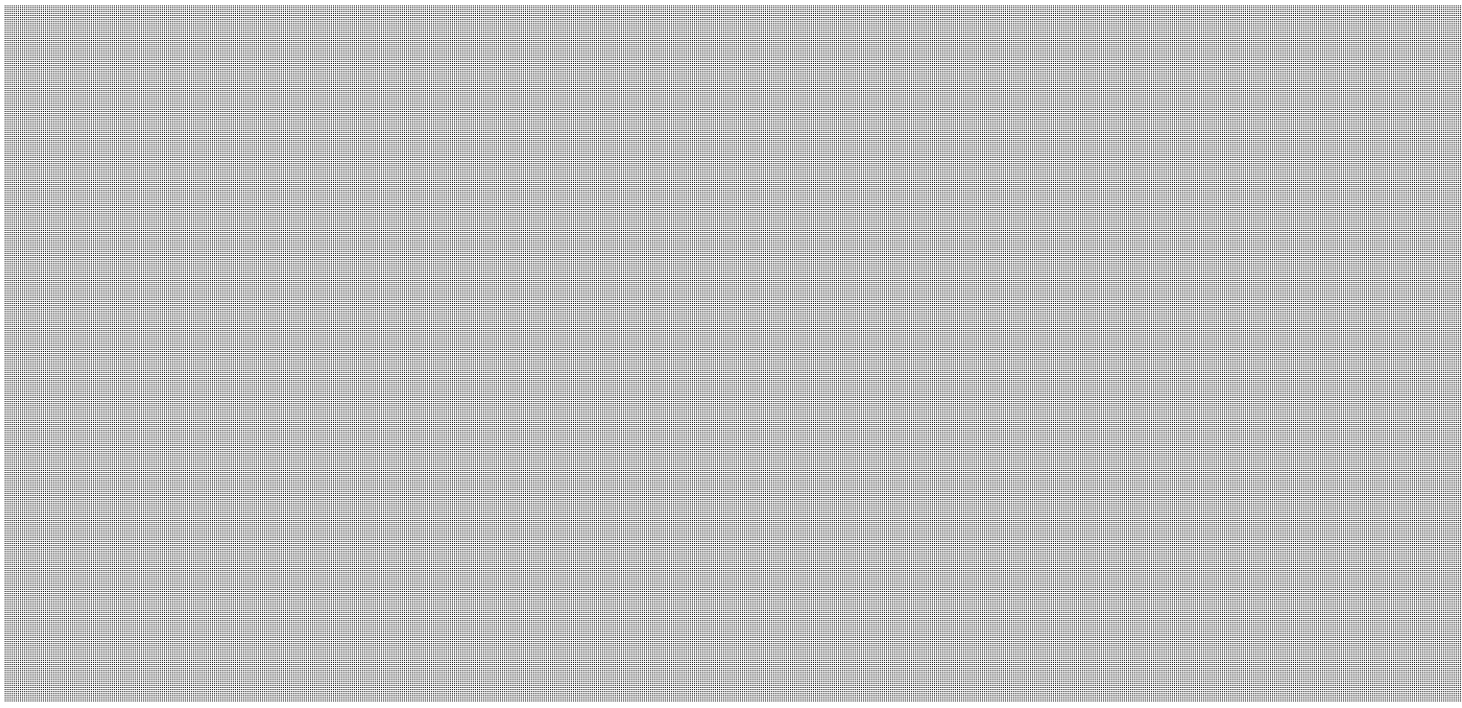
Subject: RE: Debrief from Sunday EC



Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>
Date: 2020-03-22 16:16 (GMT-05:00)
To: Tom Oommen <Tom.Oommen@otc-cta.gc.ca>, John Dodsworth <John.Dodsworth@otc-cta.gc.ca>
Cc: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>
Subject: RE: Debrief from Sunday EC

Tom



John

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Tom Oommen <Tom.Oommen@otc-cta.gc.ca>

Date: 2020-03-22 11:10 AM (GMT-05:00)
To: John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>, Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>, Jason Tsang <Jason.Tsang@otc-cta.gc.ca>, Marc Thomson <Marc.Thomson@otc-cta.gc.ca>, Carole Girard <Carole.Girard@otc-cta.gc.ca>
Subject: Debrief from Sunday EC

Nadine Landry

From: Valérie Lagacé
Sent: Sunday, March 22, 2020 6:52 PM
To: Martin Dalpé; John Dodsworth; John Touliopoulos; Tom Oommen
Subject: Re: Debrief from Sunday EC

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>
Date: 2020-03-22 6:50 PM (GMT-05:00)
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>, John Dodsworth <John.Dodsworth@otc-cta.gc.ca>, John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>, Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Subject: RE: Debrief from Sunday EC

[redacted]

Martin

> **From:** Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
> **Sent:** Sunday, March 22, 2020 6:46 PM
> **To:** Martin Dalpé <Martin.Dalpe@otc-cta.gc.ca>; John Dodsworth <John.Dodsworth@otc-cta.gc.ca>; John Touliopoulos <John.Touliopoulos@otc-cta.gc.ca>; Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
> **Subject:** Re: Debrief from Sunday EC
>
> [redacted]
>
> Sent from my Bell Samsung device over Canada's largest network.

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Pages 127 to / à 130

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Nadine Landry

From: Valérie Lagacé
Sent: Sunday, March 22, 2020 6:51 PM
To: Patrice Bellerose
Subject: Fwd: Revised statement
Attachments: Statement.docx

Hi Patrice,

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

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[redacted]

Nadine Landry

From: Valérie Lagacé
Sent: Sunday, March 22, 2020 12:08 PM
To: John Dodsworth
Subject: RE: they will go ahead with a section 80 exemption

[redacted]

De : John Dodsworth <John.Dodsworth@otc-cta.gc.ca>
Envoyé : 22 mars 2020 11:23
À : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Objet : RE: they will go ahead with a section 80 exemption

[redacted]

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Date: 2020-03-22 11:20 (GMT-05:00)
To: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>
Subject: they will go ahead with a section 80 exemption

Hi John,

[redacted]

thanks

valérie

Nadine Landry

From: David Dawson
Sent: Tuesday, March 17, 2020 11:59 AM
To: Kristen Webster; Victorhea Rivilla-Biaoco; Zubair Parkar; Megan Grandmaison Carroll; Mandy Chan
Subject: FW: COVID 19 APR tracking
Attachments:

Fyi

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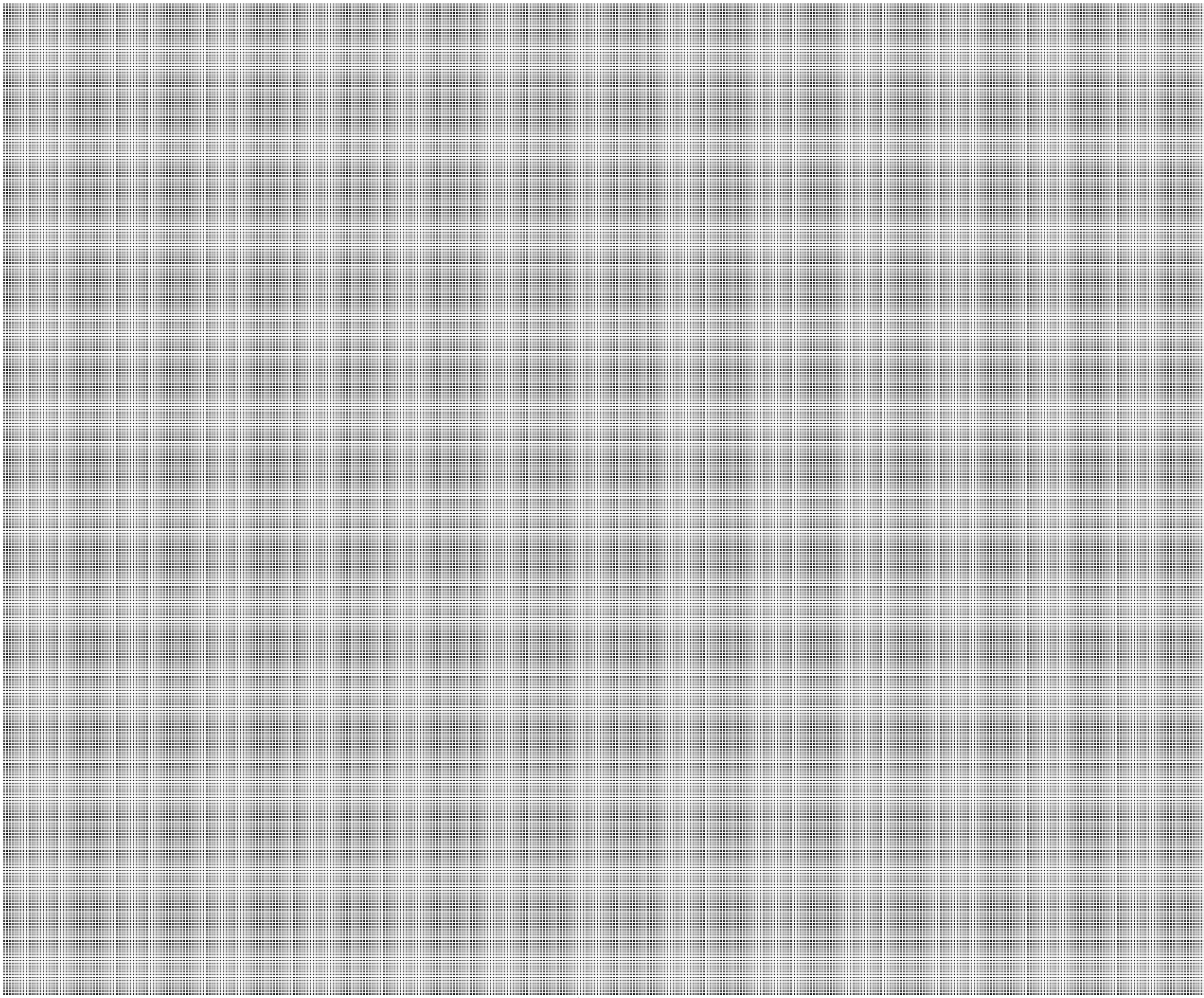

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Nadine Landry

From: Timothy Zarins
Sent: Wednesday, March 11, 2020 10:50 AM
To: Caitlin Hurcomb
Subject: RE: by way of example

Hi Cait,

[redacted]

Ireland has adapted CAA's guidance and added a small FAQ table: https://www.aviationreg.ie/news/covid-19-related-advice-%e2%80%93-guidance-on-regulation-ec2612004-.947.html

US DOT has so far issued an Enforcement Notice informing the public that airlines may deny boarding if they are traveling to the US from a country with a CDC travel health notice: https://www.transportation.gov/individuals/aviation-consumer-protection/enforcement-notice-regarding-denying-boarding-airlines

[redacted]

Tim

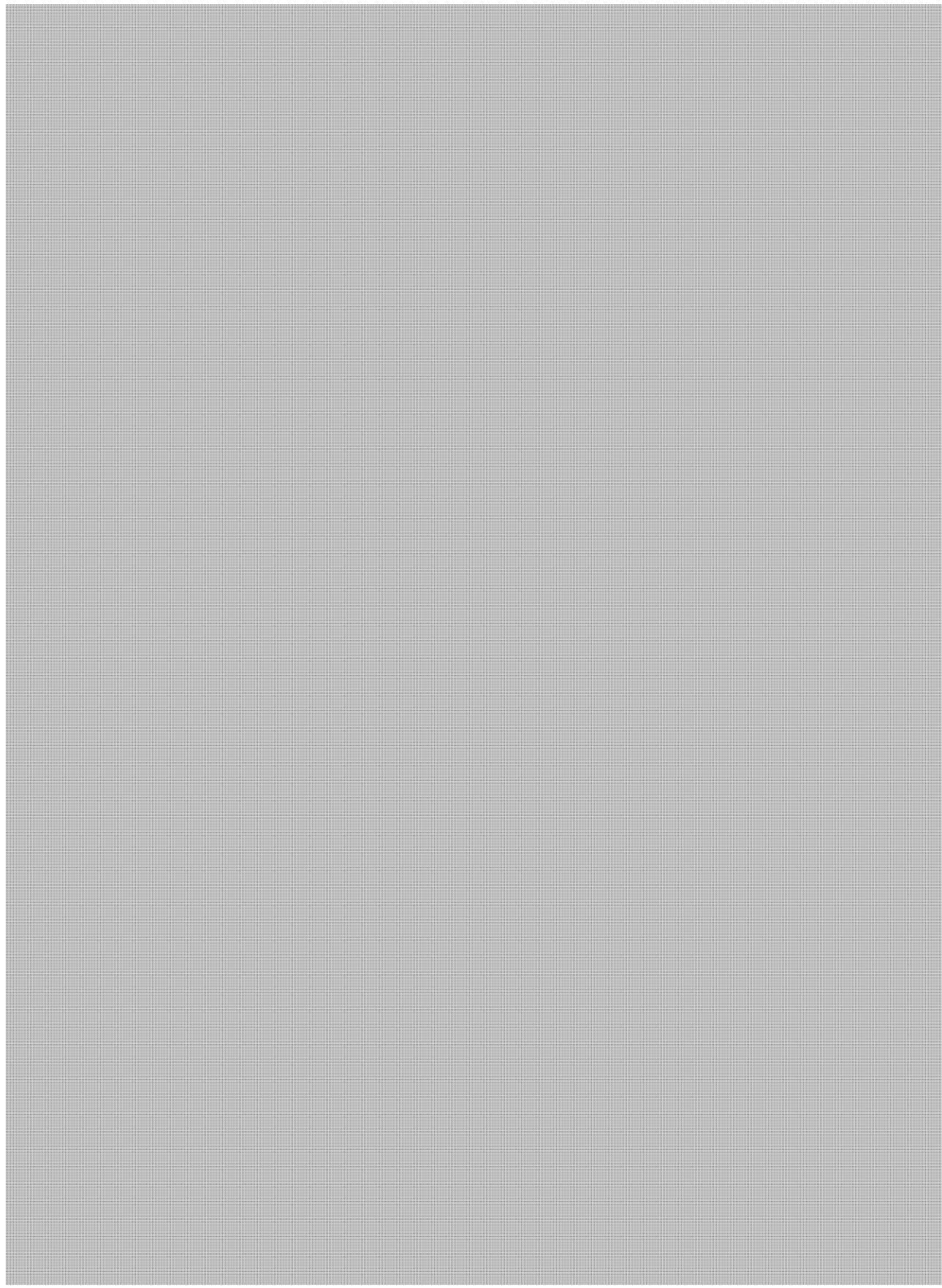
Tim Zarins
819-953-9903

> **From:** Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
> **Sent:** Wednesday, March 11, 2020 10:04
> **To:** Timothy Zarins <Timothy.Zarins@otc-cta.gc.ca>
> **Subject:** FW: by way of example
>
> Hi Tim,
> [redacted] Thanks!
>
> > **From:** Marcia Jones
> > **Sent:** Wednesday, March 11, 2020 9:59 AM
> > **To:** Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
> > **Cc:** Allan Burnside <Allan.Burnside@otc-cta.gc.ca>
> > **Subject:** FW: by way of example
> >
> > Cait [redacted] - thanks
> >
> > > **From** [redacted]@westjet.com>
> > > **Sent:** Wednesday, March 11, 2020 9:48 AM
> > > **To:** Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
> > > **Subject:** by way of example

s.20(1)(b)

s.20(1)(c)

Guidance on the application of Regulation EC261/2004 in the context of the developing situation with Covid-19



s.19(1)
s.20(1)(b)
s.20(1)(c)

[redacted]

[redacted] Government Relations and Regulatory Affairs
116 Lisgar Street, Suite 600
Ottawa,ON
K2P 0C2

P [redacted] | W westjet.com

WESTJET
Love Where You're Going

Nadine Landry

From: Timothy Zarins
Sent: Friday, March 13, 2020 3:39 PM
To: Marcia Jones
Cc: Caitlin Hurcomb
Subject: RE: Coronavirus : l'Italie a trouvé la parade au remboursement des voyages... quid de la France ?

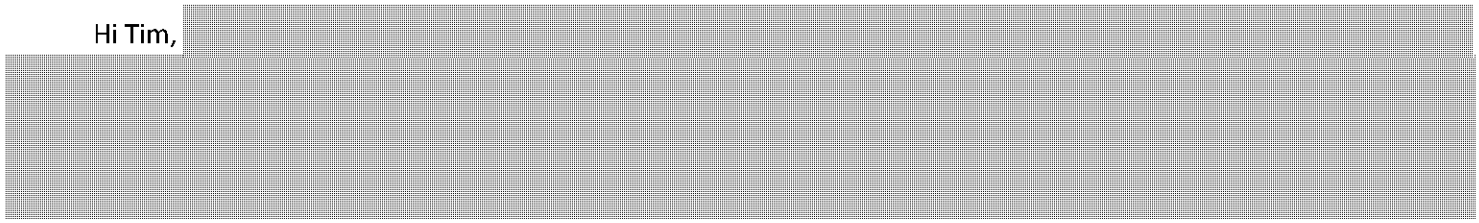
Hi Marcia,

Tim

Tim Zarins
819-953-9903

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Friday, March 13, 2020 15:10
To: Timothy Zarins <Timothy.Zarins@otc-cta.gc.ca>
Cc: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: Coronavirus : l'Italie a trouvé la parade au remboursement des voyages... quid de la France ?
Importance: High

Hi Tim,



https://www.tourmag.com/Coronavirus-l-Italie-a-trouve-la-parade-au-remboursement-des-voyages-quid-de-la-France_a102778.html

Thanks,
Marcia

Nadine Landry

From: Timothy Zarins
Sent: Tuesday, March 17, 2020 11:56 AM
To: David Dawson
Subject: COVID 19 APR tracking
Attachments: RE: by way of example; RE: Coronavirus : l'Italie a trouvé la parade au remboursement des voyages... quid de la France ?

Hi Dave,

[redacted]

(https://www.iata.org/en/programs/safety/health/diseases/government-measures-related-to-coronavirus/)

[redacted]

(https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/mobility_en)

Italy notably issued a decree that required all transportation service providers to provide full refunds for cancelled trips (second email).

[redacted]

Tim

Tim Zarins

Analyste subalterne, Affaires réglementaires
Office des transports du Canada | Gouvernement du Canada
timothy.zarins@otc-cta.gc.ca | 819-953-9903

Junior Analyst, Regulatory Affairs
Canadian Transportation Agency | Government of Canada
timothy.zarins@otc-cta.gc.ca | 819-953-9903

Nadine Landry

From: Matilde Perrusclet
Sent: Thursday, March 26, 2020 8:32 AM
To: Vincent Turgeon
Subject: FW: Statement - problem
Attachments: RDIM-2127038-Statement on Vouchers-R.DOCX

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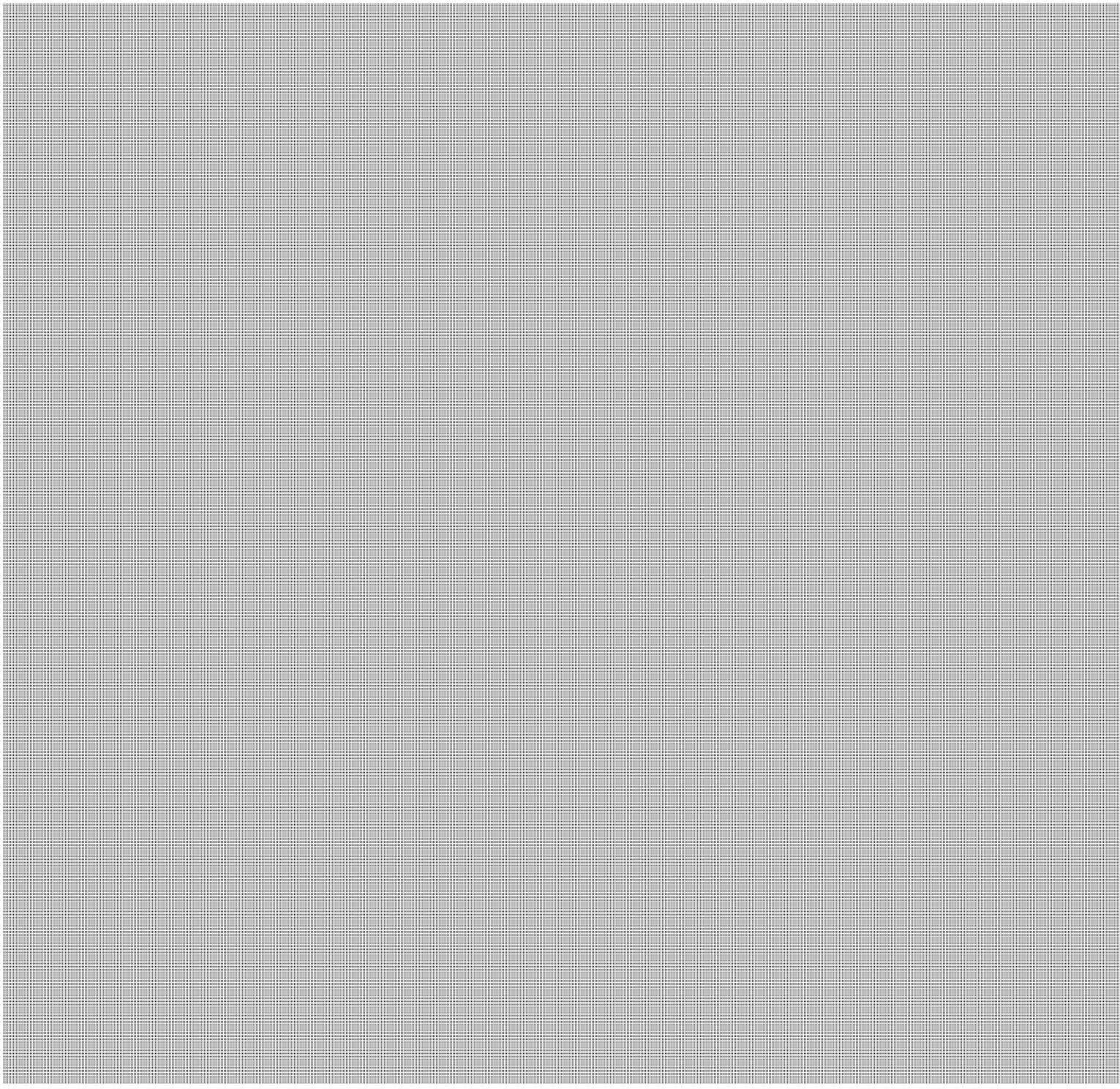

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The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

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

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

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

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

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

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

Formatted: Highlight

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

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

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

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

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

Nadine Landry

From: Marcia Jones
Sent: Wednesday, March 25, 2020 1:55 PM
To: Renée Langlois
Cc: Tim Hillier; Vincent Turgeon; Valérie Lagacé; Caitlin Hurcomb
Subject: FW: Statement
Attachments: Statement.docx

Over to you! ☺

> **From:** Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
> **Sent:** Wednesday, March 25, 2020 1:35 PM
> **To:** Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
> **Cc:** Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Liz Barker <Liz.Barker@otc-cta.gc.ca>
> **Subject:** Statement

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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

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

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

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

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

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

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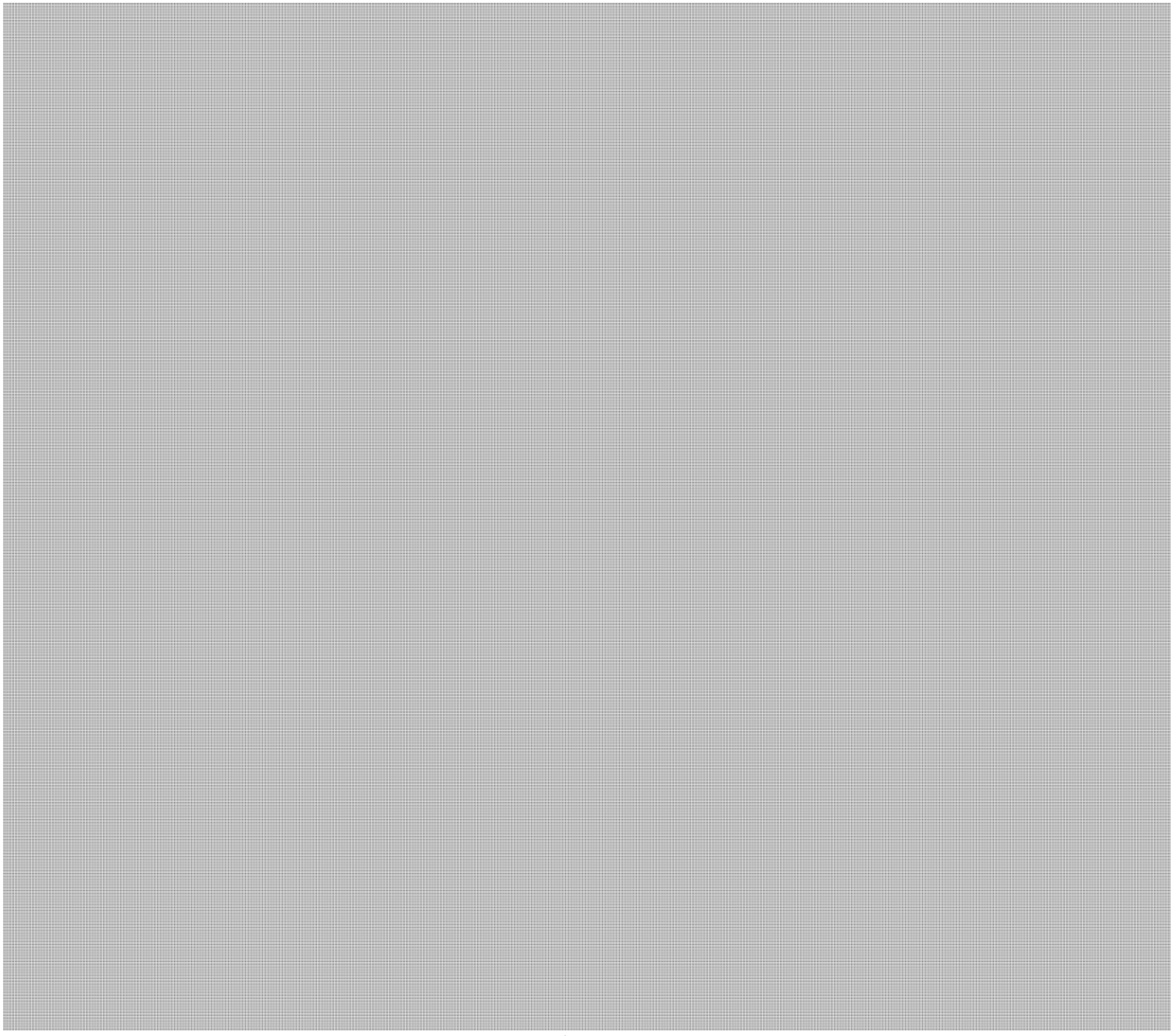
Nadine Landry

From: Cynthia Jolly
Sent: Tuesday, March 24, 2020 10:00 AM
To: Matilde Perrusclet
Subject: FW: Statement re passenger refunds
Attachments: RDIM-2127038-COVID-19 APPR Statement-R.DOCX; RDIM-2127049-COVID-19 APPR Statement - French-R.DOCX

Importance: High

Duplicate



Pages 150 to / à 151

are duplicates

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Nadine Landry

From: Cynthia Jolly
Sent: Tuesday, March 24, 2020 8:46 AM
To: web; Matilde Perrusclet; Simon Fecteau Labbé
Subject: FW: heads up - UPCOMING web publicshing today

Importance: High

Follow Up Flag: Follow up
Flag Status: Completed

Duplicate

00152

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

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

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

Pages 154 to / à 161
are withheld pursuant to sections
sont retenues en vertu des articles

21(1)(a), 21(1)(b)

of the Access to Information Act
de la Loi sur l'accès à l'information

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

affirmed before me on January 3, 2021

"Simon Lin"

Signature

A-2020-00029 - Access to Information - Notice of release

OTC.AIPRP-ATIP.CTA <OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca> Wed, Dec 23, 2020 at 7:49 AM
To: "lukacs@AirPassengerRights.ca" <lukacs@airpassengerrights.ca>

December 23, 2020

PROTECTED A

Our file: A-2020-00029

Dear Gabor Lukacs:

This is in response to your request received at our office on August 25th, 2020 and submitted under the *Access to Information Act* (Act) for the following records:

"All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers (https://otc-cta.gc.ca/eng/statement-vouchers). The time period we request is March 11, 2020 to April 9, 2020."

Further to the email that was sent to you on September 29th, 2020, please find enclosed the records which are responsive to your request. Please be advised that certain records or portions thereof have been withheld under the following dispositions of the Act:

- 19(1) personal information
- 20(1)(b) financial, commercial, scientific or technical information given in confidence to the government and treated in a consistently in a confidential manner by the third party.
- 20(1)(c) information that could result in a financial loss or gain
- 21(1)(a) advice or recommendations
- 21(1)(b) consultations or deliberations
- 23 solicitor-client privilege information

Feel free to review the above dispositions of the Act at https://laws-lois.justice.gc.ca/eng/acts/A-1/page-1.html.

Please be advised that you are entitled to complain to the Information Commissioner of Canada concerning the processing of your request within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3
Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Should you have any questions, please do not hesitate to contact the ATIP office by email at OTC.AIPRP-ATIP.CTA@otc-cta.gc.ca.

Sincerely,

Myriame Côté

Coordonnatrice d'AIPRP, Direction, Gestion de l'information et des technologies

Office des transports du Canada / Gouvernement du Canada

Myriame.Cote@otc-cta.gc.ca / Tél. : **819-743-7259**

ATIP Coordinator, Information Management & Technology Services Directorate

Canadian Transportation Agency / Government of Canada

Myriame.Cote@otc-cta.gc.ca / Tel. : **819-743-7259**

A-2020-00029 - Release copy.pdf
1419K

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

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

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

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

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

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

Date: April 8, 2020

Issued by: _____

JEAN-FRANÇOIS DUPORT
REGISTRY OFFICER
AGENT DU GREFFE

Address of
local office: Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario, K1A 0H9

TO: **CANADIAN TRANSPORTATION AGENCY**

APPLICATION

This is an application for judicial review pursuant to section 28 of the *Federal Courts Act* in respect of two public statements issued on or about March 25, 2020 by the Canadian Transportation Agency [**Agency**], entitled "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] that cites the Statement.

These public statements, individually or collectively, purport to provide an unsolicited advance ruling on how the Agency will treat and rule upon complaints of passengers about refunds from air carriers relating to the COVID-19 pandemic.

The Statement was issued without hearing the perspective of passengers whatsoever.

The Applicant makes application for:

1. a declaration that:

   (a) the Agency's Statement **is not** a decision, order, determination, or any other ruling of the Agency and has no force or effect of law;

   (b) the issuance of the Statement on or about March 25, 2020, referencing of the Statement within the COVID-19 Agency Page, and the subsequent distribution of those publications is contrary to the Agency's own *Code of Conduct* and/or gives rise to a reasonable apprehension of bias for:

      i. the Agency as a whole, or

      ii. alternatively, the appointed members of the Agency who supported the Statement;

   (c) further, the Agency, or alternatively the appointed members of the Agency who supported the Statement, exceeded and/or lost its (their) jurisdiction under the *Canada Transportation Act*, S.C. 1996, c. 10 to rule upon any complaints of passengers about refunds from carriers relating to the COVID-19 pandemic;

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

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

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

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

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

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

3. an interlocutory order that:

(a) the Agency shall forthwith completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page and substitute it with this Court's interlocutory order, or alternatively the order renewing the interim clarification (subparagraph 2(a) above), until final disposition of the Application;

(b) the interim orders in subparagraphs 1(b)-(c) above are maintained until final disposition of the Application;

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

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

4. a permanent order that:

(a) the Agency prominently post at the top portion of the COVID-19 Agency Page that the Agency's Statement has been ordered to be removed by this Court;

(b) the Agency remove the Statement, and references to the Statement within the COVID-19 Agency Page, from its website and replace the Statement with a copy of this Court's judgment;

(c) in the event the Agency receives any formal complaint or informal inquiry regarding air carriers' refusal to refund in respect of the COVID-19 pandemic, promptly and prominently inform the complainant of this Court's judgment; and

(d) the Agency, or alternatively the appointed members of the Agency who supported the Statement, be enjoined from dealing with any complaints involving air carriers' refusal to refund passengers in respect of the COVID-19 pandemic, and enjoined from issuing any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic;

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

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

The grounds for the application are as follows:

A. Overview

1. The present Application challenges the illegality of the Canadian Transportation Agency's Statement, which purports to provide an unsolicited advance ruling in favour of air carriers without having heard the perspective of passengers beforehand.

2. The Statement and the COVID-19 Agency Page preemptively suggest that the Agency is leaning heavily towards permitting the issuance of vouchers in lieu of refunds. They further suggest that the Agency will very likely dismiss passengers' complaints to the Agency for air carriers' failure to refund during the COVID-19 pandemic, irrespective of the reason for flight cancellation.

3. Despite the Agency having already determined in a number of binding legal decisions throughout the years that passengers have a fundamental right to a refund in cases where the passengers could not travel for events outside of their control, the Agency now purports to grant air carriers a blanket immunity from the law via the Statement, without even first hearing passengers' submissions or perspective as to why a refund is **mandated** by law. This is inappropriate.

4. The Agency, as a quasi-judicial tribunal, must at all times act with impartiality. That impartiality, unfortunately, has clearly been lost, as demonstrated by the Agency's issuance of the unsolicited Statement and usage thereof.

5. The fundamental precept of our justice system is that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" (*R. v. Yumnu*, 2012 SCC 73 at para. 39). This fundamental precept leaves no room for any exception, even during difficult times like the COVID-19 pandemic.

6. Impartiality is further emphasized in the Agency's own *Code of Conduct* stipulating that the appointed members of the Agency shall not express an opinion on potential cases.

B. The COVID-19 Pandemic

7. The coronavirus [**COVID-19**] is a highly contagious virus that originated from the province of Hubei in the Peoples Republic of China, and began spreading outside of the Peoples Republic of China on or around January 2020.

8. On or about March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.

9. On or about March 13, 2020, the Government of Canada issued a blanket travel advisory against non-essential travel outside of Canada until further notice and restricting entry of foreign nationals into Canada, akin to a "declaration of war" against COVID-19, and that those in Canada should remain at home unless absolutely necessary to be outside of their homes [**Declaration**].

10. COVID-19 has disrupted air travel to, from, and within Canada. The disruption was brought about by the COVID-19 pandemic and/or the Declaration, such as:

    (a) closure of borders by a number of countries, resulting in cancellation of flights by air carriers;

    (b) passengers adhering strictly to government travel advisories (such as the Declaration) and refraining from air travel (and other forms of travel) unless absolutely necessary; and

    (c) air carriers cancelling flights on their own initiative to save costs, in anticipation of a decrease in demand for air travel.

C. The Agency's Actions in Relation to COVID-19, Including the "Statement on Vouchers"

11. Since March 13, 2020 and up to the date of filing this Application, the Agency has taken a number of steps in relation to COVID-19. Those listed in the four sub-paragraphs below are **not** the subject of review in this Application.

    (a) **On March 13, 2020**, the Agency issued Determination No. A-2020-42 providing, *inter alia*, that various obligations under the *Air Passen-*

ger Protection Regulations, SOR/2019-150 [**APPR**] are suspended until April 30, 2020:

i. Compensation for Delays and Inconvenience for those that travel: compensation to passengers for inconvenience has been reduced and/or relaxed (an air carrier's obligation imposed under paragraphs 19(1)(a) and 19(1)(b) of the *APPR*);

ii. Compensation for Inconvenience to those that do not travel: the air carrier's obligation, under subsection 19(2) of the *APPR* to pay compensation for inconvenience to passengers who opted to obtain a refund instead of alternative travel arrangement, if the flight delay or the flight cancellation is communicated to passengers more than 72 hours before the departure time indicated on the passengers' original ticket; and

iii. Obligation to Rebook Passengers on Other Carriers: the air carrier's obligation, under paragraphs 17(1)(a)(ii), 17(1)(a)(iii), and 18(1)(a)(ii) of the *APPR*.

(b) **On or about March 25, 2020**, the Agency issued Determination No. A-2020-47 extending the exemptions under Decision No. A-2020-42 (above) to June 30, 2020. This Determination further exempted air carriers from responding to compensation requests within 30 days (s. 19(4) of *APPR*). Instead, air carriers would be permitted to respond to compensation requests 120 days *after* June 30, 2020 (e.g. October 28, 2020).

(c) **On or about March 18, 2020**, the Agency issued Order No. 2020-A-32, suspending **all** dispute proceedings until April 30, 2020.

(d) **On or about March 25, 2020**, the Agency issued Order No. 2020-A-37, extending the suspension (above) to June 30, 2020.

12. On or about March 25, 2020, almost concurrently with the Order and Determination on the same date (above), the Agency publicly posted the Statement on its website (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **En-**

glish: https://otc-cta.gc.ca/eng/statement-vouchers) providing that:

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

13. On or about March 25, 2020, concurrently with the Statement, the Agency posted an amendment to the COVID-19 Agency Page on its website, adding four references to the Statement (French: **Information importante pour les voyageurs pour la periode de la COVID-19** [https://otc-cta.gc.ca/fra/information-

importante-pour-voyageurs-pour-periode-covid-19]; English: **Important Information for Travellers During COVID-19** [https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19]).

14. The COVID-19 Agency Page cites and purports to apply the Statement in the context of an air carrier's legal obligation in three circumstances: (1) situations outside airline control (including COVID-19 situations); (2) situations within airline control; and (3) situations within airline control, but required for safety.

15. In effect, the COVID-19 Agency Page purports to have relieved air carriers from providing passengers with refunds in practically **every** imaginable scenario for cancellation of flight(s), contrary to the Agency's own jurisprudence and the minimum passenger protections under the *APPR*.

D. Jurisprudence on Refunds for Passengers

16. Since 2004, in a number of decisions, the Agency confirmed passengers' fundamental right to a refund when, for whatever reason, an air carrier is unable to provide the air transportation, including those outside of the air carrier's control:

(a) *Re: Air Transat*, Decision No. 28-A-2004;
(b) *Lukács v. Porter*, Decision No. 344-C-A-2013, para. 88;
(c) *Lukács v. Sunwing*, Decision No. 313-C-A-2013, para. 15; and
(d) *Lukács v. Porter*, Decision No. 31-C-A-2014, paras. 33 and 137.

17. The Agency's jurisprudence was entirely consistent with the common law doctrine of frustration, the civil law doctrine of *force majeure*, and, most importantly, common sense.

18. The *APPR*, which has been in force since 2019, merely provides **minimum** protection to passengers. The *APPR* does not negate or overrule the passengers' fundamental right to a refund for cancellations in situations outside of a carrier's control.

19. Furthermore, the COVID-19 Agency Page also suggests that the Statement *would* apply to cancellations that are within airline control, or within airline control but required for safety purposes, squarely contradicting the provisions

of subsection 17(7) of the *APPR*. Subsection 17(7) clearly mandates that any refund be in the original form of payment, leaving no room for the novel idea of issuing a voucher or credit.

20. Finally, whether an air carrier's flight cancellation could be characterized as outside their control, or within their control, remains to be seen. For example, if a cancellation was to save costs in light of shrinking demand, it may be considered a situation within an air carrier's control. However, the Statement and the COVID-19 Agency Page presuppose that **any and all** cancellations at this time should be considered outside an air carrier's control.

21. The combined effect of the Statement and the COVID-19 Agency Page purports to ignore decade old and firmly established jurisprudence of the Agency. This all occurred without any formal hearing, adjudication, determination, or otherwise, or even a single legal submission or input from the passengers.

22. As described further below, the Agency does not even outline its legal basis or provide any support for those public statements.

23. The Agency's public statements are tantamount to endorsing air carriers in illegally withholding the passengers' monies, all without having to provide the services that were contracted for. The air carriers all seek to then issue vouchers with varying expiry dates and usage conditions to every passenger, effectively depriving all the passengers of their fundamental right to a refund, which is a right the Agency itself firmly recognized.

E. The Agency's Conduct Gives Rise to a Reasonable Apprehension of Bias

24. The Agency is a quasi-judicial tribunal that is subject to the same rules of impartiality that apply to courts and judges of the courts.

25. Tribunals, like courts, speak through their legal judgments and not media postings or "statements."

26. The Statement and/or the COVID-19 Agency Page is not a legal judgment. They give an informed member of the public the perception that it would be more

likely than not that the Agency, or the members that supported the Statement, will not be able to fairly decide the issue of refunds relating to COVID-19.

27. The Agency has already stipulated a general rule, outside the context of a legal judgment, that refunds need not be provided. No support was provided for this radical departure from the fundamental rights of passengers. The Agency merely provided a bald assertion or conclusion that passengers are not entitled to any refund.

28. The Agency's own Code of Conduct expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work, or comments that may create a reasonable apprehension of bias:

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

29. Although neither the Statement, nor the COVID-19 Agency Page, contain the signature or names of any specific member of the Agency, given the circumstances and considering the Agency's own Code of Conduct providing that the professional civilian staff's role are to **fully** implement the appointed member(s)' directions, the Statement and the COVID-19 Agency Page ought to be attributed to the member(s) who supported the Statement either before or after its posting on the internet.

30. In these circumstances, the Court must proactively step in to protect the passengers, to ensure that "justice should not only be done, but should manifestly and undoubtedly be seen to be done," and to ensure that the administration of justice is not put to disrepute.

31. The Court ought to issue an interim, interlocutory, and/or permanent order restricting the Agency's involvement with passengers' COVID-19 related refunds against air carriers.

F. The Applicant

32. The Applicant is a non-profit corporation under the *Canada Not-for-profit Corporations Act*, SC 2009 that is an advocacy group representing the rights of air passengers.

33. Air Passenger Rights is led by a Canadian air passenger rights advocate, Dr. Gábor Lukács, whose work and public interest litigation has been recognized by this Honourable Court in a number of judgments:

(a) *International Air Transport Assn et al. v. AGC et al.* (Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020) that:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener [Dr. Gábor Lukács] would defend the interests of airline passengers in a way that the parties [the Agency, the Attorney General of Canada, and an airlines trade association] cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal [...]

(b) *Lukács v. Canada (Transportation Agency)* 2016 FCA 174 at para. 6;

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

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

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

G. Statutory provisions

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

(a) *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections

25, 37, and 85.1;

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

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

35. Such further and other grounds as counsel may advise and this Honourable Court permits.

This application will be supported by the following material:

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

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

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

1. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents involving the appointed members of the Agency relating to the Statement and/or issuance of vouchers or credits in relation to the COVID-19 incident, including both before and after publication of the Statement;

2. The number of times the URLs for the Statements were accessed (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **English**: https://otc-cta.gc.ca/eng/statement-vouchers) from March 24, 2020 onward;

3. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents between the Canadian Transportation Agency and the travel industry (including but not limited to any travel agencies, commercial airlines, industry groups, etc.) from February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected

by COVID-19; and

4. Complete and unredacted copies of all correspondences, e-mails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.

April 6, 2020

"Simon Lin"

SIMON LIN
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6

Tel: 604-620-2666
Fax: 888-509-8168

simonlin@evolinklaw.com

Counsel for the Applicant,
Air Passenger Rights

Federal Court of Appeal | Cour d'appel fédérale

TO : APPEAL REGISTRY

FROM : WEBB J.A.

DATE : November 13, 2020

RE : **A-102-20:**
Air Passenger Rights v. Canadian Transportation Agency

DIRECTION

The parties have submitted a number of letters related to a request made under Rule 317 of the *Federal Courts Rules*, SOR/98-106 by Air Passenger Rights (APR). APR requested material relevant to its judicial review application that is in the possession of the Canadian Transportation Agency (CTA). The CTA has objected to this request.

Rules 317 and 318 state:

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.
(2) An applicant may include a request under subsection (1) in its notice of application.	(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.
(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.	(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.
318 (1) Within 20 days after service of	318 (1) Dans les 20 jours suivant la

a request under rule 317, the tribunal shall transmit	signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :
(a) a certified copy of the requested material to the Registry and to the party making the request; or	a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
(b) where the material cannot be reproduced, the original material to the Registry.	b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.
(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.	(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.
(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).	(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.
(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.	(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

A number of submissions have been made without first seeking the directions of the Court under Rule 318(3). It would appear (although it is not entirely clear) that the parties are seeking directions concerning how this issue between the parties should be resolved. The last correspondence (dated October 19, 2020) refers to the previous correspondence submitted by the parties collectively as the "Requests for Directions".

In this case, it would appear that APR wants to compel the CTA to produce some material and that the CTA is objecting to such production. APR should therefore bring a motion requesting an order to compel the production of the requested material.

"WWW"

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE MOVING PARTY, AIR PASSENGER RIGHTS

Motion pursuant to Rules 41 and 318 of the *Federal Courts Rules*

VOLUME 2 of 3

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Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS OF THE MOVING PARTY

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Applicant seeks an order under Rule 318(4) for the Canadian Transportation Agency [**Agency**] to transmit certain materials, or alternatively, leave under Rule 41 to issue a subpoena to the Agency's CEO to produce the same materials.

2. The underlying Application relates to the widely disseminated "Statement on Vouchers" that the Agency published on its website on March 25, 2020 and the "Important Information for Travellers During COVID-19" page on the Agency's website that was updated on the same date to cite the Statement on Vouchers [the **Publications**]. These Publications purport to guide the travelling public on their legal right to refunds.

3. The Applicant is a non-profit organization seeking judicial review on behalf of and for the benefit of the travelling public based on two distinct grounds of review:

(a) **Reasonable Apprehension of Bias Ground** [**RAB Ground**] — the Agency's issuing of the Publications is contrary to the Agency's own *Code of Conduct*, **and** gives rise to a reasonable apprehension of bias with respect to the Agency's members who supported and/or endorsed the Publications; and

(b) **Misinformation Ground** — the content of the Publications contains misinformation and omissions about passengers' legal rights vis-à-vis the airlines, and creates confusion for the travelling public.

4. The Applicant requests the following materials [**Materials**]:

> Complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos.

5. The Materials are relevant and necessary for the adjudication of the Reasonable Apprehension of Bias Ground advanced by the Applicant because the Agency's appointed members' involvement with the Publications, including the identity of those members and both the nature and extent of their involvement, as well as the Agency's objective in issuing the Publications, are facts in dispute.

6. Two justices of this Honourable Court have already confirmed that this RAB Ground presents a *serious issue to be tried* on its merits.[1]

7. This motion is brought pursuant to Webb, J.A.'s November 13, 2020 direction.

B. The Canadian Transportation Agency

8. The Agency is a statutory body created by the *Canada Transportation Act*. It administers a regulatory scheme for transportation by air from, to, and within Canada.

9. In respect of air travel, the Agency has two main roles under its enabling statute: (i) as a quasi-judicial tribunal, it adjudicates consumer disputes between passengers and carriers; and (ii) as the economic regulator, it regulates entrants into the air travel industry through its statutory powers to issue operating licenses or permits to airlines.[2]

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1 *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 17 [Tab 9, p. 439]; and *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 155 at para. 33 [Tab 10, p. 452].

2 *Lukács v. Canada (Transp. Agency)*, 2014 FCA 76 at paras. 50-52 [Tab 22, p. 636].

Organizational Structure: Chairperson, Appointed Members, and Staff

10. The Agency's enabling statute prescribes that the Agency is composed exclusively of its appointed members, appointed by the Governor in Council. Appointed members exercise the powers conferred upon the Agency by its enabling statute.[3]

11. Appointed members of the Agency are assisted by a roster of civil service staff, who are supervised directly or indirectly by the appointed members.[4] Civil service staff are not appointed members, and have no authority act on the Agency's behalf. It is the Agency's appointed members who are ultimately responsible for the Agency's actions and the work performed by the civil service staff.

12. Two of the Agency's appointed members are designated as the chairperson and vice-chairperson, respectively.[5]

13. The chairperson is designated as the chief executive officer, who has supervision over and direction of the work of the appointed members and civil service staff.[6]

14. The Agency's chairperson and chief executive officer is presently Mr. Scott Streiner, whose address for service is the headquarters of the Agency at 15 Eddy Street, Gatineau, Quebec K1A 0N9, with an e-mail address at Scott.Streiner@otc-cta.gc.ca.[7]

Code of Conduct for the Agency's appointed members

15. As a quasi-judicial body, the Agency's appointed members are held to a high standard of professional and ethical conduct, akin to judicial members of a court. The Agency's *Code of Conduct* further reinforces the standard statutory and common law rules with specific safeguards of the members' independence, and prohibitions against

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3 *Canada Transportation Act*, ss. 7(2) and 16 [Tab 8, pp. 433 and 435].
4 *Canada Transportation Act*, s. 19 [Tab 8, p. 436].
5 *Canada Transportation Act*, s. 7(3) [Tab 8, p. 433].
6 *Canada Transportation Act*, s. 13 [Tab 8, p. 434].
7 Lukács Affidavit, Exhibit "F" [Tab 2F, p. 49].

outside influence and conduct that might create an apprehension of bias:

> (39) Members shall not communicate with political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.
>
> (40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.[8]

C. Agency's Publications: Statement on Vouchers and COVID-19 Agency Page

16. On March 11, 2020, the World Health Organization [**WHO**] declared COVID-19 a global pandemic.[9] On March 13, 2020, the Government of Canada issued a travel advisory against non-essential travel outside of Canada until further notice and restricted entry of foreign nationals into Canada.[10]

17. Around the time of the WHO and Government of Canada announcements, the face of air travel changed significantly, with airlines cancelling numerous flights and also passengers no longer travelling for non-essential reasons.[11] This state of affairs led to a multitude of disputes between airlines and passengers, where passengers were demanding refunds for unused airfares and the airlines were refusing to refund those airfares but instead insisted on issuing credits or vouchers to the passengers.[12]

18. On March 25, 2020, the Agency published or updated two unattributed commentaries on its website [collectively the **Publications**]:

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8 *Code of Conduct for Members of the Agency*, paras. 39 and 40 – Lukács Affidavit, Exhibit "I" (emphasis added) [Tab 2I, p. 71].
9 Lukács Affidavit, Exhibit "J" [Tab 2J, p. 73].
10 Lukács Affidavit, Exhibit "K [Tab 2K, p. 78].
11 *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 1 [Tab 9, p. 437].
12 Lukács Affidavit, para. 28 [Tab 2, p. 13].

(a) a new webpage titled the "Statement on Vouchers" [**Statement**];[13] and

(b) an existing webpage titled "Important Information for Travellers During COVID-19" that was updated to reference the Statement in numerous respects [**COVID-19 Agency Page**].[14]

19. The face of the Statement endorsed airlines in issuing vouchers to guard their cash flow. The Statement also gave the passengers the impression that the Agency considered all flights cancelled during the pandemic as disruptions outside the airlines' control, and there would be no right to refunds for unused airfares. The Agency widely disseminated the Statement, including on Twitter, responses to passenger inquiries, and within their *pro forma* complaint acknowledgment emails.[15]

20. Subsequently, the travel industry, including airlines, travel agencies, and travel insurers, were relying on the Agency's Statement as a ruling, support, and/or approval for airlines issuing vouchers or credits instead of refunds to fend off passengers.[16]

21. The Transport Minister later presented the Agency's position on vouchers to a House of Commons COVI Committee as a ruling on the refunds issue "in a non-binding way" and the authority that has sealed the public debate on this topic.[17]

i. Appointed Agency Members' Involvement with the Publications

22. The Agency has persistently refused to acknowledge that its appointed members were involved with the Publications. The Agency did not identify any of the members that may have approved, supported, or otherwise endorsed the Publications.

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[13] Lukács Affidavit, Exhibit "L" [Tab 2L, p. 82].
[14] Lukács Affidavit, Exhibit "M" [Tab 2M, p. 84].
[15] Lukács Affidavit, Exhibits "N", "O", and "P" [Tabs 2N- 2P, pp. 89, 89, and 111].
[16] Lukács Affidavit, Exhibits "X" and "Y" [Tabs 2X and 2Y, pp. 154 and 174].
[17] COVI Committee, Evidence (43rd Parl., 1st Sess., No. 013), p. 14 – Lukács Affidavit, Exhibit "Z" [Tab 2Z, p. 177].

23. The evidence on this motion, however, establishes that the Agency's appointed members were, in fact, involved with the Publications—as explained below.

24. A Transport Canada policy advisor confirmed on October 5, 2020 to a Member of Parliament that the Statement on Vouchers was issued in the name of the Agency, with the approval of the Agency's members.[18]

25. On December 1, 2020, Mr. Streiner testified at the House of Commons Standing Committee on Transport, Infrastructure and Communities [**TRAN Committee**].

(a) In response to a question about Mr. Streiner's involvement with the Statement on Vouchers, he replied "as head of the organization, I am always involved, of course."[19]

(b) Mr. Streiner stated that the Statement on Vouchers was also "reviewed by senior members of the organization."[20]

26. Redacted Agency records disclosed on December 23, 2020 under the *Access to Information Act* [***ATIA***] strongly support an inference that at least the chairperson and vice-chairperson approved the Publications prior to their issuance.[21]

ii. Airlines' and Transport Canada's Input on the Publications

27. The Agency was not acting independently with respect to the Publications, but had input from the airlines and Transport Canada during the drafting process.[22]

28. On March 11, 2020, an individual from WestJet's "Government Relations and Regulatory Affairs" team sent a lengthy email to the Agency's Chief Strategy Officer

[18] Email exchange between Ms. Blake Oliver and MP Nathaniel Erskine-Smith, dated October 5, 2020 – Lukács Affidavit, Exhibit "Q" [Tab 2Q, p. 115].
[19] TRAN Committee, Evidence (43rd Parl., 2nd Sess., No. 008), p. 11 – Lukács Affidavit, Exhibit "R" [Tab 2R, p. 130].
[20] *Ibid.*
[21] Lukács Affidavit, para. 35 and Exhibit "S" [Tabs 2 and 2S, pp. 16 and 133].
[22] Lukács Affidavit, paras. 42-45 [Tab 2, pp. 19-21].

with the subject line "by way of example," which was circulated within the Agency as part of the drafting of the Statement on Vouchers. In the copy disclosed under the *ATIA*, the Agency redacted the entire content of that email save for one line.[23]

29. On March 12, 2020, Air Transat's Senior Director of Government and Industry Affairs emailed the Agency's Chief Strategy Officer with the subject line "APPR Guidelines - COVID-19," thanked her for a verbal discussion "re the above-mentioned matter" earlier that morning, and urged the Agency to issue guidance to assist Air Transat in dealing with passenger refunds and protecting employment levels.[24]

30. On March 22, 2020 in the morning, the Agency held an "EC" (Executive Committee) meeting.[25] At 2:22pm on the same day, Transport Canada's manager for national air services policy commenced an email chain with the Agency using the subject line "CTA announcement tomorrow," which continued until March 24, 2020.[26] This heavily redacted email chain was disclosed by the Agency under *ATIA*, as part of a response to a request for records relating to the drafting of the Statement on Vouchers.[27]

iii. Subsequent Changes to the Publications

31. Subsequent to the filing of the present application for judicial review, the Agency modified the Statement on Vouchers twice to add further content that was not present on March 25, 2020. The COVID-19 Agency page was also modified at least once to remove the contents that were present on March 25, 2020. All these modifications were made without notice, and without annotating what was modified and when.[28]

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[23] Lukács Exhibit "U" [Tab 2U, p. 143].
[24] Lukács Exhibit "V" [Tab 2V, p. 118].
[25] December 23, 2020 *ATIA* disclosure, pp. 00121-00126 – Lukács Affidavit, Exhibit "AJ" [Tab 2, pp. 343-348].
[26] Lukács Affidavit, Exhibit "W" [Tab 2W, 150].
[27] Lukács Affidavit, Exhibit "AK" [Tab 2AK, p. 373].
[28] Lukács Affidavit, paras. 50-55 [Tab 2, pp. 22-24].

D. Procedural History

32. The Applicant is a non-profit entity advocating for the travelling public's rights.[29]

33. On April 7, 2020, the Applicant brought this application seeking judicial review on behalf and for the benefit of the travelling public, based on two distinct grounds:

(a) **Reasonable Apprehension of Bias Ground** [**RAB Ground**] — the Agency's issuing of the Publications is contrary to the Agency's own *Code of Conduct*, **and** gives rise to a reasonable apprehension of bias with respect to the Agency's members who supported and/or endorsed the Publications; and

(b) **Misinformation Ground** — the content of the Publications contains misinformation and omissions about passengers' legal rights vis-à-vis the airlines, and creates confusion for the travelling public.

34. Two justices of this Court have confirmed that the Reasonable Apprehension of Bias Ground raises a *serious issue to be tried*, and Webb, J.A. held that the application is to be heard on its merits before a panel of this Honourable Court.[30]

i. Applicant's Interlocutory Injunctions Motion

35. On April 7, 2020, the Applicant brought a motion for interlocutory injunctions seeking removal of the Statement and references thereto, or alternatively posting of prominent warnings, and also enjoining the Agency's appointed members from dealing with passenger cases touching upon the Publications' subject-matter pending final disposition of the application [**Interlocutory Injunctions Motion**].

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[29] Lukács Affidavit, paras. 2-7 [Tab 2, pp. 8-9].

[30] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 17 [Tab 9, p. 439]; and *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 155 at para. 33 [Tab 10, p. 452].

36. On May 22, 2020, Mactavish, J.A. dismissed the Interlocutory Injunctions Motion. Mactavish, J.A. accepted that the Reasonable Apprehension of Bias Ground raises a *serious issue to be tried*;[31] however, she held that:

(a) the apprehension of bias allegation should normally be directed at the appointed members of the Agency;[32] and

(b) at the time of hearing the Interlocutory Injunctions Motion, there was no evidence before Mactavish, J.A. that the Agency's appointed members were involved with, or otherwise endorsed, the Publications.[33]

37. It was only after the Interlocutory Injunctions Motion was decided that evidence of the Agency's appointed members' involvement with the Publications came to light.[34]

ii. Agency's Motion to Strike

38. The Agency brought a motion to strike the notice of application upon the lifting of the COVID-19 suspension for this proceeding, on August 3, 2020.

39. Webb, J.A. dismissed the Agency's motion to strike on October 2, 2020, and held that the Reasonable Apprehension of Bias Ground raises a *serious issue to be tried*, and as such this ground merits a hearing before a panel of this Honourable Court.[35]

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[31] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 17 [Tab 9, p. 439].
[32] *Ibid.*, at para. 33 [Tab 9, p. 442].
[33] *Ibid.*, at para. 35 [Tab 9, p. 442].
[34] See paragraphs 24-26 above; Email exchange between Ms. Blake Oliver and MP Nathaniel Erskine-Smith, dated October 5, 2020 – Lukács Affidavit, Exhibit "Q" [Tab 2Q, p. 115]; TRAN Committee, Evidence (43rd Parl., 2nd Sess., No. 008), p. 11 – Lukács Affidavit, Exhibit "R" [Tab 2R, p. 130]; and Lukács Affidavit, paras. 35 and 41, and Exhibit "S" [Tabs 2 and 2S, pp. 16 and 19, and 133].
[35] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 155 at para. 33 [Tab 10, p. 452].

iii. The Agency's Sole Objection to Transmit Relevant Materials

40. The Notice of Application contained a request that the Agency transmit four categories of relevant materials in its possession to the Registry and the Applicant.[36]

41. On August 20, 2020, the Agency objected to the request to transmit materials, pursuant to Rule 318(2), on the sole basis that

> [...] the application does not relate to an "order" of a tribunal, Rule 317 does not apply.[37]

42. In response to the parties' requests for directions, Webb, J.A. directed on November 13, 2020 that the Applicant bring the present motion to compel the production of records that the Applicant requests for the judicial review application.[38]

43. In the interest of a swift resolution of this motion and the application, the Applicant is pursuing only one category of the requested materials, and with a narrower date range. On this motion, the Applicant is requesting the following materials from the Agency:

> Complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos [**Materials**].

E. No Alternative Means to Obtain the Materials from the Agency

44. In an effort to avoid multiple interlocutory motions, Dr. Lukács made a formal request under the *ATIA* to the Agency for:

> All documents, including e-mails, notes, meeting minutes, internal correspondences, and any other written record, relating to the drafting, review, approval, and/or publication of the Statement on Vouchers [...]. The time period we request is March 11, 2020 to April 9, 2020.[39]

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[36] Notice of Application, request to transmit [Tab 3, p. 389].
[37] Lukács Affidavit, Exhibit "AC" [Tab 2AC, p. 187].
[38] Direction of Webb, J.A., dated November 13, 2020 [Tab 4, p. 391].
[39] Lukács Affidavit, Exhibit "AE" [Tab 2AE, p. 205].

45. The Agency identified approximately 10,000 pages of responsive records.[40] The records Dr. Lukács requested under the *ATIA* would include the Materials.

46. Although Agency staff gave an assurance on October 29, 2020 that a response to the access request would be provided "within 2-4 weeks," the Agency did not grant any access within the statutory deadline.[41]

47. On December 23, 2020, nearly three months after the statutory deadline and without prior notice, the Agency emailed to Dr. Lukács 137 pages of records.[42] The Agency did not indicate whether the remaining 9,863 pages would be disclosed, nor provide an explanation why they would not be disclosed. The 137 pages of records consisted of emails and the contents of those emails were almost fully redacted.[43]

48. While the Agency's handling of the *ATIA* request is not in issue in the present proceeding, the Agency's initial response indicating that it has identified approximately 10,000 page of records confirms that the Materials that the Applicant requests on this motion do exist. Furthermore, the Agency's *ATIA* response on December 23, 2020, enclosing 137 pages of records out of 10,000 pages, demonstrates that the Agency will not voluntarily disclose any of the Materials that are necessary for the fair and full adjudication of the Reasonable Apprehension of Bias Ground for judicial review.

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[40] Agency's October 29, 2020 email: "Our system has generated a large volume of 10 000 pages approximately" – Lukács Affidavit, Exhibit "AI" [Tab 2AI, p. 233].

[41] The Agency's conduct amounts to "deemed refusal" under subsection 10(3) of the *ATIA* [Tab 6, p. 423]. Dr. Lukács filed a deemed refusal complaint with the Office of the Information Commissioner – Lukács Affidavit, para. 68 [Tab 2, p. 27].

[42] Lukács Affidavit, Exhibit "AK" [Tab 2AK, p. 373].

[43] Lukács Affidavit, Exhibit "AJ" [Tab 2AJ, p. 235].

PART II – STATEMENT OF THE POINTS IN ISSUE

49. The issues to be decided on this motion are:

(a) Whether the Agency should be ordered to transmit the Materials under Rule 318(4).

(b) Alternatively, whether a subpoena should be issued to the Agency's Chief Executive Officer to produce the same Materials under Rule 41.

PART III – STATEMENT OF SUBMISSIONS

50. The crux of the present motion is that a reviewing court must not be deprived of evidence necessary for adjudicating all grounds of judicial review.

51. Judicial review is a constitutionally entrenched public law remedy[44] by which courts uphold the rule of law and ensure that administrative bodies act within the bounds of their statutory mandate under the law.[45] Judicial review is not merely to aright individual injustices, but also to protect society as a whole from administrative overreach or improper conduct,[46] which are the focus of the underlying application.

52. A court conducting judicial review must have an adequate evidentiary record before it to allow the court to carry out its constitutional function, adjudicate all grounds of review, and to ensure that the administrative body is not immunized from scrutiny or otherwise avoids accountability for its improper conduct or actions.[47]

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[44] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 31 [Tab 15, p. 503]; and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 13 [Tab 19, p. 582].

[45] *Highwood Congregation of Jehovah's Witnesses (Judicial Comm.) v. Wall*, 2018 SCC 26 at para. 13 [Tab 19, p. 582] citing with approval *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 14 [Tab 20, p. 599].

[46] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] S.C.R. 602 at para. 50 [Tab 26, p. 665].

[47] *Lukács v. Canada (Transp. Agency)*, 2016 FCA 103 at para. 7 [Tab 23, p. 640].

53. An administrative body's objection to the evidence must be meticulously scrutinized because it could "as a matter of practical reality, deny the applicants any prospect of successfully advancing the arguments they are otherwise entitled to make."[48]

54. In this case, Reasonable Apprehension of Bias is a ground of judicial review that this Honourable Court will be adjudicating. As noted earlier, two judges of this Court have confirmed that this ground raises a *serious issue to be tried* on its merits.[49]

55. The Materials are relevant and necessary for the fair adjudication of the Reasonable Apprehension of Bias ground on its merits, and ought to be produced. As Justice Reed of the Federal Court held:

> An applicant is entitled to the production of documents in the possession of the Tribunal or the respondent which demonstrate, or tend to demonstrate bias on the part of a Board member, or the Board generally [...]."[50]

56. The central question on this motion is therefore not *whether* the Materials should be placed before this Honourable Court, but rather the procedural mechanics of *how* those Materials should be sought from the Agency.

57. The Applicant submits that Rules 318 and 41 of the *Federal Courts Rules* provide ample authority for this Honourable Court to order production of the Materials from the Agency.

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[48] *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74 at para. 20 [Tab 18, p. 565], a case cited with approval in *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at para. 6 [Tab 23, p. 640].

[49] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 17 [Tab 9, p. 439]; and *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 155 at para. 33 [Tab 10, p. 452].

[50] *Majeed v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 908 at para. 3 (emphasis added) [Tab 24, p. 647]; aff'd [1994] F.C.J. No. 1401 [Tab 25, p. 649]. Since the bias ground was already conceded by the public body in that case, the documents were not required to be produced in *Majeed*.

A. The Materials are Relevant and Necessary for Adjudicating the RAB Ground

58. The Materials are sought to advance the Reasonable Apprehension of Bias Ground.[51] Whether a reasonable apprehension of bias arises is largely fact driven.[52]

59. The two main lines of inquiry under the RAB Ground and the evidence necessary to fully adjudicate this ground can be grouped as follows:

(i) **Appointed Members' Involvement with the Publications**, including both the names of the Agency's appointed members that approved, supported, and/or endorsed the Publications, and the nature and extent of each of those appointed members' involvement in the Publications.

(ii) **Agency's Objective in Issuing the Publications**, including the nature and extent of the external influences on the Agency from the airline industry and/or Transport Canada.

60. Ascertaining the relevance of documents to an application for judicial review involves considering whether there is "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence."[53] In that context, the Notice of Application must be read generously and holistically, without fastening onto matters of form, to determine its true substance and to define the facts that are in issue.[54]

61. The Applicant will address the relevance of the aforementioned groups of evidence in the next two subsections.

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[51] Notice of Application, paras. 28-29 [Tab 3, p. 387].
[52] *R. v. S. (R.D.)*, [1997] 3 SCR 484 at para. 114 [Tab 30, p. 792].
[53] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at paras. 57-58 [Tab 13, p. 474].
[54] *Tsleil-Waututh Nation v. Canada (A.G.)*, 2017 FCA 128 at paras. 109-110 [Tab 31, p. 824].

(i) Appointed Members' Involvement with the Publications

62. A court adjudicating an allegation of reasonable apprehension of bias must consider two interrelated questions: *who* and *what*. The first question concerns the identity of the individuals whose actions are alleged to have created reasonable apprehension of bias. The second question is about the actions of those individuals in their context.[55]

63. The question of *who* concerns identifying the appointed members of the Agency whose actions are alleged to have created the reasonable apprehension of bias. Such identification is required because, according to Mactavish, J.A., reasonable apprehension of bias should normally be directed at the appointed members of the Agency.[56]

64. The question of *what* concerns the actions taken by those identified individual(s), such as approval, support, or endorsement to views or parties that may give rise to reasonable apprehension of bias.[57]

65. The Materials are necessary to enable this Court to answer both the *who* and the *what* questions.

66. On the *who* question, there have been substantial developments since the Interlocutory Injunctions Motion was determined. Back then, there was no evidence that appointed members of the Agency were involved in the Publications.

67. Subsequent to the determination of the Interlocutory Injunctions Motion, however, evidence that the Agency's appointed members were, in fact, involved with the Publications has come to light.

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[55] *R. v. S. (R.D.)*, [1997] 3 SCR 484 at para. 111 [Tab 30, p. 791].
[56] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 33 [Tab 9, p. 442].
[57] *Zündel v. Citron*, 2000 CanLII 17137 (FCA) at para. 47 [Tab 36, p. 910]; and *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 35 [Tab 9, p. 442].

(a) Redacted Agency documents disclosed under the *ATIA* strongly support an inference that at least the Chairperson and Vice-Chairperson approved the Publications prior to their issuance.[58]

(b) Mr. Streiner testified at the House of Commons TRAN Committee that he and unidentified senior members of the Agency were involved in the preparation and approval of the Publications.[59]

(c) A Transport Canada policy advisor confirmed to a Member of Parliament that the Statement on Vouchers was issued in the name of the Agency, with the approval of the Agency's members.[60]

68. The Transport Canada policy advisor's confirmation lays the evidentiary foundation on the present motion for the fact that all of the Agency's appointed members were involved with the Publications. That confirmation, being hearsay, is admissible on this motion, but may not be admissible at the hearing of the application on its merits.[61]

69. The intervention of this Honourable Court is therefore needed to ensure that admissible evidence, identifying the specific members who were involved with the Publications, will be available to the Court at the hearing of the application on its merits.

70. After identifying the specific appointed members who were involved with the Publications, this Court will also have to determine what an individual properly informed of the circumstances, viewing the matter realistically and practically and having thought the matter through, would conclude about each of the involved Agency members.[62]

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[58] Lukács Affidavit, para. 35 and Exhibit "S" [Tabs 2 and 2S, pp. 16 and 133].
[59] TRAN Committee, Evidence (43rd Parl., 2nd Sess., No. 008), p. 11 – Lukács Affidavit, Exhibit "R" [Tab 2R, p. 130].
[60] Email exchange between Ms. Blake Oliver and MP Nathaniel Erskine-Smith, dated October 5, 2020 – Lukács Affidavit, Exhibit "Q" [Tab 2Q, p. 115].
[61] *Federal Courts Rules*, Rule 81(1) [Tab 7, p. 427].
[62] *Miglin v. Miglin*, 2003 SCC 24 at para. 26 [Tab 27, p. 683]; and *Yukon Francophone School Board v. Yukon (A.G.)*, 2015 SCC 25 at paras. 21-23 [Tab 33, p. 850].

71. To that end, the Court will need to consider the *nature* and *extent* of each identified members' involvement with the Publications, including whether the member approved, supported, or otherwise endorsed the Publications.[63]

72. The Materials demonstrate or tend to demonstrate[64] the nature and extent of each individual members' involvement with the Publications, and as such they are relevant[65] and necessary to fully adjudicate the Reasonable Apprehension of Bias Ground.

(ii) Documents on the Agency's Objective in Issuing the Publications

73. The Agency's objective in issuing the Publications is a fact in dispute. It is alleged that the Agency drafted the Publications as an extrajudicial measure to assist the airlines in fending off passengers' demand for refunds.[66] The Agency disputes this and claims that it was acting independently to protect the passengers.

74. At the hearing of the application on its merits, this Court will have to determine what a properly informed person, viewing the matter realistically and practically and having thought the matter through, would conclude about the Agency's members who were involved with the Publications.[67]

75. Currently, there is some evidence to demonstrate that the Agency was not acting independently with respect to the Publications, but rather had input from the airlines and Transport Canada during the drafting process.[68] The evidence also demonstrates that the evidentiary record relating to such input is far from being complete.[69]

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63 *Zündel v. Citron*, 2000 CanLII 17137 (FCA) at para. 47 [Tab 36, p. 910].
64 See *Majeed* quoted in paragraph 55 above.
65 *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at paras. 57-58 [Tab 13, p. 474].
66 Notice of Application, para. 26 [Tab 3, p. 386].
67 *Miglin v. Miglin*, 2003 SCC 24 at para. 26 [Tab 27, p. 683]; and *Yukon Francophone School Board v. Yukon (A.G.)*, 2015 SCC 25 at paras. 21-23 [Tab 33, p. 850].
68 See paragraphs 27-30 above.
69 See paragraphs 47-48 above.

76. Reasonable apprehension of bias requires consideration of all of the relevant circumstances, including communications with interested parties.[70] Consequently, the Agency's internal correspondence about the Publications as well as the airlines' and Transport Canada's undisclosed input to the Publications are squarely relevant.

B. Production of the Materials under Rule 318(4)

77. On a Rule 318(4) motion, the Court is tasked with determining the evidentiary record that will be before the panel hearing the judicial review on its merits. The outcome of a Rule 318(4) motion is not limited to upholding or rejecting the administrative body's objection to transmit materials. The Court has extensive tools within its arsenal to ensure that evidence necessary for the adjudication of the grounds for judicial review before it are available at the hearing on the merits.[71]

78. In ensuring that the record before the Court is sufficient to proceed with the judicial review, the Court's powers are not confined to those set out under Rule 318(4); rather, the Court may draw upon its common law powers to regulate its proceedings and its plenary powers in supervising federal administrative bodies.[72]

79. A party seeking to compel an administrative body to transmit materials under Rule 318(4) must demonstrate that the requested materials are:

(i) relevant to the application;

(ii) in the administrative body's possession; and

(iii) not in the moving party's possession.

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[70] *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 77 [Tab 35, p. 893].
[71] *Lukács v. Canada (Transp. Agency)*, 2016 FCA 103 at para. 12 [Tab 23, p. 641].
[72] *Girouard v. Canadian Judicial Council*, 2019 FCA 252 at para. 18 [Tab 17, 553]; and *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 14-15 [Tab 23, pp. 641-642].

All three requirements are met in the present case

80. The Materials are relevant to the underlying application for judicial review, as outlined in paragraphs 58-76, above.

81. The Materials are in the Agency's possession. The Agency has confirmed that these records do exist, but disclosed only a minuscule subset of the records, and even those were heavily redacted.[73] The evidence on this motion demonstrates that:

(1) the Agency's members supported and/or approved the Publications;[74]

(2) the airlines had input at the drafting phase of the Publications;[75] and

(3) there were undisclosed communications between the Agency and Transport Canada in connection with the subject matter of the Publications.[76]

82. In particular, the transmittal of the Materials is a legitimate request for evidence necessary for the fair adjudication of the application, and not a fishing expedition.

83. The Materials are not in the Applicant's possession. The Agency provided access to less than 1.5% of the records that were identified,[77] and the records that were provided have been redacted to the point that they are largely indiscernible.

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[73] See paragraphs 47-48 above.

[74] See paragraphs 24-26 above; see also: Email exchange between Ms. Blake Oliver and MP Nathaniel Erskine-Smith, dated October 5, 2020 – Lukács Affidavit, Exhibit "Q" [Tab 2Q, p. 115]; TRAN Committee, Evidence (43rd Parl., 2nd Sess., No. 008), p. 11 – Lukács Affidavit, Exhibit "R" [Tab 2R, p. 130]; and Lukács Affidavit, para. 35 and Exhibit "S" [Tabs 2 and 2S, pp. 16 and 133].

[75] See paragraphs 28-29 above; see also Lukács Exhibits "U" and "V" [Tabs 2U and 2V, pp. 143 and 147].

[76] See paragraph 30 above; see also: Lukács Affidavit, Exhibit "W" [Tab 2W, 150].

[77] See paragraphs 47-48 above.

Only objections properly asserted under Rule 318(2) should be considered

84. Rules 317-318 govern transmittal of material in the administrative body's possession and objections to such requests. Under Rule 318(1), the administrative body must transmit the requested material within 20 days. Objection to transmittal requests must be communicated in writing and accompanied with reasons for the objection:

> **318 (2)** Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.[78]

85. Upon receipt of an objection, the Court may make directions under Rule 318(3) about how the objections are to be addressed.[79] A possible way of dealing with objections is for the requesting party to bring a motion for an order under Rule 318(4).

86. It follows from the scheme of Rules 317-318 that, as a matter of procedural fairness, the administrative body's objection under Rule 318(2) must be complete. That is, it must contain sufficient details to allow the Court and the applicant to appreciate the nature of all objection(s) that the administrative body intends to rely upon. In particular, an administrative body cannot split its case and tack on further objections that were not properly asserted under Rule 318(2). It would be unfair and impractical to require an applicant to guess what other objection(s) the administrative body may later assert.

The Agency's sole objection asserted under Rule 318(2)

87. The Agency's correspondence pursuant to Rule 318(2) raises a single objection, namely, that the present judicial review does not concern a formal "order" of the Agency. That is, the Agency did not issue a formal "decision" or "order" that is being challenged herein.[80] That objection has no merit in light of this Honourable Court's broad remedial powers on a Rule 318(4) motion.

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[78] *Federal Courts Rules*, Rule 318(2) [Tab 7, p. 429].
[79] *Federal Courts Rules*, Rule 318(3) [Tab 7, p. 429].
[80] Agency's reasons for objection – Lukács Affidavit, Exhibit "AC" [Tab 2AC, p. 187].

88. The Applicant acknowledges that the most common judicial review applications involve the review of a formal "order" or "decision" of a federal administrative body. In the context of judicial review applications seeking a *mandamus*, some prothonotaries and one judge of the Federal Court have raised concerns whether Rule 317 could be invoked because there was no specific conduct or action subject to review.[81] These *mandamus* cases concerned the public body's *inaction*, a feature that distinguishes them from the present case.

89. There is ample authority for the proposition that in judicial reviews involving non-binding instruments such as policies, practices, and/or statements, like in the present case, the lack of a formal order is not a bar to production of relevant records. In *Renova Holdings Ltd. v. Canadian Wheat Board*, Justice Kelen adopted a purposive approach and held that the absence of an order or decision was not a bar to ordering production of materials in the administrative body's possession under Rule 318:

> Given the availability of judicial review in respect of administrative policies and practices, as confirmed by the Federal Court of Appeal in *Krause*, above, it would be inconsistent to deny applicants access to the material necessary to establish the grounds for review.[82]

90. In *Airth v. Canada*, Justice Phelan noted that "Rule 317 is an inelegant tool in dealing with judicial review of actions, conduct or policies and practices," but concurred with Justice Kelen's conclusion in *Renova Holdings*:

> [7] I concur with Justice Kelen's sentiments in *Renova Holdings Ltd. v. Canada (Canadian Wheat Board)*, 2006 FC 1505 at paragraph 18 that it would be inconsistent with the right to challenge administrative policies and practices (including, presumably, specific actions) to deny applicants access to the material necessary to establish or, more particularly, to challenge the government's claim as to the underlying legitimacy of its policies, practices or actions. The issue is the manner in

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[81] *Western Canada Wilderness Committee v. Canada (M.E.)*, 2006 FC 786 para. 8 [Tab 34, p. 870]; *Patterson v. Gascon*, 2004 FC 972 at paras. 9-13 [Tab 28, p. 755]; and *Gaudes v. Canada (A.G.)*, 2005 FC 351 at paras. 15-18 [Tab 16, p. 547].

[82] *Renova Holdings Ltd. v. Canadian Wheat Board*, 2006 FC 1505 at para. 18 [Tab 29, p. 764].

> which this material is to be produced without authorizing a fishing expedition or a discovery type process.
>
> [8] The weight of authority in this Court is that the absolute right and procedure set forth in Rule 317 et seq. is available only where there is an "order"which is the subject-matter of judicial review. (See *Patterson c. Canada (Correctional Services)*, 2004 FC 972 and also *Guades v. Canada (A.G.)*, 2005 FC 351). However, this is largely an issue of form rather than substance as I have no doubt that the relevant materials for a judicial review must be disclosed one way or another.[83]

91. Recently, in the context of giving general guidance to a litigant that invoked an incorrect procedure in seeking documents for a contempt of court motion, the Federal Court in *obiter* referred to Prothonotary Tabib's 2004 decision in *Patterson*.[84] However, the Federal Court overlooked Justices Kelen and Phelan's subsequent decisions that have overtaken *Patterson*. In any event, *Lill* was not a judicial review that involved non-binding instruments such as policies, practices, and/or statements, and could not be treated as an authority for the present case.

92. The purposive approach adopted by Justices Kelen and Phelan with respect to the stipulation for a formal order is consistent with Stratas, J.A.'s recent guidance on the flexibility of Rule 318(4), and the Court's broad and flexible remedial powers.[85]

93. In short, this Honourable Court has the power to fashion a suitable order under Rule 318 to ensure that an adequate evidentiary record will be before the panel of this Honourable Court, and in particular, for producing the Materials from the Agency.

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[83] *Airth v. Canada (N.R.)*, 2007 FC 415 at paras. 6-8 (emphasis added) [Tab 11, p. 453].
[84] *Lill v. Canada (A.G.)*, 2020 FC 551 at para. 34 [Tab 21, p. 613].
[85] *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 14-15 [Tab 23, pp. 641- 642].

C. Alternatively, Subpoena for the Materials under Rule 41

94. As a procedural alternative to Rule 318(4), this Honourable Court may direct under Rule 41 that a subpoena be issued to a witness to produce documents for a judicial review application:

> [...] In rare cases, witnesses may be subpoenaed to produce a document or other material on an application for judicial review: Rule 41(1) and Rule 41(4)(c). The subpoena power in Rule 41 applies to "proceedings" and Rule 300 shows that applications are "proceedings." This is allowed with leave of the Court where:
>
> - the evidence is necessary;
> - there is no other way of obtaining the evidence;
> - it is clear that an applicant is not engaged in a fishing expedition but, instead, has raised a credible ground for review beyond the applicant's say-so; and
> - a witness is likely to have relevant evidence on the matter.[86]

95. The availability of and the test for issuing a subpoena to produce documents in a judicial review application were also endorsed by a panel of this Honourable Court.[87]

All four criteria for issuing a subpoena are met in the present case

96. The Materials are necessary for adjudicating the application for judicial review for the reasons outlined in paragraphs 58-76, above.

97. As outlined in paragraphs 44-48, there is no other way of obtaining the Materials, except by the issuance of a subpoena under Rule 41, if this Court finds that Rules 317-318 are inapplicable.

98. Although the law does not require an applicant to pursue an access to information request,[88] the Applicant's affiant has already done so in this instance. However,

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[86] *Tsleil-Waututh Nation v. Canada (A.G.)*, 2017 FCA 128 at para. 103 [Tab 31, p. 823].
[87] *Tsleil-Waututh Nation v. Canada (A.G.)*, 2018 FCA 104 at para. 22 [Tab 32, p. 841].
[88] *Association des crabiers Acadiens v. Canada (A.G.)*, 2006 FC 222 at para. 15 [Tab 12, p. 460]; and *Cooke v. Canada*, 2005 FC 712 at para. 22 [Tab 14, p. 492].

only a minuscule subset of the requested records were disclosed, and the records that were provided have been redacted to the point that they are largely indiscernible.[89]

99. The Applicant is clearly not engaged in a fishing expedition. Two justices of this Court have already confirmed that the RAB Ground raises a *serious issue to be tried* on its merits.[90] Furthermore, as discussed in paragraph 81, the evidence on this motion demonstrates that the Materials do exist.

100. Lastly, Mr. Streiner is the chairperson of Agency. Section 13 of the *Canada Transportation Act* provides that:

> The Chairperson is the chief executive officer of the Agency and has the supervision over and direction of the work of the members and its staff, including the apportionment of work among the members and the assignment of members to deal with any matter before the Agency.[91]

101. Due to his role as the chief executive officer and his power of supervision over and direction of the work of the Agency's appointed members and staff, Mr. Streiner is likely to have possession and/or control of the Materials.

D. Conclusion

102. The Materials are relevant and necessary for adjudicating the Reasonable Apprehension of Bias Ground of judicial review on its merits. The Applicant and the Court should not be denied access to material necessary to establish a ground of review that was already found to raise a *serious issue to be tried*.

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[89] See paragraphs 47-48 above.

[90] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 17 [Tab 9, p. 439]; and *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 155 at para. 33 [Tab 10, p. 452].

[91] *Canada Transportation Act*, s. 13 (emphasis added) [Tab 8, p. 434].

PART IV – ORDER SOUGHT

103. The Moving Party, Air Passenger Rights, is seeking:

(a) An Order, pursuant to Rule 318(4), that within ten days the Agency transmit in electronic format to the Registry and to the Applicant complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos [**Materials**];

(b) In the alternative, an Order pursuant to Rule 41, directing the issuance of a subpoena to the Chief Executive Officer of the Agency to produce the Materials within ten days;

(c) costs and/or reasonable out-of-pocket expenses of this motion; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 3, 2021

"Simon Lin"

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

PART V – LIST OF AUTHORITIES

Statutes and Regulations

Access to Information Act, R.S.C., 1985, c. A-1
ss. 7, 9, and 10

Canada Transportation Act, S.C. 1996, c. 10,
ss. 7, 13, 16, and 19

Federal Courts Rules, S.O.R./98-106,
Rules 41, 81, 317-318, and 369

Case Law

Air Passengers Rights v. Canada (Transportation Agency), 2020 FCA 92

Air Passenger Rights v. Canada (Transportation Agency), 2020 FCA 155

Airth v. Airth v. Canada (National Revenue), 2007 FC 415

Association des crabiers Acadiens v. Canada (Attorney General), 2006 FC 222

British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia, 2020 SCC 20

Cooke v. Canada (Correctional Services), 2005 FC 712

Dunsmuir v. New Brunswick, 2008 SCC 9

Gaudes v. Canada (Attorney General), 2005 FC 351

Girouard v. Canadian Judicial Council, 2019 FCA 252

Hartwig v. Saskatchewan (Commissioner of Inquiry), 2007 SKCA 74

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26

Knox v. Conservative Party of Canada, 2007 ABCA 295

Lill v. Canada (Attorney General), 2020 FC 551

Lukács v. Canadian Transportation Agency, 2014 FCA 76

Lukács v. Canada (Transportation Agency), 2016 FCA 103

Majeed v. Canada (Minister of Employment & Immigration), 1993] F.C.J. No. 908

Majeed v. Canada (Minister of Employment and Immigration) (F.C.A.), [1994] F.C.J. No. 1401

Martineau v. Matsqui Institution, [1980] S.C.R. 602

Miglin v. Miglin, 2003 SCC 24

Patterson v. Bath Institution, 2004 FC 972

Renova Holdings Ltd. v. Canadian Wheat Board, 2006 FC 1505

R. v. S. (R.D.), [1997] 3 SCR 484

Tsleil-Waututh Nation v. Canada (Attorney General), 2017 FCA 128

Tsleil-Waututh Nation v. Canada (Attorney General), 2018 FCA 104

Yukon Francophone School Board, Education Area No. 23 v. Yukon (Attorney General), 2015 SCC 25

Western Canada Wilderness Committee v. Canada (Minister of the Environment), 2006 FC 786

Wewaykum Indian Band v. Canada, 2003 SCC 45

Zündel v. Citron, 2000 CanLII 17137 (FCA), [2000] 4 FC 225

CANADA

CONSOLIDATION

CODIFICATION

Access to Information Act

Loi sur l'accès à l'information

R.S.C., 1985, c. A-1

L.R.C. (1985), ch. A-1

Current to December 2, 2020

Last amended on June 21, 2020

À jour au 2 décembre 2020

Dernière modification le 21 juin 2020

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

receiving the Information Commissioner's decision in writing, give written notice to the person who made the request for access to a record under this Part of the refusal and of the date on which the running of the period resumes in accordance with subsection (1.2).

dès la réception de la réponse écrite du Commissaire, avise par écrit la personne qui a fait la demande de ce refus et de la date à laquelle le délai recommence à courir conformément au paragraphe (1.2).

Notice

(2) If the head of a government institution declines to act on the person's request, they shall give the person written notice of their decision to decline to act on the request and their reasons for doing so.

2019, c. 18, s. 6.1.

Avis

(2) Dans le cas où le responsable de l'institution fédérale décide de ne pas donner suite à la demande, il en avise par écrit la personne qui a fait la demande, motifs à l'appui.

2019, ch. 18, art. 6.1.

Notice where access requested

7 Where access to a record is requested under this Part, the head of the government institution to which the request is made shall, subject to sections 8 and 9, within 30 days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof.

R.S., 1985, c. A-1, s. 7; 2019, c. 18, s. 6.2; 2019, c. 18, s. 41(E).

Notification

7 Le responsable de l'institution fédérale à qui est faite une demande de communication de document est tenu, dans les trente jours suivant sa réception, sous réserve des articles 8 et 9 :

a) d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non communication totale ou partielle du document;

b) le cas échéant, de donner communication totale ou partielle du document.

L.R. (1985), ch. A-1, art. 7; 2019, ch. 18, art. 6.2; 2019, ch. 18, art. 41(A).

Transfer of request

8 (1) Where a government institution receives a request for access to a record under this Part and the head of the institution considers that another government institution has a greater interest in the record, the head of the institution may, subject to such conditions as may be prescribed by regulation, within fifteen days after the request is received, transfer the request and, if necessary, the record to the other government institution, in which case the head of the institution transferring the request shall give written notice of the transfer to the person who made the request.

Transmission de la demande

8 (1) S'il juge que le document objet de la demande dont a été saisie son institution concerne davantage une autre institution fédérale, le responsable de l'institution saisie peut, aux conditions réglementaires éventuellement applicables, transmettre la demande, et, au besoin, le document, au responsable de l'autre institution. Le cas échéant, il effectue la transmission dans les quinze jours suivant la réception de la demande et en avise par écrit la personne qui l'a faite.

Deeming provision

(2) For the purposes of section 7, where a request is transferred under subsection (1), the request shall be deemed to have been made to the government institution to which it was transferred on the day the government institution to which the request was originally made received it.

Départ du délai

(2) Dans le cas prévu au paragraphe (1), c'est la date de réception par l'institution fédérale saisie de la demande qui est prise en considération comme point de départ du délai mentionné à l'article 7.

Meaning of greater interest

(3) For the purpose of subsection (1), a government institution has a greater interest in a record if

(a) the record was originally produced in or for the institution; or

Justification de la transmission

(3) La transmission visée au paragraphe (1) se justifie si l'autre institution :

a) est à l'origine du document, soit qu'elle l'ait préparé elle-même ou qu'il ait été d'abord préparé à son intention;

(b) in the case of a record not originally produced in or for a government institution, the institution was the first government institution to receive the record or a copy thereof.

R.S., 1985, c. A-1, s. 8; 2019, c. 18, s. 41(E).

b) est la première institution fédérale à avoir reçu le document ou une copie de celui-ci, dans les cas où ce n'est pas une institution fédérale qui est à l'origine du document.

L.R. (1985), ch. A-1, art. 8; 2019, ch. 18, art. 41(A).

Extension of time limits

9 (1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Part for a reasonable period of time, having regard to the circumstances, if

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,

(b) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or

(c) notice of the request is given pursuant to subsection 27(1)

by giving notice of the extension and, in the circumstances set out in paragraph (a) or (b), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

Prorogation du délai

9 (1) Le responsable d'une institution fédérale peut proroger le délai mentionné à l'article 7 ou au paragraphe 8(1) d'une période que justifient les circonstances dans les cas où :

a) l'observation du délai entraverait de façon sérieuse le fonctionnement de l'institution en raison soit du grand nombre de documents demandés, soit de l'ampleur des recherches à effectuer pour donner suite à la demande;

b) les consultations nécessaires pour donner suite à la demande rendraient pratiquement impossible l'observation du délai;

c) avis de la demande a été donné en vertu du paragraphe 27(1).

Dans l'un ou l'autre des cas prévus aux alinéas a), b) et c), le responsable de l'institution fédérale envoie à la personne qui a fait la demande, dans les trente jours suivant sa réception, un avis de prorogation de délai, en lui faisant part de son droit de déposer une plainte à ce propos auprès du Commissaire à l'information; dans les cas prévus aux alinéas a) et b), il lui fait aussi part du nouveau délai.

Notice of extension to Information Commissioner

(2) Where the head of a government institution extends a time limit under subsection (1) for more than thirty days, the head of the institution shall give notice of the extension to the Information Commissioner at the same time as notice is given under subsection (1).

R.S., 1985, c. A-1, s. 9; 2019, c. 18, s. 41(E).

Avis au Commissaire à l'information

(2) Dans les cas où la prorogation de délai visée au paragraphe (1) dépasse trente jours, le responsable de l'institution fédérale en avise en même temps le Commissaire à l'information et la personne qui a fait la demande.

L.R. (1985), ch. A-1, art. 9; 2019, ch. 18, art. 41(A).

Where access is refused

10 (1) Where the head of a government institution refuses to give access to a record requested under this Part or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

(a) that the record does not exist, or

(b) the specific provision of this Part on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

Refus de communication

10 (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente partie, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

a) soit le fait que le document n'existe pas;

b) soit la disposition précise de la présente partie sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

Existence of a record not required to be disclosed

(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

Deemed refusal to give access

(3) Where the head of a government institution fails to give access to a record requested under this Part or a part thereof within the time limits set out in this Part, the head of the institution shall, for the purposes of this Part, be deemed to have refused to give access.

R.S., 1985, c. A-1, s. 10; 2019, c. 18, s. 39.

Application fee

11 (1) Subject to this section, a person who makes a request for access to a record under this Part shall pay, at the time the request is made, any application fee of not more than $25, that may be prescribed by regulation.

Waiver

(2) The head of a government institution to which a request for access to a record is made under this Part may waive the requirement to pay a fee or a part of a fee under this section or may refund a fee or a part of a fee paid under this section.

R.S., 1985, c. A-1, s. 11; 1992, c. 21, s. 2; 2019, c. 18, s. 7.

Access Given

Access to record

12 (1) A person who is given access to a record or a part thereof under this Part shall, subject to the regulations, be given an opportunity to examine the record or part thereof or be given a copy thereof.

Language of access

(2) Where access to a record or a part thereof is to be given under this Part and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language

(a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or

(b) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.

pourrait vraisemblablement se fonder si le document existait.

Dispense de divulgation de l'existence d'un document

(2) Le paragraphe (1) n'oblige pas le responsable de l'institution fédérale à faire état de l'existence du document demandé.

Présomption de refus

(3) Le défaut de communication totale ou partielle d'un document dans les délais prévus par la présente partie vaut décision de refus de communication.

L.R. (1985), ch. A-1, art. 10; 2019, ch. 18, art. 39.

Versement des droits

11 (1) Sous réserve des autres dispositions du présent article, au moment où la personne fait la demande, elle acquitte les droits dont le montant, d'un maximum de vingt-cinq dollars, peut être fixé par règlement.

Dispense

(2) Le responsable de l'institution fédérale peut dispenser en tout ou en partie la personne qui fait la demande du versement des droits ou lui rembourser tout ou partie du versement.

L.R. (1985), ch. A-1, art. 11; 1992, ch. 21, art. 2; 2019, ch. 18, art. 7.

Exercice de l'accès

Communication

12 (1) L'accès aux documents s'exerce, sous réserve des règlements, par consultation totale ou partielle du document ou par délivrance de copies totales ou partielles.

Version de la communication

(2) La personne à qui sera donnée communication totale ou partielle d'un document et qui a précisé la langue officielle dans laquelle elle le désirait se verra communiquer le document ou la partie en cause dans la version de son choix :

a) immédiatement, si le document ou la partie en cause existent dans cette langue et relèvent d'une institution fédérale;

b) dans un délai convenable, si le responsable de l'institution fédérale dont relève le document juge dans l'intérêt public de faire traduire ce document ou cette partie.

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to December 2, 2020

Last amended on June 17, 2019

À jour au 2 décembre 2020

Dernière modification le 17 juin 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Rota of Judges for Vancouver

40 (1) On or before July 1 in each year, the Chief Justice of the Federal Court shall, in consultation with the other judges of that court, establish a rota of judges for Vancouver for the twelve months commencing on September 1 of that year, excluding the Christmas recess.

Powers of Chief Justice of the Federal Court

(2) The Chief Justice of the Federal Court may make changes to the Vancouver rota, including the substitution of one judge for another during all or part of the judge's period of assignment.

Responsibilities of judges

(3) A judge assigned to Vancouver shall reside in Vancouver for the period of the assignment and hold sittings and otherwise transact the judicial business of the Federal Court in Vancouver and in such other places as may be required.

Assignment period

(4) Except with a judge's consent, the Chief Justice of the Federal Court shall not

(a) assign the judge to Vancouver for a period exceeding two months; or

(b) reassign the judge to Vancouver for a second assignment within two months after the end of the first.

SOR/2004-283, ss. 9, 33, 34.

Liste de roulement de Vancouver

40 (1) Au plus tard le 1er juillet de chaque année, le juge en chef de la Cour fédérale, après consultation des autres juges de cette cour, dresse la liste de roulement des juges à Vancouver pour la période de douze mois commençant le 1er septembre de l'année, en excluant les vacances judiciaires de Noël.

Pouvoirs du juge en chef adjoint

(2) Le juge en chef de la Cour fédérale peut modifier la liste de roulement, notamment remplacer un juge par un autre pour tout ou partie de sa période d'affectation.

Responsabilités des juges

(3) Le juge affecté à Vancouver y réside durant sa période d'affectation; il tient des audiences et voit aux travaux de la Cour fédérale à Vancouver et à tout autre endroit requis.

Consentement du juge affecté

(4) Le juge en chef de la Cour fédérale ne peut, à moins d'obtenir le consentement du juge en cause :

a) l'affecter à Vancouver pour plus de deux mois;

b) le réaffecter à Vancouver avant l'expiration des deux mois suivant la fin de la dernière période d'affectation à Vancouver.

DORS/2004-283, art. 9, 33 et 34.

Summoning of Witnesses or Other Persons

Subpoena for witness

41 (1) Subject to subsection (4), on receipt of a written request, the Administrator shall issue, in Form 41, a *subpoena* for the attendance of a witness or the production of a document or other material in a proceeding.

Issuance in blank

(2) A *subpoena* may be issued in blank and completed by a solicitor or party.

Multiple names

(3) Any number of names may be included in one *subpoena*.

Assignation de témoins et d'autres personnes

Subpœna

41 (1) Sous réserve du paragraphe (4), sur réception d'une demande écrite, l'administrateur délivre un *subpœna*, selon la formule 41, pour contraindre un témoin à comparaître ou à produire un document ou des éléments matériels dans une instance.

Subpœna en blanc

(2) Le *subpœna* peut être délivré en blanc et rempli par l'avocat ou la partie.

Nombre de noms

(3) Le nombre de noms pouvant être inscrits sur le même *subpœna* n'est pas limité.

Where leave required

(4) No *subpoena* shall be issued without leave of the Court

(a) for the production of an original record or of an original document, if the record or document may be proven by a copy in accordance with an Act of Parliament or of the legislature of a province;

(b) to compel the appearance of a witness who resides more than 800 km from the place where the witness will be required to attend under the *subpoena*; or

(c) to compel the attendance of a witness at a hearing other than a trial or a reference under rule 153.

Autorisation de la Cour

(4) Un *subpœna* ne peut être délivré sans l'autorisation de la Cour dans les cas suivants :

a) pour la production de l'original d'un dossier ou d'un document qui peut être prouvé par une copie en vertu d'une loi fédérale ou provinciale;

b) pour la comparution d'un témoin qui réside à plus de 800 km du lieu de comparution requis;

c) pour la comparution d'un témoin à une audience, sauf lors d'une instruction ou lors d'un renvoi ordonné en vertu de la règle 153.

***Ex parte* motion**

(5) Leave may be granted under subsection (4) on an *ex parte* motion.

Requête *ex parte*

(5) L'autorisation visée au paragraphe (4) peut être accordée sur requête *ex parte*.

Personal service of *subpoena*

42 No witness is required to attend under a *subpoena* unless the *subpoena* has been personally served on the witness in accordance with paragraph 128(1)(a) and witness fees and travel expenses have been paid or tendered to the witness in the amount set out in Tariff A.

SOR/2002-417, s. 6.

Signification à personne

42 Un témoin ne peut être contraint à comparaître aux termes d'un *subpœna* que si celui-ci lui a été signifié à personne conformément à l'alinéa 128(1)a) et qu'une somme égale à l'indemnité de témoin et aux frais de déplacement prévus au tarif A lui a été payée ou offerte.

DORS/2002-417, art. 6.

Witness fees

43 Where a witness is required under these Rules to attend a proceeding other than pursuant to a *subpoena*, the witness is entitled to witness fees and travel expenses in the amount set out in Tariff A.

Indemnité de témoin

43 Lorsqu'une disposition des présentes règles oblige un témoin à comparaître dans une instance autrement qu'aux termes d'un *subpœna*, celui-ci a droit à une indemnité de témoin et aux frais de déplacement selon le montant prévu au tarif A.

44 [Repealed, SOR/2002-417, s. 7]

44 [Abrogé, DORS/2002-417, art. 7]

Compelling attendance of detainee

45 On motion, the Court may make an order in Form 45 requiring that any person who is in the custody of a prison or penitentiary be brought before the Court.

Comparution d'un détenu

45 La Cour peut, sur requête, rendre une ordonnance, selon la formule 45, exigeant qu'une personne détenue dans une prison ou un pénitencier soit amenée devant elle.

Failure to obey

46 Where a witness who is required to attend at a hearing fails to do so, on motion, the Court may, by a warrant in Form 46, order that the witness be apprehended anywhere in Canada, brought before the Court and

(a) detained in custody until the witness's presence is no longer required; or

Défaut de comparution

46 Lorsqu'un témoin assigné à comparaître à une audience ne se présente pas, la Cour peut, sur requête, ordonner, au moyen d'un mandat établi selon la formule 46, d'appréhender le témoin en tout lieu du Canada, de l'amener devant elle et :

a) soit de le détenir jusqu'à ce que sa présence en qualité de témoin ne soit plus requise;

Citation of rule or order

(2) An amendment made under subsection (1) shall indicate the rule or Court order under which the amendment is made.

Signification

(2) Le document modifié selon le paragraphe (1) doit indiquer la date de la modification et la règle ou l'ordonnance en vertu de laquelle la modification est apportée et doit être signifié à nouveau.

Affidavit Evidence and Examinations

Affidavits

Form of affidavits

80 (1) Affidavits shall be drawn in the first person, in Form 80A.

Affidavit by blind or illiterate person

(2) Where an affidavit is made by a deponent who is blind or illiterate, the person before whom the affidavit is sworn shall certify that the affidavit was read to the deponent and that the deponent appeared to understand it.

Affidavit by deponent who does not understand an official language

(2.1) Where an affidavit is written in an official language for a deponent who does not understand that official language, the affidavit shall

(a) be translated orally for the deponent in the language of the deponent by a competent and independent interpreter who has taken an oath, in Form 80B, as to the performance of his or her duties; and

(b) contain a jurat in Form 80C.

Exhibits

(3) Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn.

SOR/2002-417, s. 10.

Content of affidavits

81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

Preuve par affidavit et interrogatoires

Affidavits

Forme

80 (1) Les affidavits sont rédigés à la première personne et sont établis selon la formule 80A.

Affidavit d'un handicapé visuel ou d'un analphabète

(2) Lorsqu'un affidavit est fait par un handicapé visuel ou un analphabète, la personne qui reçoit le serment certifie que l'affidavit a été lu au déclarant et que ce dernier semblait en comprendre la teneur.

Affidavit d'une personne ne comprenant pas une langue officielle

(2.1) Lorsqu'un affidavit est rédigé dans une des langues officielles pour un déclarant qui ne comprend pas cette langue, l'affidavit doit :

a) être traduit oralement pour le déclarant dans sa langue par un interprète indépendant et compétent qui a prêté le serment, selon la formule 80B, de bien exercer ses fonctions;

b) comporter la formule d'assermentation prévue à la formule 80C.

Pièces à l'appui de l'affidavit

(3) Lorsqu'un affidavit fait mention d'une pièce, la désignation précise de celle-ci est inscrite sur la pièce même ou sur un certificat joint à celle-ci, suivie de la signature de la personne qui reçoit le serment.

DORS/2002-417, art. 10.

Contenu

81 (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

Affidavits on belief

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

SOR/2009-331, s. 2.

Poids de l'affidavit

(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

DORS/2009-331, art. 2.

Use of solicitor's affidavit

82 Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

Utilisation de l'affidavit d'un avocat

82 Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

Cross-examination on affidavits

83 A party to a motion or application may cross-examine the deponent of an affidavit served by an adverse party to the motion or application.

Droit au contre-interrogatoire

83 Une partie peut contre-interroger l'auteur d'un affidavit qui a été signifié par une partie adverse dans le cadre d'une requête ou d'une demande.

When cross-examination may be made

84 (1) A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.

Contre-interrogatoire de l'auteur d'un affidavit

84 (1) Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

Filing of affidavit after cross-examination

(2) A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

Dépôt d'un affidavit après le contre-interrogatoire

(2) La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

Due diligence

85 A party who intends to cross-examine the deponent of an affidavit shall do so with due diligence.

Diligence raisonnable

85 Le contre-interrogatoire de l'auteur d'un affidavit est effectué avec diligence raisonnable.

Transcript of cross-examination on affidavit

86 Unless the Court orders otherwise, a party who conducts a cross-examination on an affidavit shall order and pay for a transcript thereof and send a copy to each other party.

Transcription d'un contre-interrogatoire

86 Sauf ordonnance contraire de la Cour, la partie qui effectue un contre-interrogatoire concernant un affidavit doit en demander la transcription, en payer les frais et en transmettre une copie aux autres parties.

Examinations out of Court

General

Interrogatoires hors cour

Dispositions générales

Definition of *examination*

87 In rules 88 to 100, ***examination*** means

(a) an examination for discovery;

(b) the taking of evidence out of court for use at trial;

Définition de *interrogatoire*

87 Dans les règles 88 à 100, ***interrogatoire*** s'entend, selon le cas :

a) d'un interrogatoire préalable;

Material to be transmitted

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Directions as to procedure

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

Return of material

319 Unless the Court directs otherwise, after an application has been heard, the Administrator shall return to a tribunal any original material received from it under rule 318.

References from a Tribunal

Definition of *reference*

320 (1) In rules 321 to 323, ***reference*** means a reference to the Court made by a tribunal or by the Attorney General of Canada under section 18.3 of the Act.

Procedures on applications apply

(2) Subject to rules 321 to 323, rules 309 to 311 apply to references.

Notice of application on reference

321 A notice of application in respect of a reference shall set out

(a) the name of the court to which the application is addressed;

Documents à transmettre

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directives de la Cour

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

Documents retournés

319 Sauf directives contraires de la Cour, après l'audition de la demande, l'administrateur retourne à l'office fédéral les originaux reçus aux termes de la règle 318.

Renvois d'un office fédéral

Définition

320 (1) Dans les règles 321 à 323, ***renvoi*** s'entend d'un renvoi fait à la Cour par un office fédéral ou le procureur général du Canada en vertu de l'article 18.3 de la Loi.

Application d'autres dispositions

(2) Sous réserve des règles 321 à 323, les règles 309 à 311 s'appliquent aux renvois.

Contenu de l'avis de demande

321 L'avis de demande concernant un renvoi contient les renseignements suivants :

a) le nom de la cour à laquelle la demande est adressée;

(b) all affidavits and other material to be used by the respondent on the motion that is not included in the moving party's motion record;

(c) subject to rule 368, the portions of any transcripts on which the respondent intends to rely;

(d) subject to rule 366, written representations; and

(e) any other filed material not contained in the moving party's motion record that is necessary for the hearing of the motion.

SOR/2009-331, s. 6; SOR/2013-18, s. 13; SOR/2015-21, s. 28.

b) les affidavits et autres documents et éléments matériels dont l'intimé entend se servir relativement à la requête et qui ne figurent pas dans le dossier de requête;

c) sous réserve de la règle 368, les extraits de toute transcription dont l'intimé entend se servir et qui ne figurent pas dans le dossier de requête;

d) sous réserve de la règle 366, les prétentions écrites de l'intimé;

e) les autres documents et éléments matériels déposés qui sont nécessaires à l'audition de la requête et qui ne figurent pas dans le dossier de requête.

DORS/2009-331, art. 6; DORS/2013-18, art. 13; DORS/2015-21, art. 28.

Memorandum of fact and law required

366 On a motion for summary judgment or summary trial, for an interlocutory injunction, for the determination of a question of law or for the certification of a proceeding as a class proceeding, or if the Court so orders, a motion record shall contain a memorandum of fact and law instead of written representations.

SOR/2002-417, s. 22; SOR/2007-301, s. 8; SOR/2009-331, s. 7.

Mémoire requis

366 Dans le cas d'une requête en jugement sommaire ou en procès sommaire, d'une requête pour obtenir une injonction interlocutoire, d'une requête soulevant un point de droit ou d'une requête en autorisation d'une instance comme recours collectif, ou lorsque la Cour l'ordonne, le dossier de requête contient un mémoire des faits et du droit au lieu de prétentions écrites.

DORS/2002-417, art. 22; DORS/2007-301, art. 8; DORS/2009-331, art. 7.

Documents filed as part of motion record

367 A notice of motion or any affidavit required to be filed by a party to a motion may be served and filed as part of the party's motion record and need not be served and filed separately.

Dossier de requête

367 L'avis de requête ou les affidavits qu'une partie doit déposer peuvent être signifiés et déposés à titre d'éléments de son dossier de requête ou de réponse, selon le cas. Ils n'ont pas à être signifiés et déposés séparément.

Transcripts of cross-examinations

368 Transcripts of all cross-examinations on affidavits on a motion shall be filed before the hearing of the motion.

Transcriptions des contre-interrogatoires

368 Les transcriptions des contre-interrogatoires des auteurs des affidavits sont déposés avant l'audition de la requête.

Motions in writing

369 (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

Procédure de requête écrite

369 (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

Request for oral hearing

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

Demande d'audience

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

Reply

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

Disposition of motion

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

Abandonment of motion

370 (1) A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.

Deemed abandonment

(2) Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

Testimony regarding issue of fact

371 On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

PART 8

Preservation of Rights in Proceedings

General

Motion before proceeding commenced

372 (1) A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

Undertaking to commence proceeding

(2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

Interim and Interlocutory Injunctions

Availability

373 (1) On motion, a judge may grant an interlocutory injunction.

Réponse du requérant

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

Décision

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

Désistement

370 (1) La partie qui a présenté une requête peut s'en désister en signifiant et en déposant un avis de désistement, établi selon la formule 370.

Désistement présumé

(2) La partie qui ne se présente pas à l'audition de la requête et qui n'a ni signifié ni déposé un avis de désistement est réputée s'être désistée de sa requête.

Témoignage sur des questions de fait

371 Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

PARTIE 8

Sauvegarde des droits

Dispositions générales

Requête antérieure à l'instance

372 (1) Une requête ne peut être présentée en vertu de la présente partie avant l'introduction de l'instance, sauf en cas d'urgence.

Engagement

(2) La personne qui présente une requête visée au paragraphe (1) s'engage à introduire l'instance dans le délai fixé par la Cour.

Injonctions interlocutoires et provisoires

Injonction interlocutoire

373 (1) Un juge peut accorder une injonction interlocutoire sur requête.

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to March 5, 2020

Last amended on July 11, 2019

À jour au 5 mars 2020

Dernière modification le 11 juillet 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

PART I

Administration

Canadian Transportation Agency

Continuation and Organization

Agency continued

7 (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.

Composition of Agency

(2) The Agency shall consist of not more than five members appointed by the Governor in Council, and such temporary members as are appointed under subsection 9(1), each of whom must, on appointment or reappointment and while serving as a member, be a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Chairperson and Vice-Chairperson

(3) The Governor in Council shall designate one of the members appointed under subsection (2) to be the Chairperson of the Agency and one of the other members appointed under that subsection to be the Vice-Chairperson of the Agency.

1996, c. 10, s. 7; 2001, c. 27, s. 221; 2007, c. 19, s. 3; 2015, c. 3, s. 30(E).

Term of members

8 (1) Each member appointed under subsection 7(2) shall hold office during good behaviour for a term of not more than five years and may be removed for cause by the Governor in Council.

Reappointment

(2) A member appointed under subsection 7(2) is eligible to be reappointed on the expiration of a first or subsequent term of office.

Continuation in office

(3) If a member appointed under subsection 7(2) ceases to hold office, the Chairperson may authorize the member to continue to hear any matter that was before the member on the expiry of the member's term of office and that member is deemed to be a member of the Agency, but that person's status as a member does not preclude the appointment of up to five members under subsection 7(2) or up to three temporary members under subsection 9(1).

1996, c. 10, s. 8; 2007, c. 19, s. 4; 2015, c. 3, s. 31(E).

PARTIE I

Administration

Office des transports du Canada

Maintien et composition

Maintien de l'Office

7 (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.

Composition

(2) L'Office est composé, d'une part, d'au plus cinq membres nommés par le gouverneur en conseil et, d'autre part, des membres temporaires nommés en vertu du paragraphe 9(1). Tout membre doit, du moment de sa nomination, être et demeurer un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

Président et vice-président

(3) Le gouverneur en conseil choisit le président et le vice-président de l'Office parmi les membres nommés en vertu du paragraphe (2).

1996, ch. 10, art. 7; 2001, ch. 27, art. 221; 2007, ch. 19, art. 3; 2015, ch. 3, art. 30(A).

Durée du mandat

8 (1) Les membres nommés en vertu du paragraphe 7(2) le sont à titre inamovible pour un mandat d'au plus cinq ans, sous réserve de révocation motivée par le gouverneur en conseil.

Renouvellement du mandat

(2) Les mandats sont renouvelables.

Continuation de mandat

(3) Le président peut autoriser un membre nommé en vertu du paragraphe 7(2) qui cesse d'exercer ses fonctions à continuer, après la date d'expiration de son mandat, à entendre toute question dont il se trouve saisi à cette date. À cette fin, le membre est réputé être membre de l'Office mais son statut n'empêche pas la nomination de cinq membres en vertu du paragraphe 7(2) ou de trois membres temporaires en vertu du paragraphe 9(1).

1996, ch. 10, art. 8; 2007, ch. 19, art. 4; 2015, ch. 3, art. 31(A).

within three months after the vesting, absolutely dispose of the interest.

1996, c. 10, s. 10; 2015, c. 3, s. 32(E).

Remuneration

Remuneration

11 (1) A member shall be paid such remuneration and allowances as may be fixed by the Governor in Council.

Expenses

(2) Each member is entitled to be paid reasonable travel and living expenses incurred by the member in carrying out duties under this Act or any other Act of Parliament while absent from the member's ordinary place of work.

Members — retirement pensions

12 (1) A member appointed under subsection 7(2) is deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*.

Temporary members not included

(2) A temporary member is deemed not to be employed in the public service for the purposes of the *Public Service Superannuation Act* unless the Governor in Council, by order, deems the member to be so employed for those purposes.

Accident compensation

(3) For the purposes of the *Government Employees Compensation Act* and any regulation made pursuant to section 9 of the *Aeronautics Act*, a member is deemed to be an employee in the federal public administration.

1996, c. 10, s. 12; 2003, c. 22, ss. 224(E), 225(E); 2015, c. 3, s. 33(E).

Chairperson

Duties of Chairperson

13 The Chairperson is the chief executive officer of the Agency and has the supervision over and direction of the work of the members and its staff, including the apportionment of work among the members and the assignment of members to deal with any matter before the Agency.

Absence of Chairperson

14 In the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant, the Vice-Chairperson has all the powers and shall perform all the duties and functions of the Chairperson.

Rémunération

Rémunération et indemnités

11 (1) Les membres reçoivent la rémunération et touchent les indemnités que peut fixer le gouverneur en conseil.

Frais de déplacement

(2) Les membres ont droit aux frais de déplacement et de séjour entraînés par l'exercice, hors de leur lieu de travail habituel, des fonctions qui leur sont confiées en application de la présente loi ou de toute autre loi fédérale.

Pensions de retraite des membres

12 (1) Les membres nommés en vertu du paragraphe 7(2) sont réputés appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

Membres temporaires

(2) Sauf décret prévoyant le contraire, les membres temporaires sont réputés ne pas appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

Indemnisation

(3) Pour l'application de la *Loi sur l'indemnisation des agents de l'État* et des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*, les membres sont réputés appartenir à l'administration publique fédérale.

1996, ch. 10, art. 12; 2003, ch. 22, art. 224(A) et 225(A); 2015, ch. 3, art. 33(A).

Président

Pouvoirs et fonctions

13 Le président est le premier dirigeant de l'Office; à ce titre, il assure la direction et le contrôle de ses travaux et la gestion de son personnel et procède notamment à la répartition des tâches entre les membres et à la désignation de ceux qui traitent des questions dont est saisi l'Office.

Intérim du président

14 En cas d'absence ou d'empêchement du président ou de vacance de son poste, la présidence est assumée par le vice-président.

Absence of both Chairperson and Vice-Chairperson

15 The Chairperson may authorize one or more of the members to act as Chairperson for the time being if both the Chairperson and Vice-Chairperson are absent or unable to act.

Quorum

Quorum

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

Quorum lost because of incapacity of member

(2) Where a member who is conducting a hearing in respect of a matter becomes incapacitated or dies during the hearing or after the conclusion of the hearing but before rendering a decision and quorum is lost as a result, the 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.

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.

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.

Choix d'un autre intérimaire

15 Le président peut habiliter un ou plusieurs membres à assumer la présidence en prévision de son absence ou de son empêchement, et de ceux du vice-président.

Quorum

Quorum

16 (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

Perte de quorum due à un décès ou un empêchement

(2) En cas de décès ou d'empêchement d'un membre chargé d'une audience, pendant celle-ci ou entre la fin de l'audience et le prononcé de la décision, et de perte de quorum résultant de ce fait, le président peut, avec le consentement 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.

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.

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.

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 Agency shall be appointed in accordance with the *Public Service Employment Act*.

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.

Records

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.

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.

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

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.

Personnel

Secrétaire et personnel

19 Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

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.

Registre

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.

Original

(2) Le document enregistré en application de l'alinéa (1)a) en constitue l'original.

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

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE MOVING PARTY, AIR PASSENGER RIGHTS

Motion pursuant to Rules 41 and 318 of the *Federal Courts Rules*

VOLUME 3 of 3

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AIR PASSENGERS RIGHTS (Applicant) and CANADIAN TRANSPORTATION AGENCY (Respondent)

Anne L. Mactavish J.A.

Judgment: May 22, 2020
Docket: A-102-20

Counsel: Simon Lin (written), for Applicant
Allan Matte (written), for Respondent

***Anne L. Mactavish J.A.*:**

1 As is the case with so many other areas of life today, the airline industry and airline passengers have been seriously affected by the COVID-19 pandemic. International borders have been closed, travel advisories and bans have been instituted, people are not travelling for non-essential reasons and airlines have cancelled numerous flights.

2 In response to this unprecedented situation, the Canadian Transportation Agency (CTA) issued two public statements on its website that suggest that it could be reasonable for airlines to provide passengers with travel vouchers when flights are cancelled for pandemic-related reasons, rather than refunding the monies that passengers paid for their tickets.

3 Air Passenger Rights (APR) is an advocacy group representing and advocating for the rights of the public who travel by air. It has commenced an application for judicial review of the CTA's public statements, asserting that they violate the CTA's own *Code of Conduct*, and mislead passengers as to their rights when their flights are cancelled. In the context of this application, APR has brought a motion in writing seeking an interlocutory order that, among other things, would require that the statements be removed from the CTA's website. It also seeks to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the Agency's public statements.

4 For the reasons that follow, I have concluded that APR has not satisfied the tripartite injunctive test. Consequently, the motion will be dismissed.

1. Background

5 In early 2020, the effects of the COVID-19 coronavirus began to be felt in North America, rapidly reaching the level of a pandemic. On March 25, 2020, the CTA posted a statement on its website dealing with flight cancellations. The statement, entitled "Statement on Vouchers" notes the extraordinary circumstances facing the airline industry and airline customers because of the pandemic, and the need to strike a "fair and sensible balance between passenger protection and airlines' operational realities" in the current circumstances.

6 The Statement on Vouchers observes that passengers who have no prospect of completing their planned itineraries "should not be out-of-pocket for the cost of cancelled flights". At the same time, airlines facing enormous drops in passenger volumes and revenues "should not be expected to take steps that could threaten their economic viability".

7 The Statement on Vouchers states that any complaint brought to the CTA will be considered on its own merits. However, the Statement goes on to state that, generally speaking, the Agency believes that "an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time". The Statement then suggests that a 24-month period for the redemption of vouchers "would be considered reasonable in most cases".

8 Concurrent with the posting of the Statement on Vouchers, the CTA published an amendment to a notice already on its website entitled "Important Information for Travellers During COVID-19" (the Information Page), which incorporates references to the Statement on Vouchers.

9 These statements are the subject of the underlying application for judicial review.

2. APR's Arguments

10 APR submits that there is an established body of CTA jurisprudence that confirms passengers' right to a refund where air carriers are unable to provide air transportation, including cases where flight cancellations are for reasons beyond the airline's control. According to APR, this jurisprudence is consistent with the common law doctrine of frustration, the doctrine of *force majeure* and common sense. The governing legislation further requires airlines to develop reasonable policies for refunds when airlines are unable to provide service for any reason.

11 According to APR, statements on the Information Page do not just purport to relieve air carriers from having to provide passenger refunds where flights are cancelled for reasons beyond the airlines' control, including pandemic-related situations. They also purport to relieve airlines

from their obligation to provide refunds where flights are cancelled for reasons that are within the airlines' control, including where cancellation is required for safety reasons.

12 APR further contends that the impugned statements by the CTA are tantamount to an unsolicited advance ruling as to how the Agency will treat passenger complaints about refunds from air carriers where flights are cancelled for reasons relating to the COVID-19 pandemic. The statements suggest that the CTA is leaning heavily towards permitting the issuance of vouchers in lieu of refunds, and that it will very likely dismiss passenger complaints with respect to airlines' failure to provide refunds during the pandemic, regardless of the reason for the flight cancellation. According to APR, this creates a reasonable apprehension that CTA members will not deal with passenger complaints fairly.

3. The Test for Injunctive Relief

13 The parties agree that in determining whether APR is entitled to interlocutory injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.).

14 That is, the Court must consider three questions:

> 1) Whether APR has established that there is a serious issue to be tried in the underlying application for judicial review;
>
> 2) Whether irreparable harm will result if the injunction is not granted; and
>
> 3) Whether the balance of convenience favours the granting of the injunction.

15 The *RJR-MacDonald* test is conjunctive, with the result that an applicant must satisfy all three elements of the test in order to be entitled to relief: *Janssen Inc. v. AbbVie Corp.*, 2014 FCA 112, 120 C.P.R. (4th) 385 (F.C.A.) at para. 14.

4. Has APR Raised a Serious Issue?

16 The threshold for establishing the existence of a serious issue to be tried is usually a low one, and applicants need only establish that the underlying application is neither frivolous nor vexatious. A prolonged examination of the merits of the application is generally neither necessary nor desirable: *RJR-MacDonald*, above at 335, 337-338.

17 With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

18 However, APR also seeks mandatory orders compelling the CTA to remove the two statements from its website and directing it to "clarify any misconceptions for passengers who previously contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry". It further seeks a mandatory order requiring that the CTA bring this Court's order and the removal or clarification of the CTA's previous statements to the attention of airlines and a travel association.

19 A higher threshold must be met to establish a serious issue where a mandatory interlocutory injunction is sought compelling a respondent to take action prior to the determination of the underlying application on its merits. In such cases, the appropriate inquiry is whether the party seeking the injunction has established a strong *prima facie* case: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 (S.C.C.) at para. 15. That is, I must be satisfied upon a preliminary review of the case that there is a *strong likelihood* that APR will be ultimately successful in its application: *C.B.C.*, above at para. 17.

20 As will be explained below, I am not persuaded that APR has established a strong *prima facie* case here as the administrative action being challenged in its application for judicial review is not amenable to judicial review.

21 APR concedes that the statements on the CTA website do not reflect decisions, determinations, orders or legally-binding rulings on the part of the Agency. It notes, however, that subsection 18.1(1) of the *Federal Courts Act* does not limit the availability of judicial review to formal decisions or orders, stating rather that applications may be brought "by anyone directly affected by the matter in respect of which relief is sought" [my emphasis].

22 Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69, [2020] F.C.J. No. 498 (F.C.A.) at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3 (F.C.A.), leave to appeal to SCC refused 38379 [*City of Burnaby v. Attorney General of Canada, et al.*, 2019 CarswellNat 1517 (S.C.C.)] (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest & Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149 (F.C.A.).

23 For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority*, 2011 FCA 347, 426 N.R. 131 (F.C.A.); *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3 (Fed. T.D.). It is noteworthy that in its Notice of Application, APR itself states the CTA's statements "purport[t] to provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

24 I will return to the issue of the impact of the CTA's statements on APR in the context of my discussion of irreparable harm, but suffice it to say at this juncture that there is no suggestion that APR is itself directly affected by the statements in issue. The statements on the CTA website also do not determine the right of airline passengers to refunds where their flights have been cancelled by airlines for pandemic-related reasons.

25 Noting the current extraordinary circumstances, the statements simply suggest that having airlines provide affected passengers with vouchers or credits for future travel "could be" an appropriate approach in the present context, as long as these vouchers or credits do not expire in an unreasonably short period of time. This should be contrasted with the situation that confronted the Federal Court in *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750 (Fed. T.D.), relied on by APR, where the statement in issue included a clear statement of how, in the respondent's view, the law was to be interpreted and the statement in issue was intended to be coercive in nature.

26 As a general principle, CTA policy documents are not binding on it as a matter of law: *Canadian Pacific Railway Company v. Cambridge (City)*, 2019 FCA 254, 311 A.C.W.S. (3d) 416 (F.C.A.) at para. 5. Moreover, in this case the Statement on Vouchers specifically states that "any specific situation brought before the Agency will be examined on its merits". It thus remains open to affected passengers to file complaints with the CTA (which will be dealt with once the current suspension of dispute resolution services has ended) if they are not satisfied with a travel voucher, and to pursue their remedies in this Court if they are not satisfied with the Agency's decisions.

27 It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

5. Irreparable Harm

28 A party seeking interlocutory injunctive relief must demonstrate with clear and non-speculative evidence that it will suffer irreparable harm between now and the time that the underlying application for judicial review is finally disposed of.

29 APR has not argued that it will itself suffer irreparable harm if the injunction is not granted. It relies instead on the harm that it says will befall Canadian airline passengers whose flights have been cancelled for pandemic-related reasons. However, while APR appears to be pursuing this matter as a public interest litigant, it has not yet sought or been granted public interest standing.

30 As a general rule, only harm suffered by the party seeking the injunction will qualify under this branch of the test: *RJR-MacDonald*, above at 341; *Metropolitan Stores (MTS) Ltd. v. Manitoba*

Food & Commercial Workers, Local 832, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 (S.C.C.) at 128. There is a limited exception to this principle in that the interests of those individuals dependent on a registered charity may also be considered under this branch of the test: *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, 440 N.R. 232 (F.C.A.) at paras. 33-34; *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265, [2010] 1 C.T.C. 161 (F.C.A.) at para. 17. While APR is a not-for-profit corporation, there is no suggestion that it is a registered charity.

31 I am also not persuaded that irreparable harm has been established, even if potential harm to Canadian airline passengers is considered.

32 Insofar as APR seeks to enjoin the CTA from dealing with passenger complaints, it asserts that the statements in issue were published contrary to the CTA's own *Code of Conduct*. This prohibits members from publicly expressing opinions on potential cases or issues relating to the work of the Agency that may create a reasonable apprehension of bias on the part of the member. According to APR, the two statements at issue here create a reasonable apprehension of bias on the part of the CTA's members such that they will be unable to provide complainants with a fair hearing.

33 Bias is an attitude of mind that is unique to an individual. As a result, an allegation of bias must be directed against a specific individual who is alleged to be unable to bring an impartial mind to bear on a matter: *E.A. Manning Ltd. v. Ontario (Securities Commission)* (1995), 23 O.R. (3d) 257, 32 Admin. L.R. (2d) 1 (Ont. C.A.), citing *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (B.C. C.A.).

34 As is the case with many administrative bodies, the CTA carries out both regulatory and adjudicative functions. It resolves specific commercial and consumer transportation-related disputes and acts as an industry regulator issuing permits and licences to transportation providers. The CTA also provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers.

35 There is no evidence before me that the members of the CTA were involved in the formulation of the statements at issue here, or that they have endorsed them. Courts have, moreover, rejected the notion that a "corporate taint" can arise based on statements by non-adjudicator members of multi-function organizations: *Zündel v. Citron*, [2000] 4 F.C. 225, 189 D.L.R. (4th) 131 (Fed. C.A.) at para. 49; *E.A. Manning Ltd.*, above at para. 24.

36 Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing. The alleged harm is thus not irreparable.

37 APR also asserts that passengers are being misled by the travel industry as to the import of the CTA's statements, and that airlines, travel insurers and others are citing the statements as a basis to deny reimbursement to passengers whose flights have been cancelled for pandemic-related reasons. If third parties are misrepresenting what the CTA has stated, recourse is available against those third parties and the alleged harm is thus not irreparable.

6. Balance of Convenience

38 In light of the foregoing, it is unnecessary to deal with the question of the balance of convenience.

7. Other Matters

39 Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

40 APR asks that it be permitted to make submissions on the issue of costs once the Court has dealt with the merits of its motion. APR shall have 10 days in which to file submissions in writing in relation to the question of costs, which submissions shall not exceed five pages in length. The CTA shall have 10 days in which to respond with submissions that do not exceed five pages, and APR shall have a further five days in which to reply with submissions that do not exceed three pages in length.

Motion dismissed.

2020 FCA 155
Federal Court of Appeal

Air Passenger Rights v. Canada (Transportation Agency)

2020 CarswellNat 4279, 2020 FCA 155

AIR PASSENGER RIGHTS (Applicant) and CANADIAN TRANSPORTATION AGENCY (Respondent)

Wyman W. Webb J.A.

Judgment: October 2, 2020
Docket: A-102-20

Counsel: Simon Lin (written), for Applicant
Allan Matte, for Respondent

***Wyman W. Webb J.A.*:**

1 The Canadian Transportation Agency (CTA) has brought a motion to strike the judicial review application filed by Air Passenger Rights (APR). The judicial review application relates to two statements that were published on the website of the CTA that were prompted by the COVID-19 pandemic. The "Statement on Vouchers" addresses the situation arising when flights are cancelled. It includes the following:

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

2 The second statement that is the subject of the judicial review application is one which references the Statement on Vouchers.

3 Following the filing of its application for judicial review, APR brought a motion seeking an interlocutory order that would require the removal of the statements from the CTA's website. It was also seeking "to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the [CTA]'s public statements" (*Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 (F.C.A.), at para. 3).

4 In dismissing the motion, Justice Mactavish applied the test for interlocutory injunctive relief as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.).

5 In paragraph 16 of the reasons related to the dismissal of this motion, Justice Mactavish noted that there is a low threshold for establishing the existence of a serious issue to be tried. In paragraph 17 she stated:

> With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

6 Justice Mactavish also noted that a higher threshold is involved when a person is seeking a mandatory interlocutory injunction to compel another person to take action prior to the determination of the underlying application on its merits. In that case, she found that the party who is seeking an injunction would need to establish a strong *prima facie* case (paragraph 19).

7 In addressing whether APR had established a strong *prima facie* case, Justice Mactavish stated:

> 22 Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.
>
> 23 For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al.*, 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's statements "purport [t]o provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

8 In paragraph 27 of her reasons, Justice Mactavish concluded:

> 27 It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient

> to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

9 As a result, APR had failed to establish, with respect to its request for mandatory relief that the statements be removed from the CTA's website, that these statements "affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers".

10 Following this finding, Justice Mactavish noted:

> 39 Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

11 Prompted by this notation that there was no motion before the Court to dismiss the application for judicial review, the CTA brought the current motion to strike this application.

12 In *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.), (*JP Morgan*) this Court noted that the threshold for striking an application for judicial review is high:

> 47 The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" [footnote omitted]: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), at page 600. There must be a "show stopper" or a "knockout punch" — an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> 48 There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, above, at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, above, subsection 18.1(2) and section 18.4. An unmeritorious motion — one that raises matters that should be advanced at the hearing on the merits — frustrates that objective.

13 APR's main argument in its memorandum filed in relation to this motion is that the test for the availability of judicial review has changed. APR submits that the test based on whether the conduct of the administrative body affects legal rights, imposes legal obligations, or causes

prejudicial effects is no longer applicable. Therefore, APR submits that Justice Mactavish erred in basing her decision on her finding that the impugned statements did not affect legal rights, impose legal obligations, or cause prejudicial effects.

14 APR notes that this Court in *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (F.C.A.), (*AC v. TPA*) stated:

> 28 The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> 29 One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

15 However, APR, in paragraph 49 of its memorandum, submits that the Supreme Court of Canada changed the test that is to be applied to determine if judicial review is available:

> [i]n 2018, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26] the Supreme Court recast the test for availability of judicial review as simply whether the administrative bodies' action is an exercise of state authority that is of a sufficiently public character [***Wall*-test**].
>
> (emphasis in original)

16 Although APR does not explicitly state that, in its view, the Supreme Court indirectly overturned the decision of this Court in *Air Canada v. Toronto Port Authority*, it appears that this is implicit in its argument which culminates in the following statement in paragraph 63 of its memorandum:

> Therefore, the panels of this Honourable Court in *Oceanex* [*Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250] and *Guérin* [*Guérin c. Canada (Procureur général)*, 2019 CAF 272] correctly concluded that availability of judicial review of acts of federal administrative bodies is to be determined based on the *Wall*-test.

17 The position of the CTA is that the principle, as set out in *Air Canada v. Toronto Port Authority*, that there is no right to judicial review "where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects" is still good law and it has not been overturned by the Supreme Court. Therefore, since the statements at issue in this judicial review application do not affect legal rights, impose legal obligations or cause prejudicial effects, the application for judicial review should be struck.

18 It is important to examine exactly what each court said. The relevant paragraph in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (S.C.C.) (*Wall*), is paragraph 14:

> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature - such as renting premises and hiring staff - and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (ibid.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

19 There is nothing in this paragraph that indicates that the Supreme Court is overturning the decision of this Court in *Air Canada v. Toronto Port Authority*. Rather, the Supreme Court specifically refers to this decision in the above quoted paragraph, albeit for a different principle referenced in that case. If the Supreme Court had intended that *Air Canada v. Toronto Port Authority* should no longer be followed for the principle that judicial review will not be available if the conduct does not affect legal rights, impose legal obligations or cause prejudicial effects, it presumably would have explicitly stated it was overturning this decision.

20 Furthermore, it is important to review the context in which this statement was made by the Supreme Court. The issue in *Wall*, was described by the Supreme Court in the first paragraph of that decision:

> 1. The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

21 The issue was, therefore, whether the decision that had been reached by the Judicial Committee could be the subject of a judicial review. The conclusion of the Supreme Court was that this decision was not justiciable. The Supreme Court did not decide that a particular conduct

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which did not affect legal rights, impose legal obligations or cause prejudicial effects, could nevertheless be subject to judicial review. In *Wall*, Mr. Wall had been disfellowshipped by the Judicial Committee and therefore his rights were affected.

22 APR submitted that two decisions of this Court applied the test as set out in *Wall*. In *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 (F.C.A.), this Court simply noted that the Supreme Court had recently revisited the law governing the availability of judicial review and that it had emphasized:

> [...] that judicial review is available only where two conditions are met - "where there is an exercise of state authority and where that exercise is of a sufficiently public character" [...]
>
> (emphasis in original)

23 This Court did not decide that judicial review would be available where these two conditions are met regardless of whether the particular decision or conduct affects legal rights, imposes legal obligations or causes prejudicial effects.

24 In *Guérin c. Canada (Procureur général)*, 2019 CAF 272 (F.C.A.), the reference to the Supreme Court's decision in *Wall*, is in paragraph 65: « Ce principe a récemment été réitéré par la Cour suprême dans *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) c. Wall* [...] ». The principle to which this Court was referring was stated in the immediately preceding paragraph: « Dans l'arrêt *Dunsmuir*, la Cour suprême a clairement réaffirmé le principe selon lequel la relation de la Couronne avec ses employés est régie par le droit des contrats. » The principle to which this Court was referring was not the principle that related to the availability of judicial review but rather that the relationship between the Crown and its employees is governed by the law of contract.

25 As a result, none of these cases support the proposition advanced by APR. APR also refers to the decision of this Court in *Wenham v. Canada (Attorney General)*, 2018 FCA 199 (F.C.A.). In that case, this Court noted:

> 36 An application can be doomed to fail at any of the three stages:
>
> > I. Preliminary objections. An application not authorized under the *Federal Courts Act*, R.S.C., 1985, c. F-7 or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605.

26 This Court referred to both the Supreme Court's decision in *Wall* and the decision of this Court in *Air Canada v. Toronto Port Authority* as providing a basis on which a judicial review application could fail. Therefore, an application for judicial review could fail if the test as set out

in *Wall* is not satisfied, or if the particular decision or conduct did not affect legal rights, impose legal obligations or cause prejudicial effects.

27 As a result, there is no support for the proposition as advocated by APR that "where there is an exercise of state authority and where that exercise is of a sufficiently public character" that exercise of public authority can be subject to judicial review even though no legal rights are affected, no legal obligations are imposed and there are no prejudicial effects.

28 However, the finding by Justice Mactavish that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects were made in relation to the part of the judicial review application with respect to the request for an order compelling the CTA to remove these statements from its website.

29 As noted above, Justice Mactavish stated that she was assuming "that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part". APR lost its motion for an interlocutory injunction in relation to this aspect at the irreparable harm stage, not the serious issue to be tried stage. CTA did not address this distinction in its memorandum of fact and law that it included with its motion record. Instead, the CTA only focused on Justice Mactavish's conclusion that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects.

30 Following the receipt of APR's motion record, CTA addressed the reasonable apprehension of bias argument in its reply submissions, which were longer than its original submissions.

31 CTA, in its reply submissions, stated:

> 13. [APR] wants this Court to review facts which [APR] says create a reasonable apprehension of bias in future cases. There is no precedent for this. The proper course is to raise the issue in those cases where the decision of the [CTA] would affect the legal rights of the parties.
>
> 14. The decision of Mactavish J.A. on the motion for an interlocutory injunction brings home this very point. Mactavish J.A. pointed out that allegations of bias could be raised in actual proceedings affecting the rights of individuals, as was done in *E.A. Manning* [*E.A. Manning Ltd. v. Ontario Securities Commission*, 18 O.R. (3d) 97, [1994] O.J. No. 1026];
>
> > Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing.

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32 However, these comments of Justice Mactavish were made in paragraph 36 of her reasons in relation to the irreparable harm component of the *RJR-MacDonald* test, not whether there was a serious issue that was raised in the judicial review application in relation to this matter. The absence of a precedent should not also necessarily lead to the conclusion that an application for judicial review should be struck. CTA was also unable to identify any precedent that clearly supported its position that this part of the judicial review application was "so clearly improper as to be bereft of any possibility of success" (*Pharmacia Inc. v. Canada (Minister of National Health & Welfare)* (1994), [1995] 1 F.C. 588 (Fed. C.A.), at page 600, (1994), 58 C.P.R. (3d) 209 (Fed. C.A.)).

33 The arguments related to the reasonable apprehension of bias should be made at the hearing of the judicial review application, not in reply submissions in relation to a motion to strike the judicial review application. APR should not be deprived of its argument simply because there is no precedent.

34 As a result, I would dismiss the motion to strike the application for judicial review. The costs of this motion shall be in the cause.

2007 FC 415, 2007 CF 415
Federal Court

Airth v. Minister of National Revenue

2007 CarswellNat 2022, 2007 CarswellNat 881, 2007 FC 415, 2007 CF 415, [2007] 3 C.T.C. 197, 157 A.C.W.S. (3d) 233, 2007 D.T.C. 5356 (Eng.)

Brian Airth et al, Applicants and The Minister of National Revenue, Respondent

M.L. Phelan J.

Judgment: April 19, 2007
Docket: T-1188-06

Counsel: Mr. Martin Peters, for Applicants
Ms Donnaree Nygard, for Respondent

***M.L. Phelan J.*:**

1 The Applicant has brought a motion for an Order under Rule 318(4) of the *Federal Courts Rules* compelling the Respondent to produce material relevant to the Application(s) for Judicial Review pursuant to Rule 317. The Applicant in this instance is the lead applicant in consolidated judicial reviews filed by in excess of 40 applicants.

2 The Applicant challenges the authority of the Respondent in issuing letters of requirement for information purportedly for income tax audit purposes. The Applicant's position is that the predominant purpose of these letters is the Applicant's penal liability and that the Respondent's actions are outside the authority and purpose of the *Income Tax Act*.

3 The Respondent brought a preliminary motion to strike the judicial review because it was filed outside the 30-day time limit specified in s. 18.1(2) of the *Federal Courts Act*. I dismissed the motion on the basis that the state of the pleadings at that time indicated that the challenge was to the actions of the Respondent, rather than a specific decision, and therefore s. 18.1(2) of the Act did not apply. Because this was early days in this proceeding, I reserved for the Respondent the right to re-argue the time limit issue at the judicial review, which is the usual method of dealing with time limit issues.

4 The relevant provisions are s. 18.1(2) of the *Federal Courts Act* and Rule 317(1) of the *Federal Courts Rules*::

18.1 (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.	18.1 (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.
317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

5 I have difficulty with the Applicant's argument that the reference to "in respect of a decision or order" in s. 18.1(2) is not a reference to the same order as "whose order is the subject of the application ..." in Rule 317(1). Aside from the discordance in reference to "decision or order" in the Act and only to "order" in the Rule, it seems to me that Rule 317(1) is directed to the order (or decision) under review and referred to in s. 18.1(2) of the Act.

6 Rule 317 is clearly more suited to the traditional type of judicial review of an order or decision where there is a record below which forms the substrata of the order or decision under attack. Rule 317 is an inelegant tool in dealing with judicial review of actions, conduct or policies and practices.

7 I concur with Justice Kelen's sentiments in *Renova Holdings Ltd. v. Canadian Wheat Board*, 2006 FC 1505 (F.C.) at paragraph 18 that it would be inconsistent with the right to challenge administrative policies and practices (including, presumably, specific actions) to deny applicants access to the material necessary to establish or, more particularly, to challenge the government's claim as to the underlying legitimacy of its policies, practices or actions. The issue is the manner in which this material is to be produced without authorizing a fishing expedition or a discovery type process.

8 The weight of authority in this Court is that the absolute right and procedure set forth in Rule 317 et seq. is available only where there is an "order" which is the subject-matter of judicial review. (See *Patterson v. Bath Institution*, 2004 FC 972 (F.C.) and also *Gaudes v. Canada (Attorney General)*, 2005 FC 351 (F.C.)). However, this is largely an issue of form rather than substance as I have no doubt that the relevant materials for a judicial review must be disclosed one way or another.

9 In this case, the Respondent has said that it has produced all the relevant material. This is consistent with its position that what is really under judicial review is an "order or decision" to which issues of standard of review and the like may have application.

10 The fulsomeness of disclosure may be an issue in cross-examination but is not something with which the Court can deal at this time.

11 Given the Respondent's disclosure commitment earlier referenced, the demand under Rule 317 is moot assuming that the relevant material is produced.

12 Therefore, this motion is dismissed with costs in the cause.

Order

IT IS ORDERED THAT this motion is dismissed with costs in the cause.

Motion dismissed.

2006 FC 222, 2006 CF 222
Federal Court

Assoc. des Crabiers Acadiens Inc. c. Canada (Procureur général)

2006 CarswellNat 433, 2006 CarswellNat 4610, 2006 FC 222, 2006 CF 222, [2006] F.C.J. No. 294, 154 A.C.W.S. (3d) 565

Association des Crabiers Acadiens, duly incorporated under the laws of the province of New Brunswick, Association des Crabiers de la Baie, an association duly registered under the laws of the province of Quebec and Association des Crabiers Gaspésiens, an association duly registered under the laws of the province of Quebec, Applicants and Attorney General of Canada, Respondent

Harrington J.

Heard: February 13, 2006
Judgment: February 17, 2006
Docket: T-775-05

Counsel: Brigitte Sivret, pour demanderesse
Dominique Gallant, Kim Duggan, pour défendeur

***Harrington J.*:**

1. Introduction

1 This motion is made in connection with an application for judicial review. The motion is seeking an order directing the defendant (respondent) to provide the plaintiffs (applicants) with additional documents. Pursuant to Rule 317, the applicants are seeking the filing of two documents and any changes to the said documents in the possession of the federal entity which took the impugned decision. The respondent maintained that the documents are not relevant since they were not before the decision-maker. Further, he noted that these documents were created only after the decision was rendered.

2 The applicants are seeking judicial review of the decision by the Minister of Fisheries and Oceans made on or about April 4, 2005 to issue a snow crab fishing permit authorizing the taking of a quota of 480 metric tons of snow crabs to the Association des pêcheurs de poissons de fond

acadiens (APPFA) in exchange for a payment to the Department of Fisheries and Oceans (DFO) of $1,900,000 to enable the DFO to finance its activities.

3 The decision, at least as communicated to the applicants by fax on April 4, 2005, reads as follows:

> [TRANSLATION]
>
> Further to call for tenders on project F4697-040016, the bid received from the Association des Pêcheurs de Poissons de Fond Acadiens has been accepted by the Department.

4 As to the application for judicial review, the applicants (that is, the plaintiffs) are seeking a declaration that the Minister did not have jurisdiction and/or exceeded his jurisdiction when he made the decision to issue a snow crab fishing permit to the APPFA in exchange for the sum of $1,900,000 to be used to finance the DFO's activities; a declaration that the snow crab fishing permit issued to the APPFA is invalid since the Minister did not have the power to issue a fishing permit in exchange for the sum of $1,900,000 to finance the DFO's activities; a declaration that the Minister did not have the power to delegate and/or exceeded his power to delegate his discretionary authority to issue fishing permits and his duty to manage fisheries efficiently to the APPFA; and an order quashing the Minister's decision of April 4, 2005 to issue a snow crab fishing permit to the APPFA authorizing the taking of 480 mt.

5 As to the motion at bar, the applicants are seeking an order from this Court that the following documents be filed: a copy of the draft agreement concluded with APPFA in 2005 regarding the issuing of a fishing permit and the taking of 480 metric tons of snow crabs; a copy of the fishing permit issued to the APPFA for the 480 metric tons; and a copy of any changes to the aforesaid documents.

6 This case began when the [TRANSLATION] "project call for tenders", the closing date of which was March 23, 2005, was sent to the DFO, Finance and Material Management, in Moncton. Its primary purpose was, *inter alia*:

> [TRANSLATION]
>
> ... the purpose of improving fishing management in these zones and financing the additional activities of the Department. A quota not exceeding 480 metric tons of snow crabs was identified for the DFO's additional activities to improve the overall management of fishing in these zones. The promoter's financial obligations amount to $1,900,000.

7 The call for tenders was issued by Carole LeBlanc, contracting and procurement officer.

8 The fax of April 4, 2005 indicating that the APPFA bid [TRANSLATION] "has been accepted by the Department" was sent out by Monique Baker, Senior Advisor, Shellfish, with the DFO for the Gulf region.

9 Ms. Leblanc and Ms. Baker both signed affidavits regarding this case. Ms. Baker stated that the documents sought by the applicants existed, but the draft agreement with the APPFA was concluded on April 12, 2005 and the fishing permit issued on April 29, 2005.

10 Ms. LeBlanc, Ms. Baker and other individuals were members of the review committee. On March 30, 2005, Ms. LeBlanc sent a letter to J.B. Jones, General Manager of the Gulf region, recommending that the quota be awarded to the APPFA. On the same day, Francis R. Breau, Acting Regional General Manager, signed the approval on behalf of Mr. Jones.

2. Issues

A. Are the documents relevant?

B. If the documents are relevant, must they be filed despite the fact that they did not exist when the decision was made?

C. If the documents are relevant, must they be filed despite the fact that they were not before the decision-maker?

3. Analysis

11 The documents are clearly relevant in view of the decision challenged by this application for judicial review.

12 It does not much matter that the documents did not exist when the decision was made. The applicants were informed that the decision received from the APPFA had been approved by the Minister. As it is not only necessary to have a contract but a fishing licence for the contract to be enforceable, and in the case at bar the contract had been awarded, the Minister could not then argue that he could not provide the documents since the contract was not finalized. "Equity looks on as done that which ought to be done".

13 As to the fact that the documents were not before the decision-maker, the filing thereof cannot be avoided by failing to supply them to the decision-maker. As indicated in *Tremblay v. Canada (Attorney General)*, 2005 C.F. 339, [2005] F.C.J. No. 421 (F.C.), the issue is not only whether the documents were before the decision-maker but whether they should have been before him.

14 Irrespective of the time of creation of the documents, they are directly related to the decision nevertheless and in such circumstances cannot be ignored. The documents in question still flow directly from what was decided, whether on March 30 or April 4, 2005.

15 In general, an application for judicial review is based on the documentation before the original decision-maker. However, if it is not possible to decide the question, there are exceptions, for instance where the tribunal's authority is in issue. It will not suffice for the Minister to argue that the documents could have been obtained by an access to information application. As mentioned by Phelen J. in *Cooke v. Canada (Correctional Services)*, 2005 CF 712, [2005] F.C.J. No. 886 (F.C.), at paragraphs 22 and 23:

> ¶ 22 I reject any suggestion made by the Respondent that an applicant must use such indirect means as the *Access to Information Act* to secure materials in a tribunal's possession where the tribunal had failed to meet its obligations under Rule 318(1).
>
> ¶ 23 Since the material which is "relevant to an application" is material which may affect the decision that this Court may make; and, in this instance the Applicant clearly attacked the adequacy of the investigation, the material requested by the Applicant under Rule 317 should have been provided to him. (*CBC v. Paul*, [2001] F.C.J. No. 542, 2001 FCA 93).

16 In accordance with the analysis in *Gitxsan Treaty Society v. H.E.U.* (1999), 249 N.R. 37, [2000] 1 F.C. 135 (Fed. C.A.), I am of the view that the documents should be filed.

17 The applicants also sought an order varying an earlier order on deadlines to have a cross-examination postponed on account of circumstances beyond the parties' control, and a further deadline for filing their record pursuant to Rule 309. The respondent consented to the extension of time.

Order

THIS COURT ORDERS:

1. The motion is granted;

2. The respondent shall provide the applicants with the following documents:

   (a) a copy of the draft agreement concluded with the APPFA in 2005 regarding the issuance of a fishing permit and the taking of 480 metric tons of snow crabs;

   (b) a copy of the fishing permit issued to the APPFA regarding the 480 metric tons; and

   (c) a copy of any changes to the aforesaid documents;

3. The applicants have until April 24, 2006 to file their record;

4. The respondent has until May 30, 2006 to file his record;

5. The whole with costs.

2020 SCC 20, 2020 CSC 20
Supreme Court of Canada

British Columbia (Attorney General) v. Provincial
Court Judges' Association of British Columbia

2020 CarswellBC 1865, 2020 CarswellBC 1866, 2020 SCC 20,
2020 CSC 20, [2020] 10 W.W.R. 1, 320 A.C.W.S. (3d) 227, 38
B.C.L.R. (6th) 213, 448 D.L.R. (4th) 1, 69 Admin. L.R. (6th) 167

Attorney General of British Columbia (Appellant) and Provincial Court Judges' Association of British Columbia (Respondent) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Saskatchewan, Attorney General of Alberta, Canadian Superior Courts Judges Association, Canadian Bar Association, Canadian Association of Provincial Court Judges, Canadian Taxpayers Federation and Canadian Civil Liberties Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: December 9, 2019
Judgment: July 31, 2020
Docket: 38381

Proceedings: reversing *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)* (2018), 2018 BCCA 394, 2018 CarswellBC 2776, 48 Admin. L.R. (6th) 279, 430 D.L.R. (4th) 660, 19 B.C.L.R. (6th) 188, [2019] 7 W.W.R. 521, Bauman C.J.B.C., Dickson J.A., Harris J.A. (B.C. C.A.); affirming *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia* (2018), 2018 CarswellBC 2158, 2018 BCSC 1390, 19 B.C.L.R. (6th) 168, Hinkson C.J.S.C. (B.C. S.C.); affirming *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)* (2018), 2018 BCSC 1193, 2018 CarswellBC 1891, Muir Master (B.C. S.C.)

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Steven M. Barrett, Colleen Bauman, for Intervener, the Canadian Association of Provincial Court Judges
Adam Goldenberg, Stephanie Willsey, for Intervener, the Canadian Taxpayers Federation
Andrew K. Lokan, Lauren Pearce, for Intervener, the Canadian Civil Liberties Association

Karakatsanis J. **(Wagner C.J.C. and Abella, Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ. concurring):**

1 This appeal arises in litigation that implicates the relationship between two branches of the state. It requires this Court to balance several constitutional imperatives relating to the administration of justice and the separation of powers between the executive, legislative and judicial branches of the state: the financial dimension of judicial independence; the shared responsibility of the executive and legislature to make decisions about public money; and the public interest in ensuring the executive can conduct its internal business in confidence.

2 This appeal, along with its companion appeal, *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21 (S.C.C.), asks whether a Cabinet submission concerning a government's response to a judicial compensation commission's recommendations is properly part of the record on a judicial review of the government's response. If so, the further issue arises whether the Attorney General of British Columbia should nevertheless be permitted to refuse to produce the submission on grounds of public interest immunity.

3 The British Columbia courts found that the confidential Cabinet document requested by the Provincial Court Judges' Association of British Columbia was relevant and not protected by public interest immunity, and ordered that the Attorney General produce it.

4 In my view, they were wrong to do so.

5 In its judicial independence case law, this Court has consistently sought to strike a balance between several competing constitutional considerations by establishing a unique process for setting judicial remuneration, backed up by a focused, yet robust form of judicial review described in *Provincial Court Judges' Assn. (New Brunswick) v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286 (S.C.C.) [hereinafter Bodner]. [1] In resolving this appeal, the rules of evidence and production must be applied in a manner that reflects the unique features of the limited review described in *Bodner*, and respects both judicial independence and the confidentiality of Cabinet decision making.

6 For the reasons that follow, where a party seeking *Bodner* review requests that the government produce a document relating to Cabinet deliberations, it must first establish that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner*. Only then would the government be required to produce the document for judicial inspection. If the document does in fact provide some evidence which tends to show that the government's response does not comply with the constitutional requirements, the court can then determine whether its production is barred by public interest immunity or another rule of evidence invoked by the government.

7 Public interest immunity requires a careful balancing between the competing public interests in confidentiality and disclosure. Since there will be a strong public interest in keeping a document concerning Cabinet deliberations confidential, it must be outweighed by a still stronger public interest to warrant the document's disclosure. In the *Bodner* context, the strength of the public interest in disclosure will often depend on the importance of the document to determining the issues before the court in the *Bodner* review.

8 Here, the Provincial Court Judges' Association did not meet the threshold necessary to compel production of a confidential Cabinet document for judicial inspection. While this is not a high bar, it is not met simply by showing that the government considered the Cabinet document before making its response. I would allow the appeal and quash the order for production of the Cabinet submission.

I. Background

A. Judicial Compensation Act, S.B.C. 2003, c. 59

9 In the *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) ([hereinafter] *Provincial Judges Reference*), this Court set out the constitutional baseline for making changes to judicial remuneration. The *Judicial Compensation Act* implements that baseline in British Columbia.

10 The *Judicial Compensation Act* provides for the appointment of a triennial judicial compensation commission to make recommendations about the remuneration, allowances and benefits of provincial judges and judicial justices: ss. 2 and 5(1). The commission must consider a prescribed set of factors and may consider other factors, provided it justifies their relevance: s. 5(5), (5.1) and (5.2). The commission communicates its recommendations in a final report to the Attorney General: s. 5(3). [2]

11 Upon receipt of the commission's report, the Attorney General must then lay the report before the Legislative Assembly of British Columbia within a statutory timeline: s. 6(1). The Attorney General must also advise the Assembly that if it does not reject the commission's recommendations within a statutory timeline, the recommendations will go into effect: s. 6(1) and (3). The Assembly

can then pass a resolution rejecting one or more recommendations and set judicial remuneration, allowances and benefits: s. 6(2). The resolution has binding legal effect: ss. 6(4) and 8(1).

B. Judicial Compensation Commission's Recommendations and Government's Response

12 In October 2016, the Judicial Compensation Commission submitted its final report to the Attorney General and made recommendations for the 2017-20 period. The commission recommended an 8.2 percent increase in the salary of provincial judges in 2017-18 and a 1.5 percent increase in both 2018-19 and 2019-20.[3] The commission also recommended that the Provincial Court Judges' Association be reimbursed for the entirety of its costs of participating in the commission process.

13 At some point after the commission submitted its report, the Attorney General made a submission to Cabinet concerning the commission's recommendations and the government's response. The Cabinet submission is not in the record before this Court and was not put before the courts below. Moreover, there is no evidence in the record about what the submission might contain.

14 Having laid the commission's report before the Legislative Assembly in September 2017, the Attorney General tabled the government's proposed response to the commission's report in October 2017. The Attorney General did not table the Cabinet submission and there is no indication in the record that any member of the Legislative Assembly other than those serving in Cabinet was aware of the contents of the submission.

15 The Attorney General moved to pass a resolution rejecting the commission's recommended increase in the salary of provincial judges and adopting a 3.8 percent increase in 2017-18 and a 1.5 percent increase in both 2018-19 and 2019-20.[4] The Attorney General also proposed reducing the recommended reimbursement for the Provincial Court Judges' Association's costs of participating in the commission process from approximately $93,000 to about $66,000 in accordance with the formula established by s. 7.1 of the *Judicial Compensation Act*. With the support of government and opposition members, the Legislative Assembly passed the resolution.

16 The Provincial Court Judges' Association petitioned for judicial review of the Legislative Assembly's resolution. Among other things, the Provincial Court Judges' Association asked to have the resolution quashed and sought a declaration that the government's response and the resolution were inconsistent with the *Judicial Compensation Act* and with the constitutional principle of judicial independence.

17 In anticipation of the hearing of their petition on the merits, the Provincial Court Judges' Association asked the Attorney General to produce the Cabinet submission relied on in preparing the government's response. The Attorney General refused, so the Association sought an order to

require the Attorney General to produce the submission: see *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 22-1(4)(c).

II. Procedural History

A. Supreme Court of British Columbia, 2018 BCSC 1193 (B.C. S.C.) (Master Muir)

18 The Provincial Court Judges' Association's motion was initially heard by a Supreme Court of British Columbia master. The master noted that the Attorney General did not contest that the government's response was informed by a detailed submission to Cabinet: para. 9 (CanLII).

19 Turning to relevance, while acknowledging that the government had not referred to or relied on the submission to Cabinet in making its decision, the master concluded that the submission was relevant to the *Bodner* review and specifically to whether the government relied on a reasonable factual foundation in developing its response to the commission's recommendation, and whether its response demonstrates meaningful engagement with the commission process: paras. 9 and 18-21.

20 Regarding public interest immunity, the master explained that the Attorney General did not provide any specific evidence of harm that would result from the production of the Cabinet submission: para. 23. The importance of review of the government's response and the need for transparency outweighed the public interest in its remaining confidential: paras. 23 and 27. The master ordered the Attorney General to produce the Cabinet submission: para. 28.

B. Supreme Court of British Columbia, 2018 BCSC 1390, 19 B.C.L.R. (6th) 168 (B.C. S.C.) (Hinkson C.J.S.C.)

21 The Supreme Court of British Columbia dismissed the appeal from the master's decision. Like the master, the court did not examine the Cabinet submission: para. 45.

22 Hinkson C.J.S.C. found no error in the master's conclusion that the Cabinet submission was relevant, agreeing that the submission was relevant to the issue whether the government respected the commission process such that the overall objectives of the process were achieved: paras. 34-35.

23 The court found no error in the master's conclusion that public interest immunity did not apply based on the factors identified in *Carey v. Ontario*, [1986] 2 S.C.R. 637 (S.C.C.). The court emphasized that the submission related to the subject matter of the litigation and that the Attorney General did not offer in any evidence that any particular harm would flow from disclosure: para. 46.

C. Court of Appeal for British Columbia, 2018 BCCA 394, 19 B.C.L.R. (6th) 188 (B.C. C.A.) (Bauman C.J.B.C., Harris and Dickson JJ.A.)

24 The Court of Appeal for British Columbia dismissed the Attorney General's further appeal from the Supreme Court's decision. Writing for the Court of Appeal, Bauman C.J.B.C. explained

that although the Legislative Assembly is the decision-maker under the *Judicial Compensation Act*, the Attorney General prepares the government's draft response for approval by Cabinet before presenting it to the Legislative Assembly: para. 9. Cabinet is thus directly involved in the decision-making process.

25 The Court of Appeal concluded that the Cabinet submission was necessarily relevant given that it informed the government's response to the commission's recommendations: paras. 9 and 16. Since Cabinet was "a primary actor in the impugned 'government response' ... the Cabinet submission is clearly 'evidence which was before the administrative decision-maker'" and should be included in the record on judicial review: para. 19, quoting *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 304 Sask. R. 1 (Sask. C.A.), cited as *Hartwig v. Saskatchewan (Commission of Inquiry)*, at para. 33. The Court of Appeal also affirmed Hinkson C.J.S.C.'s analysis on public interest immunity: para. 22.

III. Issues

26 This appeal raises two issues: (a) whether the Cabinet submission in this case should form part of the record on *Bodner* review and (b) whether the Cabinet submission is protected by public interest immunity.

IV. Analysis

A. Judicial Independence and the Nature of Bodner Review

27 This appeal arises in the context of review of a government's response to a judicial compensation commission's recommendations. Such review aims to safeguard judicial independence.

28 The constitutional principle of judicial independence flows from the recital in the preamble to the *Constitution Act, 1867* that our country is to have a "Constitution similar in Principle to that of the United Kingdom", ss. 96 to 101 of the *Constitution Act, 1867*, s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and s. 42(1)(*d*) of the *Constitution Act, 1982*: *R. v. Beauregard*, [1986] 2 S.C.R. 56 (S.C.C.), at pp. 72-73; *Provincial Judges Reference*, at paras. 84 and 105-9; *Reference re Supreme Court Act (Canada)*, 2014 SCC 21, [2014] 1 S.C.R. 433 (S.C.C.), at para. 94; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116 (S.C.C.), at para. 31.

29 These provisions and the broader principle of judicial independence serve not only to protect the separation of powers between the branches of the state and thus, the integrity of our constitutional structure, but also to promote public confidence in the administration of justice: *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857 (S.C.C.), at paras. 21-23; *Conférence des juges de*

paix magistrats du Québec, at para. 31. They are fundamental to the rule of law and to democracy in Canada.

30 The overarching principle of judicial independence applies to all courts, whether of civil or criminal jurisdiction and whether their judges are appointed by federal, provincial or territorial authorities:*Provincial Judges Reference*, at para. 106; *Ell*, at paras. 21-24; *Conférence des juges de paix magistrats du Québec*, at para. 32.

31 The three core characteristics of judicial independence are security of tenure, financial security and administrative independence: *Provincial Judges Reference*, at para. 118. The characteristic at issue in this appeal — financial security — in turn has three components, "which all flow from the constitutional imperative that ... the relationship between the judiciary and the other branches of government be *depoliticized*": para. 131 (emphasis in original). First, absent a "dire and exceptional financial emergency precipitated by unusual circumstances", a government cannot change judicial remuneration parameters without first seeking the recommendations of an independent body, a "commission": paras. 133 and 137. (Government can, depending on the context, mean the executive, legislature or legislative assembly.) Second, judges cannot engage in negotiations with the government over remuneration: para. 134. Finally, judicial remuneration cannot fall below the basic minimum level required for the office of a judge: at para. 135.

32 More specifically, this appeal concerns the first component of financial security: the convening of a judicial compensation commission to make recommendations concerning judicial remuneration. The commission charged with making such recommendations must be independent, effective and objective:*Provincial Judges Reference*, at para. 133.

33 The effectiveness requirement means that the commission must be regularly convened, that no changes can be made to remuneration until the commission submits its report and that "the reports of the commission must have a meaningful effect on the determination of judicial salaries": *Provincial Judges Reference*, at paras. 174-75 and 179; see also *Bodner*, at para. 29.

34 To ensure that the commission's recommendations have a meaningful effect, the government must formally respond to the commission's report: *Provincial Judges Reference*, at para. 179; *Bodner*, at para. 22. Because of the executive and legislature's shared constitutional responsibility to make decisions about the expenditure of public money,[5] the commission's recommendations are not binding (unless the legislature so provides). The government must, however, give specific reasons justifying any departure from the recommendations: *Provincial Judges Reference*, at para. 180; *Bodner*, at paras. 18 and 20-21; *Conférence des juges de paix magistrats du Québec*, at para. 35.

35 To hold a government to its constitutional obligations in jurisdictions where a commission's recommendations are not binding, the government's response to the commission's

recommendations is subject to what this Court described in *Bodner* as a "limited form of judicial review": paras. 29 and 42. The standard of justification to uphold the government's response is that of "rationality": *Provincial Judges Reference*, at paras. 183-84; *Mackin v. New Brunswick (Minister of Justice)*, 2002 SCC 13, [2002] 1 S.C.R. 405 (S.C.C.), at para. 57; *Bodner*, at para. 29. Both the standard of justification and the test used to measure the government's response against that standard are "deferential": *Bodner*, at paras. 30, 40 and 43. Both the fact that the government remains ultimately responsible for setting judicial compensation and the fact that the nature of a *Bodner* review is limited serve to balance the constitutional interests at stake.

36 Building on the approach established by the *Provincial Judges Reference*, in *Bodner*, at para. 31, this Court set out a three-part test for determining whether a government's decision to depart from a commission's recommendation meets the rationality standard:

> (1) Has the government articulated a legitimate reason for departing from the commission's recommendations?
>
> (2) Do the government's reasons rely upon a reasonable factual foundation? and
>
> (3) Viewed globally, has the commission process been respected and have the purposes of the commission — preserving judicial independence and depoliticizing the setting of judicial remuneration — been achieved?

37 Under the first two parts of the test, the focus is on the reasons given by government for departing from the commission's recommendations: *Bodner*, at paras. 32-33 and 36. The government "must respond to the [commission's] recommendations" by "giv[ing] legitimate reasons for departing from or varying them": paras. 23 and 24. The reasons must "show that the commission's recommendations have been taken into account and must be based on [a reasonable factual foundation] and sound reasoning": paras. 25 and 26. The reasons must also "articulat[e] the grounds for rejection or variation", "reveal a consideration of the judicial office and an intention to deal with it appropriately", "preclude any suggestion of attempting to manipulate the judiciary" and "reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence": para. 25.

38 The third part of the *Bodner* test looks to whether the government has respected the commission process and, more broadly, whether the purposes of that process have been achieved: paras. 30-31, 38 and 43. This new part of the test was added by this Court in an effort to achieve the "unfulfilled" hopes this Court had in the *Provincial Judges Reference* of depoliticizing the process of setting judicial remuneration and thereby preserving judicial independence: paras. 10-12 and 31. The third step in the *Bodner* test requires the court to take a global perspective and ask whether the government demonstrated respect for the judicial office by engaging meaningfully with the commission process: see paras. 25, 31 and 38.

39 However, this addition in *Bodner* was not intended to transform the analysis into a probing review of the process through which the government developed its response, whether it took place within the executive, the legislature or both. As a result, I cannot agree with the Provincial Court Judges' Association that references to the "totality" or "whole of the process" in *Bodner*, at para. 38, were meant to expand the scope of review such that the Cabinet decision-making process must necessarily be scrutinized in every case.

40 There is no doubt that the *Provincial Judges Reference* and *Bodner* require that the reviewing court focus on the government's response. In *Bodner* itself, this Court looked at the Alberta, New Brunswick and Ontario governments' responses to commission recommendations to determine whether the third part of the *Bodner* test had been met: paras. 83, 100 and 130-31. That said, the third part of the *Bodner* test is not necessarily limited to consideration of the government's public reasons.

41 Moreover, this does not mean that the government can hide behind reasons that conceal an improper or colourable purpose. The *Provincial Judges Reference* and *Bodner* cannot be interpreted to mean that as long as the government's public reasons are facially legitimate and appear grounded in a reasonable factual foundation, the government could provide reasons that were not given in good faith. Indeed, it is implicit in the third part of the *Bodner* test itself that, presented with evidence that the government's response is rooted in an improper or colourable purpose and has accordingly fallen short of the constitutional benchmark set in this Court's jurisprudence, the reviewing court cannot simply accept the government's formal response without further inquiry.

42 This is nothing new. In *Beauregard*, at p. 77, this Court made clear that "[i]f there were any hint that a federal law dealing with [the fixing of salaries and pensions of superior court judges] ... was enacted for an *improper or colourable purpose*, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held *ultra vires* s. 100 of the *Constitution Act, 1867*" (emphasis added). This is true of all judges to whom the constitutional principle of judicial independence applies: see *Provincial Judges Reference*, at paras. 145 and 165.

43 Considerations of legitimacy and respect for the process — and conversely, considerations of impropriety or colourability — permeate the entire *Bodner* analysis. Indeed, in *Bodner*, which concerned the remuneration of provincially-appointed judges, this Court considered whether the reasons given by the Alberta, New Brunswick, Ontario and Quebec governments were "based on purely political considerations", "reveal political or discriminatory motivations" or "evidence any improper purpose or intent to manipulate or influence the judiciary": paras. 66, 96 and 159; see also paras. 68 and 123.

44 Reasons that reveal an improper or colourable purpose would fail the first step of the *Bodner* test which requires that a government articulate a legitimate reason for departing from a commission's recommendations. Similarly, in reviewing whether a government had relied on a reasonable factual foundation, this Court acknowledged the possibility that the government might also rely on "affidavits containing evidence of good faith and commitment to the process, such as information relating to the government's study of the commission's recommendations": *Bodner*, at para. 36. Finally, a government's conduct and the adequacy of its response are also directly engaged in the third part of the *Bodner* test, which looks to whether the government has respected the commission process and, more broadly, whether the purposes of that process have been achieved.

45 Thus, even if a government's public reasons appear to satisfy the requirements of *Bodner*, the government's response remains subject to challenge on the basis that it is grounded in an improper or colourable purpose.

46 In *Bodner*, this Court underscored that "[t]he limited nature of judicial review [of the government's response] dictates the choice of remedies. The remedies must be consistent with the role of the reviewing court and the purpose of the commission process": para. 42. In my view, the limited nature of *Bodner* review, the role of the reviewing court and the purpose of the process also have implications for the evidence considered by the reviewing court.

B. Evidence on Bodner Review

47 The limited nature of *Bodner* review implies that the record for this type of review is narrower than it would be on ordinary judicial review. It also means that relevance must be assessed in relation to the specific issues that are the focus of the court's inquiry on *Bodner* review: the legitimacy of the reasons given by government, the reasonableness of the factual foundation relied on by government, and the respect for the commission process by government such that the objectives of the process have been achieved. Further, since *Bodner* review tends to oppose two branches of the state, special considerations arise where the party seeking *Bodner* review requests the production of a confidential Cabinet document. As I detail below, those considerations require that the party seeking production establish that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet a requirement described in this Court's jurisprudence, including *Bodner*. Only then will the reviewing court examine the document to determine whether it should be produced.

(1) Scope of the Record on Bodner Review

48 Like the Court of Appeal, the Provincial Court Judges' Association invokes the rule that the record on judicial review generally includes any evidence that was before the decision-maker, subject to limited exceptions that either add to or subtract from the record. According to the Provincial Court Judges' Association, since the submission was put before Cabinet and since

Cabinet approved the resolution introduced by the Attorney General and ultimately passed by the Legislative Assembly, the Cabinet submission was part of the evidence before the decision-maker and is thus relevant to the judicial review. The Provincial Court Judges' Association argues that the submission must therefore be included in the record on judicial review.

49 The Attorney General argues that the decision-maker was the Legislative Assembly, not Cabinet, so the Cabinet submission was not before the decision-maker and therefore should not be included in the record. More fundamentally, the Attorney General rejects the suggestion that the administrative law notion of the record on judicial review applies in this context.

50 With respect to the identification of the formal decision-maker, neither the *Provincial Judges Reference* nor *Bodner* prescribes that a particular institution must make the decision to respond to a commission's recommendations. In some cases, it may be clear that only a single institution is involved, but in a jurisdiction like British Columbia where both the executive and Legislative Assembly play a substantive role, it would be artificial to focus solely on the Legislative Assembly's part and ignore the executive's involvement. Indeed, in this case the executive's proposed reasons for departing from the commission's recommendations were incorporated by reference into the resolution passed by the Legislative Assembly.

51 More importantly, in my view, the *Provincial Judges Reference* and *Bodner* describe a unique form of review distinct from judicial review in the ordinary administrative law sense. In contrast to judicial review, *Bodner* review is available even when the decision-maker is the legislature (or any part of the legislature): see *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 558; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.), at para. 59. Further, the grounds for a *Bodner* review are narrower than those for a usual judicial review. The *Bodner* grounds centre on the legitimacy and sufficiency of a government's reasons for departing from a commission's recommendations, whether the government has respected the commission process more generally and whether the objectives of the process have been achieved.

52 In the usual context of judicial review, the record generally consists of the evidence that was before the decision-maker: see *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301 (F.C.A.), at para. 42; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, 80 B.C.L.R. (5th) 243 (B.C. C.A.), at para. 52. However, the rule that the record generally consists of the evidence that was before the decision-maker cannot be automatically transposed into the limited context of *Bodner* review.

53 The record on *Bodner* review necessarily includes any submissions made to the commission by the government, judges and others; the commission's report, including its recommendations; and the government's response to the recommendations, which, as the *Provincial Judges Reference* recognized, at para. 180, may take different forms depending on which institution is charged with responding.

54 As *Bodner* itself acknowledged, the record may also include certain forms of additional evidence put in by the government: paras. 27 and 36. The government may be permitted to "provide details [concerning the factual foundation of its response], in the form of affidavits, relating to economic and actuarial data and calculations" and "affidavits containing evidence of good faith and commitment to the process, such as information relating to the government's study of the impact of the commission's recommendations": para. 36; see also paras. 63-64 and 103. But the government cannot use the additional evidence to "advance reasons other than those mentioned in its response" or to cure defects in the factual foundation it relied on in its response: paras. 27 and 36.

55 Although the point was not made explicitly in *Bodner*, the party seeking *Bodner* review, which will usually be the judges whose remuneration is at stake, can also put in certain forms of additional evidence relevant to the issues the reviewing court must decide. The party seeking review can, for example, seek to introduce evidence to counter relevant evidence put in by a government. It may put in evidence aimed at calling into question the reasonableness of the factual foundation relied on by the government, the government's lack of meaningful engagement with or respect for the commission process or whether the government's response was grounded in an improper or colourable purpose. To those ends, the party seeking review can ask that the government produce evidence in its possession. For the government's part, provided it respects the rule against supplementing its reasons and bolstering their factual foundation, it can respond with additional evidence of its own to refute the allegations made by the party seeking review.

(2) Relevance of Evidence to a Bodner Review

56 The Attorney General contends that the British Columbia courts were wrong to conclude that the Cabinet submission is relevant to the *Bodner* review sought by the Provincial Court Judges' Association. The attorneys general of Canada and of several provinces intervened to make similar submissions.

57 Evidence is relevant when it has "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence": *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433 (S.C.C.), at para. 36, quoting D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 31. Put another way, [TRANSLATION] "a fact is relevant, in particular, if it is a fact in issue, if it contributes to rationally proving a fact in issue or if its purpose is to help the court assess the probative value of testimony": J.C. Royer and C. Piché, *La preuve civile* (5th ed. 2016), at para. 215.

58 Evidence is thus relevant to a proceeding when it relates to a fact that is in issue in the proceeding. The pleadings, which must be read generously and in light of the governing law, define what is in issue: see *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535 (S.C.C.), at para. 41.

59 Generally, what is in issue in a *Bodner* review is whether a government failed to meet its constitutional obligations flowing from the principle of judicial independence in its response to a commission's recommendations. The relevance of any proposed additional evidence must therefore be tested in relation to the issues that the court must determine on *Bodner* review.

60 To be relevant, the proposed evidence must contain something that tends to establish a fact concerning one of the steps of the test established in *Bodner*. For instance, if the party seeking *Bodner* review contests the reasonableness of the factual foundation relied on by a government, the proposed evidence must either tend to support or undermine the reasonableness of that foundation. Likewise, if the party seeking .*Bodner* review alleges disrespect for the commission process or that the government's response is grounded in an improper or colourable purpose, the proposed evidence must either tend to establish the legitimacy of the government's response or its illegitimacy. Finally, if the government introduces evidence of its good faith and commitment to the process, the applicant's proposed evidence may be tendered to undermine that evidence: see, e.g., *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 (B.C. S.C.).

61 However, as I will explain, the requirement of relevance alone — even as it pertains to the limited set of issues properly considered on a *Bodner* review — fails to adequately protect the competing constitutional imperatives that arise when a party seeking *Bodner* review requests production of a confidential Cabinet document.

(3) Confidential Cabinet Documents in the Bodner Context

62 Since a *Bodner* review often concerns decisions in which Cabinet plays a part, a party seeking review may request the production of a confidential Cabinet document as additional evidence to show that the government's response does not meet the applicable constitutional requirements. Although the normal course would be for the judge to consider a description of the proposed evidence or examine it to determine whether it is relevant to the *Bodner* review, special considerations arise when the party seeking *Bodner* review asks the government to produce a document related to Cabinet deliberation and decision making.

63 Unlike an action or an application for judicial review brought against the government by a private party, a *Bodner* review usually opposes two different branches of the state — the judiciary and the executive — as parties in the application. In the *Provincial Judges Reference*, at para. 7, Lamer C.J. underscored that while litigation is always "a very serious business", "it is even more serious where it ensue[s] between two primary organs of our constitutional system — the executive and the judiciary — which both serve important and interdependent roles in the administration of justice". Such litigation may prove necessary to hold the government to its constitutional obligations in jurisdictions where the commission's recommendations have not been made binding. *Bodner* review is the mechanism for ensuring that the government respects the

commission process and for safeguarding the public confidence in the administration of justice that process serves to protect.

64 But as this Court warned in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at pp. 89, 97-98, 103 and 109, the outcome of an action brought by one branch of the state against another can effectively alter the separation of powers. Such proceedings call for special prudence to keep courts from overstepping the bounds of the judicial role.

65 Canadian constitutional law has long recognized that sovereign power in this country is divided not only between Parliament and the provincial legislatures, but also among the executive, legislative and judicial branches of the state: *Fraser v. Canada (Treasury Board, Department of National Revenue)*, [1985] 2 S.C.R. 455 (S.C.C.), at pp. 469-70; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.), at p. 389; *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at para. 33. Although there are limited areas of overlap, the branches play fundamentally distinct roles and have accordingly developed different core competencies: *Provincial Judges Reference*, at para. 139; *R. v. Imona-Russell*, 2013 SCC 43, [2013] 3 S.C.R. 3 (S.C.C.), at para. 29.

66 As this Court underscored in *Criminal Lawyers' Association*, at para. 29, "each branch will be unable to fulfill its role if it is unduly interfered with by the others". Several doctrines work to prevent undue interference, including the secrecy afforded judicial deliberations (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.)), and the recognition of the privileges, powers and immunities enjoyed by the Senate, the House of Commons and the legislative assemblies: *Constitution Act, 1867*, preamble and s. 18; *New Brunswick Broadcasting Co.*; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 (S.C.C.); *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687 (S.C.C.). These doctrines are a corollary to the separation of powers because they help to protect each branch's ability to perform its constitutionally-assigned functions.

67 The executive, too, benefits from a degree of protection against undue interference. Deliberations among ministers of the Crown are protected by the constitutional convention of Cabinet confidentiality. Constitutional conventions do not have direct legal effect: *Reference re Amendment to the Constitution of Canada*, [1981] 1 S.C.R. 753 (S.C.C.), at pp. 880-83; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 98. However, as I will explain in greater detail, the common law respects the confidentiality convention and affords the executive public interest immunity over deliberations among ministers of the Crown: see *Carey*; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 (S.C.C.), at paras. 18-19 and 60.

68 Where the executive plays a role in formulating a government's response to a judicial compensation commission's recommendations, Cabinet will generally determine the

position taken by the executive. Ministers' deliberations concerning their appreciation of the recommendations and how the government should respond will usually be protected by Cabinet confidentiality.

69 A document reflecting on Cabinet deliberations concerning a government's response may well be relevant, even if only to negate the claim that the government failed to meet its constitutional obligations. If the government sought to have the document admitted in support of an affidavit speaking to its good faith and its commitment to the process of the sort described in *Bodner*, at para. 36, the document would undoubtedly be considered relevant. It is difficult, then, to see why the same should not also be true where the party seeking *Bodner* review looks to have the document admitted to challenge the government's claims of good faith and commitment to the process or to raise the question whether the government acted for legitimate reasons or with an improper or colourable purpose.

70 Thus, if relevance were the sole consideration, confidential Cabinet documents would routinely be part of the record in every *Bodner* review. For example, the Cabinet document would either tend to lend credence to the contention that a government's response failed to meet its constitutional requirements — or tend to refute that contention. In my view, something more than relevance is needed to strike the appropriate balance between respecting Cabinet confidentiality and maintaining the overall integrity of *Bodner* review.

71 As I have said, *Bodner* review generally opposes two branches of the state: the members of the judiciary challenging the government's response and the attorney general defending it. Where the response is the product of the legislature or a collaboration between the executive and legislature, the interests of the three branches may, whether directly or indirectly, be at stake. Yet, given our constitutional structure, a member of the judiciary will also necessarily be charged with hearing and determining the application for *Bodner* review: see *Provincial Judges Reference*, at para. 180; *Bodner*, at para. 29. Owing to the doctrine of necessity, this is so even if the judge charged with hearing the application is directly affected by the commission's recommendations and the government's response: see *R. v. Campbell* (1997), [1998] 1 S.C.R. 3 (S.C.C.), at para. 5.

72 Routine judicial inspection of a confidential Cabinet document would reveal to a member of the judiciary the content of Cabinet deliberations. Although any inspection of a confidential Cabinet document undermines Cabinet confidentiality to some extent, judicial inspection of a document that concerns Cabinet deliberations about the judiciary would undermine it more significantly. That is especially so where the judge is directly affected by the response resulting from those deliberations. As with adjudication of the *Bodner* review itself, judicial inspection is appropriate in this context only where it is strictly necessary.

73 In my view, these special considerations should be accommodated at two distinct stages.

74 First, a threshold showing is required.

75 Before the reviewing court can examine the document, the party seeking *Bodner* review must first establish that there is some basis to believe that the Cabinet document in question may contain evidence which tends to show that the government failed to meet a requirement described in *Bodner*.

76 This threshold is met if the party seeking review can show that there is reason to believe that the Cabinet document may contain something that would undermine the validity of the government response. This requires the party seeking review to point to something in the record, including otherwise admissible evidence, that supports its view that the document may tend to show that the government response failed to meet one or more parts of the test established in *Bodner*.

77 Meeting this threshold does not require the party to have knowledge or information about the content of the Cabinet submission. Nor does it require that the party point to something in the record that explicitly refers to the Cabinet submission or its contents. It would be unfair to require the party to establish the contents of a confidential document: see, in the public interest immunity context, *Carey*, at p. 678.

78 The party can, however, rely on additional evidence and the rest of the record, including submissions to the commission, to support its contention that the threshold is met. For instance, the party might point to statements made by ministers or others that suggest that the government's response may have been grounded in reasons other than those formally expressed, that the government may have relied on a flawed or incomplete factual foundation or that the government may have shown disrespect for the commission process. The party may also be able to rely on additional evidence introduced by the government that suggests that a document concerning Cabinet deliberations may disclose reliance on improper purpose. But it is not enough to simply say that the document was before the executive in its capacity as decision-maker or that it would provide additional background or context for the reviewing court.

79 If the party seeking review makes the requisite showing — that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner* — the government must produce it for the court's examination.

80 Second, the reviewing court must then examine the document in private to determine whether it, in fact, provides some evidence which tends to show that the government failed to meet one of the parts of the test mandated in *Bodner*. In other words, the document must, taken with the record as a whole and in light of the applicant's theory of the case, be of assistance in challenging the legitimacy of the government's reasons, the reasonableness of the factual foundation it relied on, the respect the government has shown the commission process or whether the objectives of the process have been achieved. It may suggest that the government response was based upon an

improper or colourable purpose. To be clear, the cogency of the evidence need not be considered at this stage of the analysis.

81 Even if the document meets this test, production of the document remains subject to any other rule of evidence that bars its disclosure, such as solicitor-client privilege (which was raised in the courts below in the companion appeal) or public interest immunity (which was raised in this Court in both appeals).

82 The Provincial Court Judges' Association submits that *Bodner* review is meaningless without the production of confidential Cabinet documents to illuminate the true reasons for the government's response, which may differ from its publicly-articulated reasons. The Provincial Court Judges' Association says that without an understanding of the actual basis on which the decision rests, the reviewing court will be unable to determine whether the government's response satisfies constitutional requirements.

83 I do not agree that *Bodner* review is ineffective without any relevant Cabinet submission being included in the record. Though necessarily limited in scope, *Bodner* review is a robust form of review. The test requires that the government justify a *departure* from the commission's recommendations. The government must give legitimate and rational reasons for doing so and sound reasoning must be supported by a reasonable factual foundation. The government's response must demonstrate respect for the judicial office, for judicial independence, and for the commission process; as well, the broader objectives of the process must be achieved.

84 Thus, the party seeking *Bodner* review may well be able to make a strong case for overturning a government's response based on the public reasons given by the government. The party seeking *Bodner* review may also rely on additional admissible evidence to make their case, such as statements made by ministers or others, including more general statements made outside the commission process, about judges or their remuneration, and historical patterns, including the government's responses to past commission recommendations. Those forms of evidence might well support the contention that the government relied on an illegitimate reason for departing from the commission's recommendations or that its response does not "reveal a consideration of the judicial office and an intention to deal with it appropriately": *Bodner*, at para. 25. They might also support the contention that the government did not show appropriate respect for the underlying public interest in judicial independence and in having an effective commission process.

85 I underscore that it is never enough for the government to simply repeat the submissions it made to the commission: *Bodner*, at para. 23. That does not justify a departure from the commission's recommendations. Similarly, a government that consistently rejects a commission's recommendations will put in question whether it is respecting the commission process and, as a result, whether the process is achieving its objectives. Although across-the-board salary increases or reductions that affect judges have been found to meet the rationality standard, a government that

does not take into account the distinctive nature of judicial office and treats judges simply as a class of civil servant will fail to engage with the principle of judicial independence: *Provincial Judges Reference*, at paras. 143, 157 and 184; *Bodner*, at para. 25. More rarely, the level of remuneration itself may call the government's response into question: see *Provincial Judges Reference*, at para. 135.

86 A government response that does not *meaningfully* engage with the commission process and its recommendations risks failing the *Bodner* test. As *Bodner*, at para. 31, makes clear, the reviewing court must ultimately be satisfied that the objectives of the commission process — namely, depoliticizing decisions about judicial remuneration and preserving judicial independence — have been met.

87 To summarize, the object of *Bodner* review is the government's response to the commission's recommendations, which will generally consist of the government's decision to depart from the commission's recommendations and the reasons given for that decision. The submissions to the commission, the commission's recommendations, and the government's response accordingly form the core of the record on *Bodner* review. Certain forms of additional evidence are admissible if they are relevant to determining whether any part of the *Bodner* test has been met, including whether the government's response is grounded in an improper or colourable purpose. However, where a party seeking *Bodner* review requests the production of a confidential Cabinet document, the party must first establish there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet a requirement described in *Bodner*. Only then will the reviewing court examine the document in private to determine whether it, in fact, provides some evidence which tends to show that the government failed to meet its constitutional obligations. If the document does provide such evidence, the court must then determine whether any other rule of evidence, such as public interest immunity, bars its production.

(4) Application

88 Since the Provincial Court Judges' Association seeks production of a confidential Cabinet submission, the first issue is whether it has made the requisite threshold showing.

89 The Provincial Court Judges' Association points to prior litigation involving judicial remuneration in which the Attorney General produced a Cabinet submission concerning the government's response to a commission's recommendations: see *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 (B.C. S.C.). The Supreme Court of British Columbia in that case found that the submission revealed an "inappropriate emphasis" on the need to maintain a link between judicial salaries and public sector salaries: para. 81. The Provincial Court Judges' Association argues that this history makes the Cabinet submission in the present case relevant to resolve the issue of whether the government engaged with and showed respect for the commission process.

90 I am not persuaded. The case relied on by the Provincial Court Judges' Association was decided nearly a decade ago. It does not follow that because a Cabinet submission revealed that the government relied on an inappropriate consideration 10 years ago, it may have relied on a like consideration in the present case. Indeed, the government would be expected to learn from its past mistakes. Something more would be required for there to be reason to believe that the submission may contain evidence that would tend to show that the government failed to meet a requirement described in *Bodner*.

91 Although it is not determinative, I note that neither the executive nor the Legislative Assembly put the Cabinet submission in issue. Neither the government's response nor the Legislative Assembly's resolution refers to the Cabinet submission. Nor, in contrast with the affidavit filed in a past round of litigation opposing the Attorney General and Provincial Court Judges' Association, is there any reference to the Cabinet submission in the affidavit filed in support of the Attorney General's response to the petition for review. Nor is there anything on the face of the record that indicates the Cabinet submission may contain some evidence which tends to show that the government failed to meet a constitutional requirement.

92 In my view, the Provincial Court Judges' Association has failed to make the requisite showing. It has not provided any evidence or pointed to any circumstances that suggest that the Cabinet submission may indicate that the government did not meet the standard required by *Bodner*. It was therefore not necessary for the Attorney General to produce the document for examination by this Court.

93 This would effectively dispose of this appeal.

94 It is therefore unnecessary in this case to determine whether public interest immunity would otherwise apply so as to permit the Attorney General to refuse to produce the Cabinet submission. However, since the parties and interveners in both appeals have made extensive submissions about the law of public interest immunity, I will examine how public interest immunity applies to confidential Cabinet documents sought in a *Bodner* review and why, in my view, it is not necessary to revisit this Court's public interest immunity doctrine as it applies in this context.

C. Public Interest Immunity

95 There is a strong public interest in maintaining the confidentiality of deliberations among ministers of the Crown: *Carey*, at pp. 647 and 656-59; *Babcock*, at paras. 18-19. As a matter of constitutional convention, Cabinet deliberations are confidential: N. d'Ombrain, "Cabinet secrecy" (2004), 47(3) C*anadian Public Administration* 332, at pp. 334-35. Federal ministers swear an oath as Privy Counsellors to "honestly and truly declare [their] mind and [their] opinion" and to "keep secret all matters ... secretly treated of" in Cabinet: see C. Forcese and A. Freeman,

The Laws of Government: The Legal Foundations of Canadian Democracy (2nd ed. 2011), at p. 352. Provincial and territorial ministers swear a similar oath as executive counsellors.

96 Ministers enjoy freedom to express their views in Cabinet deliberations, but are expected to publicly defend Cabinet's decision, even where it differs from their views: see A. Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics* (2nd ed. 2014), at pp. 106-7; d'Ombrain, at p. 335. The confidentiality of Cabinet deliberations helps ensure that they are candid and frank and that what are often difficult decisions and hard-won compromises can be reached without undue external interference: see Forcese and Freeman, at p. 352; d'Ombrain, at p. 335. If Cabinet deliberations were made public, ministers could be criticized for publicly defending a policy inconsistent with their private views, which would risk distracting ministers and undermining public confidence in government.

97 Grounded in constitutional convention as much as in practical considerations, this confidentiality applies whether those deliberations take place in formal meetings of the Queen's Privy Council for Canada,[6] or a province or territory's Executive Council, or in meetings of Cabinet or of committees composed of ministers, such as Treasury Board. The confidentiality extends not only to records of Cabinet deliberations, but also to documents that reflect on the content of those deliberations: *Babcock*, at para. 18.

98 The common law protects the confidentiality of Cabinet deliberations through the doctrine of public interest immunity: *Babcock*, at para. 60. Public interest immunity forms part of federal common law and the common law of each province and territory: see *Babcock*, at paras. 19, 23 and 26. As with any common law rule, Parliament or a legislature may limit or do away with public interest immunity, provided it clearly expresses its intention to do so: *Canada (Procureur général) c. Québec (Commission des droits de la personne)*, [1982] 1 S.C.R. 215 (S.C.C.), at p. 228; *Babcock*, at para. 20; see, more generally, *R. v. W. (D.L.)*, 2016 SCC 22, [2016] 1 S.C.R. 402 (S.C.C.), at para. 21.[7]

99 In *Canadian Javelin Ltd., Re*, [1982] 2 S.C.R. 686 (S.C.C.) [hereinafter Smallwood], and in *Carey*, this Court rejected absolute Crown privilege and instead recognized a qualified public interest immunity. Public interest immunity prevents the disclosure of a document where the court is satisfied that the public interest in keeping the document confidential outweighs the public interest in its disclosure: see *Carey*, at pp. 653-54 and 670; *Babcock*, at para. 19; see also *Bisaillon c. Keable*, [1983] 2 S.C.R. 60 (S.C.C.), at p. 97.[8]

100 Although this Court rejected claims of absolute Crown privilege in *Smallwood* and *Carey*, it did not "accord the individual an automatic right to discovery of sensitive and confidential documents held by the state": *Michaud c. Québec (Procureur général)*, [1996] 3 S.C.R. 3 (S.C.C.), at para. 54. *Smallwood* and *Carey* thus require a careful balancing of the competing public interests in confidentiality and disclosure: see *Babcock*, at para. 19; *R. v. Barros*, 2011 SCC 51, [2011] 3

S.C.R. 368 (S.C.C.), at para. 35. These competing public interests must be weighed with reference to a specific document in the context of a particular proceeding.

101 In *Carey*, at pp. 670-73, this Court described the main factors relevant to balancing the public interests in confidentiality and disclosure of documents concerning public decision making, including at the Cabinet level:

(1) the level of the "decision-making process";

(2) the "nature of the policy concerned";

(3) the "particular contents of the documents";

(4) the timing of disclosure;

(5) the "importance of producing the documents in the interests of the administration of justice"; and

(6) whether the party seeking the production of the documents "alleges unconscionable behaviour on the part of the government".

102 Although public interest immunity may be raised by any party or by the reviewing court itself, the government has the burden of establishing that a document should not be disclosed because of public interest immunity: *Carey*, at pp. 653 and 678. The government should put in a detailed affidavit to support its claim of public interest immunity: pp. 653-54.

103 As a general rule, when it is clear to the reviewing court, based on a government's submissions, that public interest immunity applies to a document, it need not inspect the document: *Carey*, at pp. 671 and 681. If, however, the court has doubts about whether public interest immunity applies, the court should inspect the document in private to resolve its doubts: pp. 674 and 681; see also *Somerville v. Scottish Ministers*, [2007] UKHL 44, [2007] 1 W.L.R. 2734 (U.K. H.L.), at paras. 156 and 204; *Al-Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531 (U.K. S.C.), at para. 145. Indeed, even if the court is persuaded that public interest immunity does not apply, the court should nevertheless inspect the document in private to ensure that it does not inadvertently order the disclosure of a document which should in fact remain confidential: see *Conway v. Rimmer*, [1968] A.C. 910 (U.K. H.L.), at p. 971. If, having inspected the document, the court concludes that the contents, or any part of the contents, are not protected by public interest immunity, the court can order production accordingly.

(1) Public Interest Immunity in the Context of Bodner Review

104 As noted in *Carey*, the determination of public interest immunity often requires the reviewing court to examine the document in question. Since in the *Bodner* context the court will

generally have examined the document to determine whether it should otherwise be part of the record, the document will usually already be before the court.

105 Accordingly, the court must, looking to the factors identified in *Carey* and any other pertinent factors, determine whether the public interest in the Cabinet document's disclosure outweighs the public interest in its remaining confidential. In such a context, at least three *Carey* factors — the level of decision-making process to which the document relates, the nature of the policy on which the document bears and the contents of the document — will often weigh in favour of keeping the document confidential.

106 Aside from decisions made by the Queen or her representatives, the Cabinet decision-making process is the highest level of decision making within the executive: see *Carey* , at p. 670; *Reference re Canada Assistance Plan (Canada)* , at pp. 546-47.

107 As the British Columbia courts acknowledged in the present case, judicial remuneration is an important and sensitive area of public policy, implicating not only the use of public money, but also the administration of justice and ultimately, judicial independence. The British Columbia courts did not find this to be a factor weighing in favour of continued confidentiality: BCSC Reasons, at para. 42; C.A. Reasons, at para. 22; for similar statements by the Nova Scotia courts in the proceedings that gave rise to the companion appeal, see also *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13, 409 C.R.R. (2d) 117 (N.S. S.C.), at para. 144; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83, 429 D.L.R. (4th) 359 (N.S. C.A.), at paras. 44-46. I cannot agree with such an approach. As this Court explained in *Carey*, at pp. 671-72, the nature of the policy on which the document bears may weigh in favour of continued confidentiality to varying degrees depending on its sensitivity and significance. A government's decision about how to respond to a judicial compensation commission's recommendations concerns not merely a matter of implementation, but involves the "formulation of policy on a broad basis": see *Carey*, at p. 672; see also *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381 (S.C.C.), at para. 58. That said, as I explain below, when the policy concerns a constitutional requirement relating to the justice system, and, thus, the administration of justice, as is the case in the *Bodner* context, this may *also* weigh in favour of disclosure.

108 The contents of a document concerning Cabinet deliberations may well reflect the views of individual ministers of the Crown and reveal disagreement among ministers. Cabinet documents may also reveal considerations that were put before Cabinet. As a result, their contents will frequently be highly sensitive: see *Babcock*, at para. 18.

109 Depending on the contents of the document, the timing may also weigh in favour of keeping the document confidential. A document that simply reveals that Cabinet made a decision to reject a recommendation made by a judicial compensation commission will bear little confidentiality once

that decision is publicly announced. By contrast, ministers can rightly expect that a document that weighs several different possible responses to the commission's recommendations and proposes a particular response will remain confidential for some prolonged time even after the decision is publicly announced.

110 In this case, the British Columbia courts appear to have treated the government's failure to assert a specific harm that would result from the Cabinet submission's disclosure as being conclusive of the need for disclosure: see Master Reasons, at para. 23; BCSC Reasons, at para. 46; C.A. Reasons, at para. 22.

111 Because of the strong public interest in Cabinet confidentiality, the disclosure of a Cabinet document undermines that confidentiality and is, at least to some degree, harmful. As *Carey* recognized, certain Cabinet documents may, owing to their contents, raise additional concerns, as might be the case where they relate to defence or national security or refer to specific points of disagreement among ministers. It will often be helpful to the court for the government to be as specific as possible in raising the potential for such harm: pp. 653-54 and 671. But the government's failure to identify some specific harm resulting from a confidential Cabinet document's disclosure does not *automatically* mean the document must be disclosed. The focus must remain on whether the public interest in the document's disclosure outweighs the public interest in its remaining confidential.

112 Given the strong public interest in keeping documents concerning Cabinet deliberations confidential, a strong countervailing public interest will usually be necessary to justify their disclosure. The strength of the public interest in disclosure will often turn on the interests of the administration of justice, a factor identified in *Carey*.

113 The notion of the "interests of the administration of justice" undoubtedly encompasses a broad set of considerations: see *Carey*, at pp. 647-48 and 671. Two stand out in the *.Bodner* context: "the importance of the case and the need or desirability of producing the documents to ensure that [the case] ... can be adequately and fairly presented": *Carey*, at p. 671.

114 In the companion case, the Nova Scotia Court of Appeal concluded that disclosure of the report is in the public interest because the government knew its response to the commission's recommendations would be subject to review and because the review would focus on matters vital to the administration of justice and to the relationship between two branches of government: paras. 44-46.

115 These considerations cut both ways. Although there is no doubt that *Bodner* reviews are of great importance, the fact that a party seeks production of a relevant confidential Cabinet document in the context of a *Bodner* review is not itself a general basis for disclosure. Such an approach would effectively trump the public interest in the confidentiality of Cabinet deliberations in every

Bodner review. It would also conflate the importance of the *issues* canvassed on such a review with the importance of the *evidence* provided by the Cabinet document to the disposition of those issues.

116 In the *Bodner* context, the reviewing court's analysis of the factors bearing on the public interest in disclosure must necessarily be informed by its conclusion on the nature and probative value of the evidence. A document may provide some evidence that the government failed to meet one of the parts of the *Bodner* test, but the importance of the evidence may vary widely. When considering the interests of the administration of justice, the focus must therefore remain on the degree to which the document bears on what is at issue in the litigation.

117 A document may contain information not otherwise available such that its exclusion from evidence would undermine the court's ability to adjudicate the issues on their merits: see *Carey*, at pp. 654 and 673; *Australia (Commonwealth) v. Northern Land Council*, [1993] HCA 24, 176 C.L.R. 604 (Australia H.C.), at p. 619. A document that tends to establish that the government set out to provide misleading public reasons for its response to the commission's recommendations; that the government relied on a fundamentally flawed factual foundation; that the government acted with an improper or colourable purpose; or that the government was indifferent or disrespectful towards the commission process will be highly probative. Such a document bears so directly — and so determinately — on the issues that the reviewing court needs to resolve on *Bodner* review that to exclude the document would be contrary to the interests of the administration of justice: see *Air Canada v. Secretary of State for Trade*, [1983] 2 A.C. 394 (U.K. H.L.), at p. 435. Given the important constitutional interests at stake, the public interest in disclosure would almost certainly outweigh the public interest in the document's remaining confidential. Excluding such a document from evidence would keep the court from fulfilling its judicial role, jeopardize public confidence in the administration of justice, and ultimately threaten the rule of law. In such cases, where the probative value of the document is high, the public interest immunity analysis will lead to the same result as the production analysis set out above.

118 By contrast, the public interest immunity analysis may lead to a different result for a Cabinet document that supports the contention that the government failed to meet one of its constitutional requirements, but whose impact on the *Bodner* review would be limited. The probative value of such evidence might not weigh heavily enough to warrant disclosure, especially if there were strong public interest in its remaining confidential. But such a document's exclusion from the record could hardly keep the reviewing court from adjudicating the issues on their merits. The public interest in disclosure of such a Cabinet document would thus not outweigh the public interest in its remaining confidential.

119 As a general matter, the notion of "unconscionable behaviour" referred to in *Carey*, at p. 673, will only be pertinent in a limited set of cases. This factor is superadded to more general considerations involving the administration of justice. The conduct in question must be "harsh" or "improper"; though it need not be criminal, it must nevertheless be of a similar degree

of seriousness: p. 673. In the *Bodner* context, this factor does little work independent from the factor relating to the interests of the administration of justice. The harshness or impropriety of the government's conduct would be canvassed in assessing whether the government acted with an improper or colourable purpose. A document that demonstrates unconscionable behaviour on the government's part would tend to establish its failure to meet its constitutional requirements in a highly probative manner and, for that reason, the public interest in its disclosure would almost certainly outweigh the public interest in its remaining confidential.

120 Accordingly, I disagree with the suggestion of the Attorney General of British Columbia and other attorneys general that this Court's public interest immunity case law results in routine, almost inevitable, disclosure of confidential Cabinet documents, and should thus be revisited. Properly applied in the *Bodner* context, public interest immunity requires a careful balancing of the public interests in confidentiality and disclosure. Since the public interest in the confidentiality of documents concerning Cabinet deliberations is often particularly strong, the public interest in their disclosure will usually need to be stronger still to warrant their disclosure.

V. Disposition

121 I would allow the appeal without costs and quash the master's order for production of the Cabinet submission. The Provincial Court Judges' Association's petition can now be adjudicated on its merits without consideration of the Cabinet submission.

Appeal allowed; order for production quashed.

Pourvoi accueilli; ordonnance de production annulée.

Footnotes

1 *Provincial Court Judges' Assn. (New Brunswick) v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286 (S.C.C.) (*Bodner*).

2 The Attorney General is the minister responsible for the *Judicial Compensation Act* designated by O.C. 213/2017, Appendix B; see also *Attorney General Act*, R.S.B.C. 1996, c. 22, s. 2(j); *Constitution Act*, R.S.B.C. 1996, c. 66, s. 10(3).

3 The baseline salary used by the commission in making its recommendations was $244,112 for the 2016-17 fiscal year, but the Legislative Assembly later retrospectively increased the salary for 2016-17 by 3.4 percent to $252,290, thereby reducing the effect of the increase recommended by the commission for the 2017-20 period.

4 The retrospective salary increase for 2016-17 similarly reduces the effect of the increase adopted by the Legislative Assembly for the 2017-20 period.

5 See *Constitution Act, 1867*, ss. 54, 90 to 92, 100 to 102, 106 and 126.

6 Although the Queen's Privy Council for Canada established by s. 11 of the *Constitution Act, 1867*, includes members who are not ministers of the Crown, confidentiality also extends to its proceedings.

7 Provincial legislatures have generally preserved public interest immunity: see, e.g., *Code of Civil Procedure*, CQLR, c. C-25.01, art. 283; *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, s. 13(2); *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 9; *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360, s. 11. By contrast, Parliament has partially displaced public interest immunity in ss. 37 to 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5: see *Babcock*, at paras. 21 et seq.; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110 (S.C.C.).

8 The same considerations generally apply to testimony. However, ministers and former ministers serving as members of the Senate, House of Commons or a legislative assembly benefit from a limited form of testimonial immunity as a matter of parliamentary privilege: see *Vaid* at para. 29; *Ainsworth Lumber Co. v. Canada (Attorney General)*, 2003 BCCA 239, 14 B.C.L.R. (4th) 302 (B.C. C.A.); *TeleZone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (Ont. C.A.).

2005 FC 712, 2005 CF 712
Federal Court

Cooke v. Canada (Correctional Service)

2005 CarswellNat 1366, 2005 CarswellNat 3485, 2005 FC 712, 2005 CF 712, [2005] F.C.J. No. 886, 139 A.C.W.S. (3d) 527, 274 F.T.R. 44 (Eng.)

David William Cooke, Applicant and Correctional Services of Canada, Respondent

Phelan J.

Heard: April 5, 2005
Judgment: May 17, 2005
Docket: T-924-04

Counsel: Mr. David William Cooke, for himself
Ms Jessica Harris, for Respondent

***Phelan J.*:**

Introduction

1 Mr. Cooke seeks judicial review of a decision of the Canadian Human Rights Commission (Commission) which dismissed his complaint that Correction Services Canada discriminated against him on the basis of his "disability" (extreme sensibility to smoke) and his religion (sometimes referred to as "born-again Christian").

2 Mr Cooke's challenge to the Commission's decision is based on the alleged inadequacy of the investigation of this complaint. The essential inadequacy alleged is that the investigator did not interview at least two (2) key witnesses and a possible third witness.

3 In support of his judicial review, Mr Cooke filed a lengthy affidavit to establish the inadequacy of the investigation and its conclusions. The Respondent challenges the admissibility of much of the affidavit because, it says, the exhibits attached were not before the actual decision-maker.

Background

4 Mr Cooke was employed by the Respondent, as a Corrections Officer since 1994. He developed a hypersensitivity to second hand smoke. He became a born-again Christian in late 1998, which, resulted in him placing more emphasis on religious observance then had been the case previously.

5 In early 2002, Mr Cooke filed a complaint with the Commission alleging that the Respondent had discriminated against him, contrary to section 7 of the *Canadian Human Rights Act* (Act). More particularly he alleged that his disability and his religious practices had not been accommodated.

6 He alleged that his sick leave, due to his disability, had been used against him in his performance assessment. He also alleged that some sick leave was denied to him because the Respondent did not accept that he was disabled. He further alleged that various requests for leave to permit attendance at certain religious observances had not been accommodated by the Respondent.

7 The Respondent maintained that it accommodated his smoke difficulties as best it could and within the provisions of the *Non-Smoker Health Act*; that Mr Cooke had been uncooperative, in identifying breaches of employer's non-smoking policy and even to the extent of refusing an opportunity to work in a smoke-free building.

8 There was conflicting evidence as to the reasons for and extent of sick leave taken. However the Commission's investigator found that the Respondent had tried to accommodate Mr. Cooke's needs and to enforce its non-smoking policy. The investigator also found that Mr Cooke was denied promotion because of his sick leave usage, not because of his disabilities - apparently accepting the Respondent's contention that there was excessive incidents of sick leave.

9 While the Applicant complained that he was denied accommodation for religious observance, the Respondent confirmed that in a period of 18 months, Mr Cooke made 22 requests for leave for religious observance, of which 16 were approved. Of the 6 requests not granted, one was cancelled due to illness, in two instances insufficient notice was provided and three others fell at peak vacation time and could not be reasonably accommodated.

10 On this issue the investigator concluded that there had been no discrimination; that the requests for religious observance leave did not appear to be connected to religious holidays *per se* but the Respondent still attempted to accommodate Mr Cook's religious needs.

11 Following the investigator's report recommending dismissal of the complaint, Mr Cooke filed a detailed reply with the Commission challenging virtually every adverse aspect of the report, laying considerable stress on the investigator's failure to contact two of Mr Cooke's witnesses - members of the union which had formerly represented certain employees of the Respondent.

12 The Commission accepted the investigator's recommendation and dismissed the complaint.

13 In the Notice of Application for Judicial Review, under Rule 317, Mr Cooke requested that the Commission provide certified copies of:

All documents and files submitted by David Cooke (complainant) and Correction Services Canada and a copy of the C.H.R.C. Report and signatory to the decision.

14 In Mr Cooke's affidavit in support of the judicial review, it is clear that he was challenging the adequacy of the investigation upon which the Commission's decision was based.

15 Despite the scope of Mr Cooke's request, the Commission certified only the material which was before the actual decision-maker when it made the decision. That material consisted of the complaint, the Investigator's Report, the Summary of Complaint and Respondent's Defence, two letters from Correction Canada, and a Chronology.

16 The Commission did not file an objection under Rule 318(2) objecting to the provision of the material requested by Mr Cooke.

Analysis

Preliminary Objection

17 The Respondent seeks to strike out paragraphs 7 to 24 and exhibits referred to in those paragraphs of the Applicant's affidavit filed in support of the judicial review.

18 The principal grounds for striking are that the materials were not before the individual decision-maker at the time of rendering of the decision. The materials said to have been before that decision-maker when it made its decision are described in paragraph 15.

19 The Applicant says that the materials in paragraphs 7 - 19 were provided to the investigator; the materials in paragraph 20 - 24 were materials related to the post-investigation period.

20 The Respondent's preliminary objection is dismissed. The Respondent takes too narrow a view of the application of the principle that on a judicial review the only materials which should be before the Court are those which were before the actual decision-maker. The decision-maker is not the specific individual who decided the case but the tribunal itself. In this case those materials in the hands of the investigator are materials in the hands of the Commission itself and, therefore are materials "before" the Commission or as phrased in Rule 317 "...material relevant ... that is in the possession of a tribunal....".

21 To adopt the Respondent's position would frustrate the purpose of Rule 317 to ensure that all relevant materials is available on a judicial review. It would interfere with an applicant's right to pursue a challenge to a decision based not only on what the specific tribunal considered but on what it ought to have considered. A tribunal is or should be the repository of all relevant materials and must disclose not only the material it considered but also the relevant material it had in its possession.

22 I reject any suggestion made by the Respondent that an applicant must use such indirect means as the *Access to Information Act* to secure materials in a tribunal's possession where the tribunal had failed to meet its obligations under Rule 318(1).

23 Since the material which is "relevant to an application" is material which may affect the decision that this Court may make; and, in this instance the Applicant clearly attacked the adequacy of the investigation, the material requested by the Applicant under Rule317 should have been provided to him. (*Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93 (Fed. C.A.)).

24 There is no basis for the Respondent's challenge to paragraph's 7-19 of the Applicant's affidavit. With respect to the post-investigation material, since it may be relevant to the Court's decision it was also proper to include it in the Applicant's affidavit. Therefore all this evidence forms part of the record before this Court.

Challenge to Decision

25 The Applicant's complaint about the investigation is based on (a) the insufficiency of the evidence before the Commission because two witnesses were not interviewed; (b) the lack of thoroughness of the investigation for the same reason; (c) the failure of the Commission to give reasons for not interviewing those two witnesses. The underlying complaint or common theme is that the investigator failed to interview two witnesses.

26 In *Tahmourpour v. Canada (Solicitor General)*, [2005] F.C.J. No. 543 (F.C.A.), the Court of Appeal confirmed that the leading case in respect to the issues raised is *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (Fed. T.D.) in which Nadon J. (as he then was) held that an investigation may lack the legally required degree of thoroughness if, for example, the investigator had "failed to investigate obviously crucial evidence".

27 The Applicant has failed to satisfy me that the failure to interview his two witnesses constituted such a serious failure. The Court accords an investigator a considerable degree of latitude in determining how an investigation should be conducted.

28 The two witnesses would corroborate the Applicant's complaint without adding new evidence. However the issue in the complaint is not the credibility of the Applicant so mush as whether the Warden of the correctional institution provided reasonable accommodation to the Applicant's circumstances. The Applicant has not shown that these witnesses would be able to assist on this central issue.

29 A third possible witness was identified as one who should or could have been interviewed. However that witness' possible availability post-dates the investigation and cannot form a basis for attacking the thoroughness of the investigation.

30 With respect to the sufficiency of the evidence before the Commission, the Applicant was able to submit all of his arguments in respect of each paragraph of the investigator's report. The Applicant raised the issue of failure to interview witnesses and dealt with all issues raised by the investigation. Therefore the Applicant has no basis for this ground that the Commission was not aware of the insufficiency of the evidentiary basis or at least his argument to this effect.

31 With respect to the thoroughness of the investigation, since this ground is based on the failure to interview witnesses, for reasons already provided, this ground cannot succeed.

32 With respect to the failure to give reasons for not interviewing the witnesses, there is no obligation to provide such an explanation. These are sufficient reasons given in respect to the substantive decision to dismiss the complaint. The Commission (more particularly neither the investigator nor the particular panel of the Commission) need supply reasons for each step taken or not taken in any investigation.

Conclusion

33 This application for judicial review will be dismissed with costs.

Application dismissed.

2008 SCC 9, 2008 CSC 9
Supreme Court of Canada

Dunsmuir v. New Brunswick

2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 2008 CSC 9, [2008] 1 S.C.R. 190, [2008] A.C.S. No. 9, [2008] S.C.J. No. 9, 164 A.C.W.S. (3d) 727, 170 L.A.C. (4th) 1, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, 372 N.R. 1, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 844 A.P.R. 1, 95 L.C.R. 65, J.E. 2008-547, D.T.E. 2008T-223

David Dunsmuir (Appellant) v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management (Respondent)

McLachlin C.J.C., Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: May 15, 2007
Judgment: March 7, 2008 *
Docket: 31459

Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, *(*sub nom. *Dunsmuir v. R.)* 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.)**Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2005), 2005 NBQB 270, 2005 CarswellNB 444, 293 N.B.R. (2d) 5, 762 A.P.R. 5, 43 C.C.E.L. (3d) 205 (N.B. Q.B.)**

Counsel: J. Gordon Petrie, Q.C., Clarence L. Bennett for Appellant
C. Clyde Spinney, Q.C., Keith P. Mullin for Respondent

***Bastarache, LeBel JJ.*:**

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel,

administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. Facts

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of

the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal".

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.
>
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> . . . . .
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession...

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. Decisions of the Adjudicator

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Dr. Everett Chalmers Hospital v. Mills* (1989), 102 N.B.R. (2d) 1 (N.B. C.A.).

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a

discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. Judicial History

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270 (N.B. Q.B.)

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27 (N.B. C.A.)

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *A.U.P.E. v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28 (S.C.C.). However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's statutory interpretation determination

A. Judicial Review

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at p. 234; also *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and

defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (T. A. Cromwell, "Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*British Columbia (Minister of Finance) v. Woodward Estate* (1972), [1973] S.C.R. 120 (S.C.C.), at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), [hereinafter *Bibeault*], at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*, at pp. 237-38:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act*, and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. Reconsidering the Standards of Judicial Review

34 The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*CUPE*"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be

doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.).

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". ... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E., Local 79*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), paras. 101-103). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the

> law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. M. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness. ...

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 (S.C.C.), at paras. 40-41, *per* LeBel J.

C. Two Standards of Review

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model

is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [*infra*], at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered

or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions

of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600; *Q.*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E., Local 79*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan* (1974), [1975] 1 S.C.R. 517 (S.C.C.), where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided

on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672, 2004 SCC 26 (S.C.C.)). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.). Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.); Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (S.C.C.). In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E., Local 79*, which dealt with complex common law rules and conflicting

jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.); *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, [2004] 2 S.C.R. 185, 2004 SCC 39 (S.C.C.).

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. Application

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered

is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *A.U.P.E. v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Dr. Everett Chalmers Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), *by simply stating that cause is not alleged*" (*ibid*, emphasis added). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. The employees subject to the *PSLRA* are

usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

77 Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, in his view, lack of due process and a breach of procedural fairness.

78 The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. Duty of Fairness

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para.

21; *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.), at paras. 74-75).

80 This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

81 We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

83 In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

84 Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* to consider procedural fairness. The respondent argues that allowing adjudicators to consider

procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

85 In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66 (U.K. H.L.), a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

86 The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

87 Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.); *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.)).

518 In *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. ... [p. 653]
>
> (See also *Baker*, at para. 20.)

88 In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

89 The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

90 From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

91 *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural

protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790 (B.C. S.C.); *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (Ont. C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151 (Man. C.A.); *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83 (Sask. C.A.); *Hanis v. Teevan* (1998), 111 O.A.C. 91 (Ont. C.A.); *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (N.B. C.A.)).

92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
>
> (Wade and Forsyth, at pp. 532-33)

93 Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (U.K. H.L.), at p. 1294)

94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (N.B. Q.B.) aff'd (1991), 118 N.B.R. (2d) 306 (N.B. C.A.). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40 (Sask. Q.B.)).

95 Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.).

96 *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

97 The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000, at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

98 If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

99 First, historically, offices were viewed as a form of property, and thus could be recovered by the office holder who was removed contrary to the principles of natural justice. Employees who

were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

100 A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

101 A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. (2004), p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

102 In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement

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> and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment.
>
> [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *Southeast Kootenay School District No. 5 v. B.C.T.F.* (2000), 94 L.A.C. (4th) 56 (B.C. Arb. Bd.)). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

106 Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

107 Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

108 It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

109 In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

110 In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

111 It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

112 In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

113 The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para.

31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. *New Brunswick Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

116 A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. Conclusion

117 In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

118 We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

***Binnie J.* (concurring):**

119 I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service*

Labour Relations Act, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

120 However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system as a whole.
>
> . . . . .
>
> The time has arrived to reexamine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

121 The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called "the standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose
>
> By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene i)

122 I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations: for example a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g., *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.).

123 Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

124 On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at para. 14: 2210.

125 Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion "has the right to be wrong". This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. Limits on the Allocation of Decision Making

126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

127 Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

128 Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers. This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred

to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. *Hansard* is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414 (Eng. C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (S.C.C).

B. Reasonableness of Outcome

130 At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

131 In *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087(emphasis in original deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (Eng. C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.* ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation...?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) (para. 53), and *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. The Need to Reappraise the Approach to Judicial Review

132 The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making.

The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

133 People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs from the successful government agency. A victory before the reviewing court may

be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. Standards of Review

134 My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. Degrees of Deference

135 The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

136 A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where

the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), or policy decisions arising out of decisions of major administrative tribunals, as in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.), at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

137 Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.)) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct (*Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.)).

138 In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

139 The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

140 That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight

to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

141 Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. Multiple Aspects of Administrative Decisions

142 Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.)). In the jargon of the judicial review bar, this is known as "segmentation".

G. The Existence of a Privative Clause

143 The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the

existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. A Broader Reappraisal

144 "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

145 The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

146 The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

147 An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case,

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command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

148 When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test *of irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*Judicial Review of Administrative Action* (5th ed., H. Woolf and J. Jowell, 1995), para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

149 Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, *and* an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. Judging "Reasonableness"

150 I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

151 This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the

decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate", *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

152 Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Ryan v. Law Society (New Brunswick)*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

153 The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

154 It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part

threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

155 That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. Application to This Case

156 Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's interpretation of his "home turf" statutory framework.

157 Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

***Deschamps J.* (concurring):**

158 The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

159 By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the

legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

160 The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

161 Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — "palpable and overriding error" versus "unreasonable decision" — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

162 Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

163 However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to

overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

164 The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

165 In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

166 In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

167 I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying

intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.

168 In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

169 It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said (p. 5):

> An employee to whom section 20 of the Civil Service Act and section 100.1 of the PSLR Act apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons.

170 The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

171 This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

172 In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

173 On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1:

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25:

> **92**(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
>
> > (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
> >
> > (b) disciplinary action resulting in discharge, suspension or a financial penalty,
>
> and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended:

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

. . . . .

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

. . . . .

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

. . . . .

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Footnotes

* Corrigenda issued by the Court on March 10, 11, 2008, and April 17, 2008 have been incoporated herein.

1 Para. 41

2 Para. 47

3 Para. 48

4 Para. 53

5 Para. 133

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6 Para. 144

7 Para. 146

2005 FC 351, 2005 CF 351
Federal Court

Gaudes v. Canada (Attorney General)

2005 CarswellNat 4378, 2005 CarswellNat 655, 2005 FC 351,
2005 CF 351, [2005] F.C.J. No. 434, 137 A.C.W.S. (3d) 1082

Carole Gaudes, Applicant and Attorney General of Canada, Respondent

Snider J.

Heard: March 7, 2005
Judgment: March 11, 2005
Docket: T-537-03

Counsel: Mrs. E. Beth Eva, for Applicant
Ms Anne M. Turley, for Respondent

***Snider J.*:**

1 The Applicant, Ms. Carole Gaudes, makes a motion by way of an appeal of the Order of Prothonotary Tabib made September 30, 2004. In the Order in issue, the Prothonotary upheld the Respondent's objection to the Applicant's request for material made pursuant to Rule 317 of the *Federal Court Rules, 1998*.

Background

2 For over 20 years, Ms. Carole Gaudes has been a civilian employee of the Royal Canadian Mounted Police ("RCMP"), working as a Forensic Identification Technician in the Forensic Laboratory and Identification Group (the "FLI-FIT group"). Since the 1970s, pay for the FLI-FIT group has been determined and adjusted in accordance with a unionized group of public servants known as the Clerical and Regulatory Group, Level 5 ("CR-5 group"). Effective in 1998, arising from a pay equity ruling, the CR-5 group received both retroactive and future adjustments to their pay. The FLI-FIT group received only future pay adjustments. These employees would like to receive the retroactive payments as well. Ms. Gaudes is the Applicant in an application for judicial review to assist in this fight.

3 Decisions related to pay matters such as this are made by the Treasury Board of Canada, who is the employer of federal public servants. The original Notice of Application for Judicial Review,

filed April 7, 2003, sought review of the decision of the Commissioner of the RCMP refusing to make a submission to the Treasury Board. In addition to certiorari quashing the "decision", the Applicant also sought declaratory relief and an order of mandamus, with the ultimate goal of requiring the Treasury Board to authorize and implement the retroactive pay for the FLI-FIT group. The Notice of Application was amended on February 24, 2004. In the Amended Notice of Application, with respect to the merits of its application, the Applicant now seeks:

1. A declaration that the FLI-FIT group is entitled to the wage adjustments;

2. A declaration that the Treasury Board is required to authorize the implementation and payment of the wage adjustments to the FLI-FIT group;

3. A declaration that the President of the Treasury Board, or the Secretariat acting on behalf of the President of the Treasury Board, had no jurisdiction or authority to make a decision with respect to the wage adjustments or, alternatively, that the President had no jurisdiction or authority to delegate to the Secretariat any decision regarding the wage adjustments, such that the Secretariat decisions are invalid or unlawful; and

4. An order setting aside the Secretariat decisions.

4 In a letter dated June 21, 2004, the Respondent confirmed earlier voice-mail advice that the "Respondent will not be taking the position that the Treasury Board Secretariat made a decision in September 2000 for the purposes of s. 18.1 of the *Federal Court Act* regarding the eligibility of the FLI-FIT group for the retroactive pay equity payments". As stated by the Respondent, the result was that there was no need for the Applicant to seek the relief claimed in paragraphs 3 and 4 of the Amended Statement of Claim. Despite this advice, the response of the Applicant, by letter dated July 29, 2004, was that there was a decision of the Secretariat in September 2000 that the FLI-FIT group was not entitled to the retroactive payments and further decided not to submit the matter to the Treasury Board for its decision and authorization.

5 On May 21, 2004, the Applicant made a request, pursuant to Federal Court Rule 317, for information. By letter dated June 14, 2004, the Respondent, pursuant to Rule 318, objected to the production of the requested documentation on the following grounds:

• The request, coming this late in the judicial review process, constitutes an abuse of process;

• Rule 317 is not applicable where no decision is under review; the Applicant seeks only declaratory relief;

• The requested documents are irrelevant to the grounds cited in support of the application; and

• The documents are protected by section 39 of the *Canada Evidence Act* (as confidential Privy Council documents) or by solicitor-client privilege.

6 In her Order dated September 30, 2004, the Prothonotary upheld the Respondent's objection to the Applicant's request for production. The main thrust of her decision was as follows:

> Rule 317 requires that there be a "decision or order" of a tribunal.
>
> The Respondent's position that there was no decision made by the Secretariat means that there is no "decision or order" for judicial review and no possible application of Rule 317.
>
> Material before the Secretariat in reaching any purported decision could not be relevant to the judicial review as now framed.

7 For the reasons that follow, I am not persuaded that the Prothonotary erred in denying the Applicant's request for documents related to the "decision" of the Treasury Board Secretariat (the "Secretariat").

What is the appropriate standard of review?

8 First, I note that the decision of the Prothonotary concerns a requested order for documents. This is not a ma1tter vital to any final issue. Accordingly, the Prothonotary's Order denying the request may be overturned only if the exercise of her discretion was clearly wrong in that it "was based upon a wrong principle or upon a misapprehension of the facts" (*R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (Fed. C.A.), at 454; *1029894 Ontario Inc. v. Dolomite Svenska AB*, [1999] F.C.J. No. 1719 (Fed. T.D.), at para. 8).

Did the Prothonotary misapprehend the evidence in concluding that there was no "decision"?

9 As I understand the submissions of the Applicant, her argument is that the Prothonotary misapprehended the facts or erred in two ways. Firstly, the Prothonotary erred in concluding that there was no decision. The second part of the Applicant's argument is that she ought to have access to these documents on the basis of their relevance.

10 The critical question in this appeal is whether the Prothonotary erred in concluding that there was no decision of the Secretariat. The Prothonotary dealt with this point at length in her decision as follows:

> The principle and ultimate issue to be determined by the Court on this judicial review application is whether the Treasury Board is legally bound to apply to the FLI-FIT group the retroactive wage adjustments made in respect of the Public Service CR-5 group $^{1}/_{4}$
>
> The main thrust of the Applicant's argument has therefore been centered on the fact that, in her amended application, the Applicant specifically seeks judicial review of a purported decision of the Treasury Board Secretariat on behalf of the President of the Treasury Board

> to refuse to make the wage adjustment. The relief sought in respect to the TBS decision has however been overtaken by the Respondent's recent advice that it is now taking the position that no decision had been made by the TBS in respect of the wage adjustment. The Applicant initially accepted the Respondent's position and advised in consequence, in counsel's letter of June 30, 2004, that she would withdraw the prayer for relief set out in paragraphs 3 to 6 of her application seeking that the TBS decision be set aside. The parties' revised positions effectively lead to the result that there is no longer any decision of the TBS under judicial review, and no possible application of Rule 317.
>
> However, upon further consideration, the Applicant has retreated from her June 30, 2004 position and maintains that, as the evidence shows that the TBS did make a decision, it is not open to the Respondent to take the position that a decision was not made. The Applicant therefore maintains that the TBS decision remains the subject of this judicial review application.
>
> The Applicant argues that the Respondent's about-face is purely an attempt to shield relevant documents from disclosure under Rule 317. This may be so, but whatever the motivation, the net effect is to render the application, as it relates to the alleged TBS decision moot; it allows the application to proceed directly to the essential issue of whether the Treasury Board, in the absence of a decision by the TBS, is bound to extend the retroactive benefits of the wage adjustment to the FLI-FIT group.
>
> . . . . .
>
> I conclude that there is, in effect, no decision of the TBS subject to this judicial review application.

11 Was there a decision in this case that underlies the application for judicial review? The Applicant argues that the Secretariat must have made a decision to award pay raises on a going-forward basis but not retroactively to the pay group of the Applicant. She submits that the evidence shows that this decision was taken in 2000 and finally confirmed in an e-mail in March 2003.

12 I agree with the Applicant that some form of decision was made by the Secretariat - likely in 2000. However, this does not end the matter. As was submitted by the Respondent in the submissions on the original motion and further clarified in oral submissions to me, the Respondent has conceded that the Secretariat had no jurisdiction to make any decision on the question at issue. In other words, the Secretariat had no authority to make a decision on whether the Applicant and other members of the FLI-FIT group were entitled to retroactive benefits. A decision made without authority is no decision. The Prothonotary was correct in concluding that "there is, in effect, no decision of the TBS subject to this judicial review application".

13 I have read the Amended Notice carefully and I am satisfied that the underlying thrust of the application is two-fold. First, the Applicant has applied to quash the decision of the Secretariat on the basis that it was not within the competence of the Secretariat to make a decision on the Wage

> Adjustment for the Applicant and others in the FLI-FIT group. Secondly, she seeks declaratory relief as against the Treasury Board itself. With respect to the first part of the application, the Respondent has conceded completely. That is, the Respondent admits that the Secretariat had no authority to take the decision. This leaves only the declaratory relief. I cannot see any other way to interpret what has transpired on this judicial review application.

14 In light of the confusion that has ensued on this judicial review, I can understand why the Applicant was not fully aware of the Respondent's position. It was only when pushed during oral argument that I understood the situation. Nevertheless, the Prothonotary appears to have completely grasped the situation. There was no misapprehension of the facts.

Did the Prothonotary err in refusing to apply Rule 317 where there is no "decision"?

15 Even in the absence of a decision, the Applicant continues to argue that the requested documents must be produced. She submits that the Prothonotary erred. In this argument, the Applicant relies on the decision of this Court in *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)*, [1997] F.C.J. No. 556 (Fed. T.D.). In that case, the learned judge was dealing with a request by the Applicant in a judicial review application for documents pursuant to Rule 1612, the predecessor to Rule 317. The Applicant sought various policy documents related to "letters of advice" given by the Department of Fisheries and Oceans. The Court ordered the production of the documents on the basis that the materials met the two-prong test of Rule 1612 that they were in possession of the department and were relevant.

16 One difficulty with applying this jurisprudence to the facts before the Prothonotary and before me is that Rule 317 differs from its predecessor in a significant way. Rule 1612 referred to "material that is in the possession of the federal board, commission or other tribunal and not in the party's possession" and required that the material "must be relevant to the application for judicial review". Rule 317 adds another element to the demand for documents. That is, a party may only request material "that is in the possession of the tribunal *whose order is the subject of the application*". Thus, before invoking Rule 317 to obtain documents, there must be a decision of a tribunal.

17 Further, I note that this expansive view of Rule 1612 is not supported by other jurisprudence. For example, in the Federal Court of Appeal decision in *Eli Lilly & Co. v. Nu-Pharm Inc.*, [1996] F.C.J. No. 904 (Fed. C.A.), at para. 25, the Court stated the following:

> Contrary to the appellant's contention, the required information was not accessible by the respondents pursuant to Rule 1612 ... Those rules provide a means of enabling a party wishing to rely on material in the possession of a federal board, commission or other tribunal and not in that party's possession, to have access to that material.... This surely has reference to "material" that was before the federal board, commission or other tribunal whose decision

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> is the subject of an application for judicial review ... I cannot see how those rules could be made to apply in the circumstances where no decision of the Minister is under review in the within proceeding. [emphasis added]

18 There is also a consistent line of cases that have held that the only material that is subject to production under either Rule 317 or its predecessor, is the material that was before the decision maker (see, for example, *H. (K.A.) v. Canada (Acting/Assistant Commissioner, Correctional Service)*, [1999] F.C.J. No. 1957 (Fed. T.D.); *Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455 (Fed. C.A.)). In the case at bar, where no decision has been rendered, the content of such material can only be the subject of speculation. Indeed, this is reflected in the expansive list of requested documentation.

19 Finally, I note that the Applicant has already filed affidavits that contain a considerable amount of evidence to support her position on this judicial review. Further documents may be available through an Access to Information request.

Conclusion

20 In conclusion, I am not persuaded that the Prothonotary erred. The motion on appeal will be dismissed with costs to the Respondent.

Order

THIS COURT ORDERS THAT:

1. The motion is dismissed with costs to the Respondent.

2. The Applicant shall have 20 days from the date of this Order to serve and file the Applicant's Record.

2019 CAF 252, 2019 FCA 252
Federal Court of Appeal

Girouard c. Conseil Canadien de la magistrature

2019 CarswellNat 12492, 2019 CarswellNat 5488,
2019 CAF 252, 2019 FCA 252, 311 A.C.W.S. (3d) 498

THE HONOURABLE MICHEL GIROUARD (Appellant) and THE CANADIAN JUDICIAL COUNCIL and THE ATTORNEY GENERAL OF CANADA (Respondents) and THE ATTORNEY GENERAL OF QUEBEC (Third Party)

M. Nadon J.A., Yves de Montigny J.A., George R. Locke J.A.

Heard: September 30, 2019
Judgment: October 11, 2019
Docket: A-394-18

Proceedings: Affirmed, 2018 CarswellNat 7492, 2018 CarswellNat 7493, 301 A.C.W.S. (3d) 270, 2018 FC 1184, 2018 CF 1184 (F.C.)

Counsel: Bâtonnier Gérald R. Tremblay, Ad. E. Lisa-Anne Moisan, Bâtonnier Louis Masson, Ad. E., for the Appellant
Alyssa Tomkins, Gabriel Poliquin, James Plotkin, for the Respondent, The Canadian Judicial Council
Pascale-Catherine Guay, Lindy Rouillard-Labbé, for the Respondent, The Attorney General of Canada

***Yves de Montigny J.A.*:**

[ENGLISH TRANSLATION]

1 The Honourable Justice Michel Girouard (the appellant) is appealing a judgment of the Federal Court (the Court) dated November 26, 2018, in which it was determined that the Canadian Judicial Council (the respondent or the Council) was not required to provide 10 documents to the appellant because they were protected by solicitor-client privilege, by deliberative secrecy and by public interest privilege. The appellant had requested the documents under Rule 317 of the *Federal Courts Rules*, which provides that a party may request from a tribunal material relevant to its application for judicial review.

2 The request by the appellant arose in the broader context of his application for judicial review of the respondent's recommendation on February 20, 2018, that the appellant be removed from office. That application was heard before the Federal Court on May 22, 2019, but at the time of this writing the decision had not yet been rendered. The Council also contested the jurisdiction of the Federal Court and of this Court on the ground that it did not constitute a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*; that claim was rejected by the two courts and an application for leave to appeal the decision of this Court is presently pending before the Supreme Court.

3 This appeal raises important questions about the procedure to follow to determine whether a document is indeed privileged, at least in the context of a request for documents pursuant to Rule 317. The appellant also raises a number of arguments in support of his claim that the Court erred in its application of the privileges claimed in respect of the documents at issue.

I. The facts

4 The appellant, appointed a judge of the Quebec Superior Court in 2010, has been the subject of two inquiries before the Council and its inquiry committees. At the end of the second inquiry, in 2017, the Council (the majority of the members) adopted the findings of the inquiry committee, according to which the appellant was guilty of misconduct, and recommended that he be removed from office on the ground that he had become incapacitated or disabled from the due execution of the office of judge. The appellant filed multiple applications for judicial review of the decisions rendered by the inquiry committees, as well as of the Council's decision to recommend his removal from office, raising, *inter alia*, breaches of procedural fairness. The appellant subsequently discontinued several of his applications, while others were consolidated into one Federal Court file (T-409-18).

5 As previously mentioned, the Council filed a motion to strike these applications for judicial review, alleging that the Federal Court lacked jurisdiction. On the same day that Justice Noël dismissed the motion (2018 FC 865), he ordered the Council, in a separate order, to serve, within 20 days, a "certified list of all of the public documents [provided to] the CJC during the review of the [inquiry committee]'s report", as well as a "certified list of all documents submitted to the CJC, including a summary of each document, the number of pages, and the language of the document (French/English or bilingual), as well as indicate whether privilege is claimed, where applicable": Appeal Book, p. 447 (AB).

6 The Council complied with the order, but following an exchange of correspondence between the parties, Justice Noël saw fit to clarify his initial order with a new order dated September 26, 2018, in which he ordered the Council to file two other lists of documents by October 1, that is, [translation] "a list of all of the public documents that the decision-maker had in order to make the decision", and a [translation] "list of all documents that the decision-maker had in order to make

the decision". Each document had to be described by a title and be accompanied by an [translation] "explanation accurately describing the document, the number of pages and the language of the document (English, French or bilingual)": AB, p. 310.

7 The Council once again complied with the order, while invoking solicitor-client privilege and/or deliberative secrecy and/or public interest privilege in respect of over 70 documents (the appellant ultimately sought only 12 of those documents). This was followed by an exchange of letters and emails between the parties, during which counsel expressed divergent viewpoints on a certain number of subjects, notably with respect to the scope of the privileges claimed. Given these disagreements and the parties' inability to agree on a process to resolve them, Justice Noël issued another order on October 25, 2018, in which he established that the Court would proceed with three steps in order to determine the validity of the privileges claimed by the Council for the 10 documents in issue (the Council waived privilege for two of the documents requested by the appellant). The three steps may be summarized as follows:

> (1) The Court will review the "valid reasons" presented by the appellant to justify the lifting of one or more of the privileges, and will determine whether they warrant proceeding to the second step;
>
> (2) In the event that the Court is satisfied that the reasons presented are valid, it will review the Council's confidential affidavit and confidential representations;
>
> (3) If the Court is not satisfied with the explanations provided and considers itself unable to make the appropriate determinations solely on the basis of the representations of the parties, it will examine the confidential documents (or some of them) before making its decision.

8 Following that order, the Federal Court received the Council's representations, a confidential affidavit from the Council's executive director and senior general counsel, the Council's confidential representations, a response from the appellant to the Council's redacted representations and the redacted affidavit of its executive director, as well as brief letters from the Attorney General of Canada and the Attorney General of Quebec informing the Court that the privileges issue would be left to the courts to decide and that no comments would be made. The Council also filed with the Federal Court 12 sealed envelopes, each containing a document that was in dispute at the time.

II. The impugned decision

9 In a detailed decision rendered on November 26, 2018, the Federal Court followed the process that it had itself established in its previous order and confirmed, for the most part, the privileges claimed by the Council.

10 After having examined the grounds raised by the appellant in his application for judicial review, his representations and the representations of the Council, and taking into account the dissent of some of the Council members, the Court concluded that the appellant's arguments met the "valid reasons" test since they raised legitimate and important concerns. It therefore went on to the second step of the approach that it had adopted.

11 In this regard, the Court first set out the basis for the three privileges claimed and their justification in the specific context of the responsibilities that the Council assumes in relation to the conduct of judges. It then applied the privileges to the documents in dispute, after having indicated that it did not consider it necessary to go on to the third step and examine the documents themselves (except for one of them) to make its decision. The Court stated the following in this regard:

> [21] I have read Mr. Sabourin's confidential affidavit as well as the confidential submissions of the [Council]'s counsel. I found them to be very useful. I have a good understanding of the contents of the documents and, aside from document (7), it will not be necessary for me to proceed to the third step. For the nine (9) other documents, I believe that the information provided by the [Council] is sufficient for me to make the appropriate determinations. Mere curiosity is not a justification to consult these documents.

12 On the basis of the information made available to it by the Council, the Court concluded that solicitor-client privilege and deliberative secrecy applied to documents (1) and (3), that documents (4), (5), (6), (8), (9) and (10) were protected by deliberative secrecy, and that the public interest privilege protected document (2).

13 Finally, the Court felt it necessary to look at document (7) because a reading of the description of that document provided by the Council in its confidential representations and in the confidential affidavit did not allow the Court to reassure the applicant as to whether he had indeed received all of the documents submitted to the members of the Council. After reading the document, the Court concluded that there was no need to disclose the document to the extent that the links made available to the decision-makers were protected by deliberative secrecy; the same document also allowed the Court to confirm to the applicant that the Council had included, in the lists that it provided, all of the documents to which the members had access when making their decision.

III. Issues

14 The appellant essentially raises two issues before this Court. First, he argues that the procedure followed by the Federal Court, particularly its decision to not consult the documents at issue (with the exception of document (7)) before ruling on the application of the privileges, was not appropriate in the circumstances and offends the fundamental principle of open and accessible court proceedings. He also claims that the Federal Court did not correctly apply the privileges claimed to the documents at issue.

IV. Analysis

15 There is no doubt that the issue of whether a document is protected by privilege gives rise to considerations of mixed fact and law and that the determination of a trial judge in this regard is entitled to deference on appeal. In the absence of an extricable error in principle, the standard of palpable and overriding error applies: see *Redhead Equipment v. Canada (Attorney General)*, 2016 SKCA 115, at paragraph 21; *R v. Ragnanan*, 2014 MBCA 1, at paragraph 37; *Goodswimmer v. Canada (Attorney General)*, 2015 ABCA 253, at paragraph 8; *Sable Offshore Energy Project v. Ameron International Corporation*, 2015 NSCA 8, at paragraph 43; *Revcon Oilfield Constructors Incorporated v. Canada (National Revenue)*, 2017 FCA 22, at paragraph 2. To the extent that the appellant himself admits that the Federal Court correctly set out the applicable rule for each of the privileges claimed and does not allege any error of law in this regard, it therefore seems clear to me that this Court should show deference in the review of its conclusions.

16 However, the identification of the principles applicable to the determination by the Federal Court of the procedure to follow to decide whether a document is privileged is a different matter. This is a question that is strictly legal and that does not involve any factual considerations, and as such, it must be assessed rigorously and on the standard of correctness. Conversely, the application of this method to the contested documents may be likened to a question of mixed fact and law subject to the standard of palpable and overriding error.

17 Rules 317 and 318 do not specify the procedure to be followed when a party objects to providing a document. Rule 317 specifies at most that a party may request "material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party". It goes without saying, as the Federal Court aptly noted, that this Rule does not require the tribunal to submit all of the documents in its possession, but only the "relevant" documents that the applicant is not in possession of. As for Rule 318, it provides that a tribunal or party may object to a request under Rule 317 by informing all parties, in writing, of the reasons for the objection. Rule 318 is silent on the steps to take in such a case; at most, subsection 318(3) specifies that the Court "may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2)".

18 That is exactly what the Federal Court did in its order of October 25, 2018. *A priori*, the Court seems to enjoy considerable discretion in this respect. As my colleague Justice Stratas wrote in *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 (*Lukács*), the Court must try to craft a remedy that reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions, which the reviewing court will be unable to engage in without being satisfied that the record before it is sufficient to proceed with the review, (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while ensuring that court proceedings are as open as possible (*Lukács* at paragraph 15).

19 Counsel for the appellant argue that the Federal Court erred by failing to read all of the documents in respect of which the Council claimed a privilege. In their view, it would have been [TRANSLATION] "much more preferable" if the Court had reviewed the documents before it made its decision, in the interest of procedural fairness.

20 Counsel for the Council rely on the considerable remedial flexibility the Court enjoys when an administrative decision-maker objects to providing documents on the basis of privilege. In their opinion, the Court was able to be satisfied that any particular document fell within a category of privileged documents without having to review the documents at issue, by reading an affidavit that described the nature and content of each of the documents.

21 Somewhat surprisingly, there is little case law on this issue. Although the Attorney General of Canada did not want to take a position on the merits of the case, the Attorney General of Canada still drew the Court's attention to a Supreme Court decision that is highly relevant to the procedure to follow for verifying the existence of a privilege. In the judgment, reported as *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, 143 DLR (4th) 1 (*Ryan*), the Court made the following pronouncements: (1) the judge hearing the case may examine every document, but he or she is not required to do so; (2) he or she may proceed on affidavit material indicating the nature and relevance of the information, but (3) where necessary to the proper determination of the claim for privilege, it might be necessary for the Court to examine the documents. In short, where the judge is satisfied that the rights of the parties can be balanced without proceeding with such a review, the judge need not examine every document and failure to do so does not constitute an error of law. Given the importance of this issue for the purposes of this appeal, I find it appropriate to reproduce paragraph 39 of the decision in its entirety:

> In order to determine whether privilege should be accorded to a particular document or class of documents and, if so, what conditions should attach, the judge must consider the circumstances of the privilege alleged, the documents, and the case. While it is not essential in a civil case such as this that the judge examine every document, the court may do so if necessary to the inquiry. On the other hand, a judge does not necessarily err by proceeding on affidavit material indicating the nature of the information and its expected relevance without inspecting each document individually. The requirement that the court minutely examine numerous or lengthy documents may prove time-consuming, expensive and delay the resolution of the litigation. Where necessary to the proper determination of the claim for privilege, it must be undertaken. But I would not lay down an absolute rule that as a matter of law, the judge must personally inspect every document at issue in every case. Where the judge is satisfied on reasonable grounds that the interests at stake can properly be balanced without individual examination of each document, failure to do so does not constitute error of law.

22 That decision is still the leading case and this Court has not hesitated to consult documents in respect of which a privilege was claimed when such a review seemed necessary to determine whether privilege truly applied. In *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81, for example, three judges of this Court (as well as the trial judge) read the report that the Council alleged to be protected by solicitor-client privilege and public interest privilege before they made their decision. Similarly, in *Canada (Information Commissioner) v. Canada (Minister of Environment)*, 187 DLR (4th) 127, [2000] FCJ No 480 (QL), the Court established that it had to examine the material in which solicitor-client privilege was claimed to see if the privilege was properly invoked. And in *1185740 Ontario Ltd v. Minister of National Revenue*, [1999] F.C.J. No. 1432, 247 N.R. 287, this Court set aside a Federal Court decision on the ground that the Federal Court should have examined the statements for which privilege was invoked to determine whether they were privileged or whether the privilege had been waived. The case law of the Federal Court and of other courts of appeal is to the same effect: see, for example, *Stevens v. Conservative Party of Canada*, 2004 FC 396; *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114, 30 Admin LR (6th) 45; *Blood Tribe v. Canada*, 2010 ABCA 112, 317 DLR (4th) 634.

23 By way of analogy, it is worth noting that the Federal Court and this Court have adopted a similar approach in the context of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. In *Wang v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493, for example, the Federal Court examined the documents that the Attorney General wanted to protect to determine whether they were indeed protected by the public interest privilege under section 37 of the *Canada Evidence Act*. Similarly, this Court decided, in *Ribic v. Canada (Attorney General)*, 2003 FCA 246, [2005] 1 FCR 33, that a Federal Court judge who is seized with an application for an order regarding the disclosure of sensitive information under section 38.04 of the *Canada Evidence Act* must first review the documents to determine whether they are relevant to an accused in a criminal trial.

24 In my view, the procedure established by the Federal Court in the present case was entirely consistent with the state of the law and the judge did not commit a reviewable error by proceeding as he did with the three-step approach. It was entirely appropriate, and consistent with the case law, to establish that the documents themselves would be reviewed only if the Court were to consider itself unable to decide on the claimed privileges solely on the basis of the parties' representations. It is also important to point out that the order dated October 25, 2018, in which the process was developed, is not on appeal before us.

25 The question that arises is rather whether it was reasonable for the Federal Court to find that it did not have to read the documents (except for one) under the circumstances. I have come to the conclusion, not without some hesitation, that the judge should have read the documents before he made his decision, given the facts and the particular circumstances of this case.

26 It seems to me that the draconian consequences that the Council's recommendation would have on the appellant, if it is followed by the Minister and ultimately by the two Houses of Parliament and the Governor General, impose the utmost respect for the principles of procedural fairness. In addition, the appellant's application for judicial review of the Council's decision states precisely that the process was vitiated by a number of breaches of procedural fairness. In this context, and with respect, I fail to see how the judge could have been satisfied with secondary evidence (the parties' representations and Mr. Sabourin's affidavit) instead of examining the documents that were the subject of the claim for privilege. This is not about questioning the good faith of either party; it is about ensuring not only that justice was done, but also that it is seen to have been done.

27 I would add in closing that the review of the documents was not likely to unduly delay the proceedings or otherwise be prejudicial to the parties. The 10 documents at issue are only a few pages each, and it would not have taken a lot of time to read them. This is therefore not the situation in *Ryan*, where the examination of the documents would have been expensive and time-consuming and would have delayed the resolution of the litigation.

28 Further to a direction of the Court issued on October 7, 2019, inviting the parties to make representations on the appropriate remedy in the event of a finding that the Federal Court erred by not reading the documents, the appellant and the Attorney General of Canada asked us to review these documents ourselves, whereas the respondent asked us to give that task to the Federal Court. After careful consideration, we came to the conclusion that it was in the interests of justice to open the sealed envelopes and look at the documents ourselves to ensure that the descriptions of the documents in the Council's representations and in its executive director's affidavit accurately reflect their content. Subparagraph 52(b)(i) of the *Federal Courts Act* enables this Court to proceed this way to the extent that it authorizes this Court to give the judgment that the Federal Court should have given.

29 After a careful review of the documents at issue in this appeal, I am satisfied that they are in all respects consistent with the Council's representations before the Federal Court and that they are indeed protected by the privileges claimed. They do not constitute new evidence, do not concern the merits of the issue that had to be decided by the members of the Council, and contain no representations to which the appellant should have been able to respond.

30 That being said, I am therefore of the opinion that the appeal should be dismissed despite the error committed by the Federal Court in the application of the process that it had developed for determining whether or not the disputed documents were privileged. This error proved to be inconsequential and I am therefore of the opinion, like the trial judge, that the claimed privileges applied and justified the Council's decision to not produce the documents.

31 For all of these reasons, I would dismiss the appeal. Since the respondent did not claim costs, none shall be awarded.

***M. Nadon J.A.*:**

I agree.

***George R. Locke J.A.*:**

I agree.

2007 SKCA 74
Saskatchewan Court of Appeal

Hartwig v. Saskatchewan (Commissioner of Inquiry)

2007 CarswellSask 348, 2007 SKCA 74, [2007] 10 W.W.R. 689, [2007] S.J. No. 337, 159 A.C.W.S. (3d) 2, 284 D.L.R. (4th) 268, 304 Sask. R. 1, 413 W.A.C. 1, 66 Admin. L.R. (4th) 297

Larry Hartwig (Applicant) and Honourable Mr. Justice D.H. Wright, Commissioner, Inquiry into Matters Relating to the Death of Neil Stonechild (Respondent) and Minister of Justice, Federation of Saskatchewan Indian Nations, Saskatoon Police Service and Saskatoon City Police Association (Respondents)

Larry Hartwig (Applicant) and Honourable Mr. Justice D.H. Wright, Commissioner, Inquiry into Matters Relating to the Death of Neil Stonechild (Respondent) and The Saskatoon City Police Association (Co-Applicant) and Minister of Justice, Federation of Saskatchewan Indian Nations and Saskatoon Police Service (Respondents)

Brad Senger (Applicant) and Honourable Mr. Justice D.H. Wright, Commissioner, Inquiry into Matters Relating to the Death of Neil Stonechild (Respondent) and Minister of Justice, Federation of Saskatchewan Indian Nations, Saskatoon Police Service and Saskatoon City Police Association (Respondents)

Klebuc C.J.S., Richards, Hunter JJ.A.

Heard: June 15, 2007
Judgment: July 6, 2007 *
Docket: 1227

Counsel: Aaron A. Fox, Q.C. for Larry Hartwig
Drew Plaxton for Saskatoon City Police Association
Jay Watson for Brad Senger
Barry J. Hornsberger, Q.C. for Minister of Justice for Saskatchewan
Greg Bains for Saskatoon Police Service
Silas Halyk, Q.C. for Federation of Saskatchewan Indian Nations
Joel Hesje, Q.C. for The Honourable D.H. Wright, Commissioner

***Richards J.A.*:**

I. Introduction

1 Larry Hartwig, Brad Senger and the Saskatoon City Police Association seek to quash various aspects of the findings made by the Commission of Inquiry appointed to consider matters relating to the death of Neil Stonechild. Their applications for judicial review have been brought pursuant to the original jurisdiction of the Court as established by s. 11 of *The Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1.

2 This decision deals with preliminary matters raised by the Minister of Justice. The Minister, supported by the Federation of Saskatchewan Indian Nations and the Saskatoon Police Service, asks the Court to restrict the scope of the materials which Hartwig, Senger and the Police Association may rely on in connection with their applications and, as well, asks the Court to strike the application of the Police Association on the ground that the Association lacks standing.

II. Background

3 The Commission of Inquiry was established by the Province in 2003 to investigate the circumstances surrounding the death of Neil Stonechild and to make findings and recommendations with respect to the administration of criminal justice in Saskatchewan. The Commision's report was released in October of 2004. It concluded, among other things, that Stonechild had been in the custody of Hartwig and Senger, members of the Saskatoon Police Service, the night he died.

A. The Hartwig Application

4 Hartwig pursues an order quashing the Commission's report to the extent it relates to him and Senger and the finding they had Stonechild in their custody. The application is based on the following grounds as specified in Hartwig's amended notice of motion:

> 1. The Respondent exceeded his jurisdiction in that by his findings and statements contained in his final report he effectively imposed criminal and/or civil responsibility on Larry Hartwig and Brad Senger, contrary to the Terms of Reference for the Inquiry as appended to the Order-in-Council authorizing the establishment of the Inquiry;
>
> 2. The Respondent relied upon the evidence of Gary Robertson in coming to his conclusion that Neil Stonechild was in the custody of Larry Hartwig and Brad Senger and that marks on his hand and nose were caused by handcuffs. In a subsequent hearing it was established that Mr. Robertson's evidence was not supportive of the opinions he gave at the Inquiry and which were relied upon by the Respondent in his report;
>
> . . . . .
>
> 4. That the finding that the testimony of Jason Roy ("Roy") established that the Applicant, Larry Hartwig, and his partner, Brad Senger, had Neil Stonechild in their

custody on November 24-25, 1990 was erroneous, perverse, capricious and made without regard for the material before the Inquiry, was completely contrary to the evidence presented at the Inquiry and was unreasonable and in the alternative, was patently unreasonable based on the following:

> (a) The inconsistencies between the description of the events that Roy gave to his friends at the Binning residence on the night of November 25, 1990 and on other occasions versus his testimony at the Inquiry;
>
> (b) His lack of response to the Stonechild family when they were inquiring into the whereabouts of Neil Stonechild prior to the body being found;
>
> (c) His failure to mention to the Stonechild family anything about seeing Neil Stonechild in the back of a police car until after March of 1991 at the earliest;
>
> (d) His handwritten and verbal statements which he gave to the Saskatoon Police Service in the presence of his girlfriend Cheryl Antoine, on November 30, 1990 in which he makes no mention of seeing Neil Stonechild in a police car;
>
> (e) His expressed surprise at the funeral of Neil Stonechild at seeing an injury to Neil Stonechild's nose which directly contradicted his testimony at the Inquiry that when he had last seen Neil Stonechild in the back of a police car he had a gash across his nose which was bleeding.
>
> (f) The inconsistent statements given by him to the R.C.M.P. and Joel Hesje, Q.C., Commission Counsel, including amongst other things a detailed description of the alleged driver of the police vehicle which did not in any way resemble the Applicant or Brad Senger;
>
> (g) The testimony of Bruce Genialle which established that there was no one in the back of the police car occupied by the Applicant and Brad Senger at the time they were alleged to have had Neil Stonechild in their custody;
>
> (h) The impossibility of the events of November 24/25, 1990 occurring within the time frame described by Roy; and
>
> (i) The testimony of the Applicant, Larry Hartwig and his partner Brad Senger in which they explained why it was not possible that Neil Stonechild was in their custody.

5 Hartwig's notice of motion also indicates that, in support of his position, he proposes to rely on the transcript of the evidence presented to the Commission and on his affidavit of October

18, 2005, including the transcript of testimony given by Gary Robertson at a hearing conducted pursuant to *The Police Act, 1990*, S.S. 1990-91, c. P-15.01.

B. The Senger Application

6 Senger seeks precisely the same relief as Hartwig and seeks it on the same grounds as Hartwig.

7 In pursuing this relief, Senger proposes to rely on Hartwig's affidavit, the transcript of the evidence presented to the Commission and the transcripts of the evidence given by Robertson in Hartwig's *Police Act* appeal.

C. The Police Association Application

8 The Police Association also seeks to quash various aspects of the Commission's report. The central relief it desires in that regard was stated in broad and rather indefinite terms in its notice of motion. In response to concerns raised by the Minister, the Association particularized that relief by way of a document included at Schedule A of its Memorandum of Law. This clarification caused the Minister to withdraw an argument to the effect that the Association's application was defective because it did not properly specify the relief sought. I will proceed on the basis that Schedule A accurately reflects the relief which is in issue. I do note, however, that the Association asks, in addition, for the same orders sought by Hartwig and Senger in their applications.

9 To the extent the Association's request for relief mirrors that sought by Hartwig and Senger, it bases its arguments on the grounds set out in Hartwig's motion. In relation to the relief set out in Schedule A of its Memorandum of Law, it specifies the following grounds:

> ... [T]he Commission exceeded, lost or acted without jurisdiction or otherwise committed reviewable errors in law and otherwise in making the said findings, conclusions or recommendations, in that the same are beyond the jurisdiction and competence of the Commission of Inquiry, whether this jurisdiction be limited by the constitutional powers of the province creating the Commission, the grant and delegation of authority by the province to the Commission, by statute or otherwise.

10 In support of its application, the Association proposes to rely on the materials filed by Hartwig in his motion as well as on the affidavit of Stanley Goertzen sworn June 2, 2006.

III. Analysis

11 The Minister takes the position that the materials relied on by Hartwig, Senger and the Police Association may not be considered by the Court in the context of their judicial review applications. He seeks an order to the effect that the evidence from the Commission proceedings is not admissible. He asks for the same relief with respect to the evidence from Hartwig's *Police Act* appeal. Alternatively, the Minister seeks an order striking specific paragraphs of the Hartwig

affidavit on the ground they are argumentative and striking specific paragraphs of the Goertzen affidavit on various other grounds.

12 The Minister also asks that the Police Association's application be dismissed outright because the Association has no standing to bring the application.

A. The Status of the Evidence Presented to the Commission

13 It is useful to begin dealing with the Minister's motion by focusing first on the question of whether the evidence presented to the Commission can be considered in the course of the judicial review applications which have been filed with the Court. As noted, the Minister says the evidence is not properly before us.

14 The Minister's position, and the authorities on which he relies, are rooted in *R. v. Northumberland Compensation Appeal Tribunal* (1951), [1952] 1 All E.R. 122 (Eng. C.A.). In this well-known decision, Denning M.R. indicated that the evidence is not part of the record in a *certiorari* proceeding. He used the following language, at p. 131, to describe the materials which may be considered by a reviewing court on an application for *certiorari*:

> ... I think the record must contain at least the document which initiates the proceedings, pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision.
>
> The next question which arises is whether affidavit evidence is admissible on an application for *certiorari*. When *certiorari* is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself: see *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128....

15 This passage has become something of a touchstone and has been frequently referred to and cited with approval in cases from Saskatchewan and elsewhere. I acknowledge, therefore, that the Minister's position reflects the traditional or standard position taken by the courts in this jurisdiction. Many cases, including some from this Court, have indicated that, as a general principle, the evidence presented to an administrative tribunal may not be considered by a court conducting a judicial review hearing. See, for example: *Prince Albert Pulp Co. v. C.P.U., Local 1120* (1986), 52 Sask. R. 178 (Sask. C.A.); *Swift Current (City) v. Keith* (1991), 93 Sask. R. 308 (Sask. C.A.); *Liick v. Saskatchewan (Labour Relations Board)* (1995), 139 Sask. R. 177 (Sask. Q.B.).

16 It is important to remember, however, that the content of the record as laid out in the *Northumberland* ruling reflects the shape and nature of administrative law jurisprudence in place at the time it was rendered. It seems clear that the decision was written on the assumption that a reviewing court was in a position to examine decisions of administrative agencies for jurisdictional errors, *i.e.* errors relating to jurisdiction *stricto sensu* and, as well, for errors of law made within jurisdiction that appeared on the face of the record. There is no suggestion in the decision that judicial review could be grounded on errors of fact made within jurisdiction. As a result, the evidence presented to a tribunal was not important to the consideration of an application for *certiorari*. Unless an error made within jurisdiction was both one of law, and also apparent on the face of the record, it was not something which could lead to the decision being overturned. Indeed, Denning M.R. referred in his reasons to the then leading Privy Council decision in the area, *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (Alberta P.C.), where Lord Sumner had said this at pp. 151-152:

> ...A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not as a usurpation of a jurisdiction which he has not... To say that there is no jurisdiction to convict without evidence is the same thing as saying there is jurisdiction if the decision is right, and none if it is wrong.

See also: *R. v. Ludlow*, [1947] K.B. 634 (Eng. K.B.); *Armah v. Ghana* (1966), [1968] A.C. 192 (U.K. H.L.), at 234.

17 This state of affairs can be contrasted with the contemporary scope of judicial review in this country. In the last 30 or so years the Supreme Court has substantially modified the law in this area. The development most significant for present purposes is that the Court has clearly established that findings of fact made by an administrative agency acting within jurisdiction, in the strict sense of that term, may be subject to review by the courts. The foundation of this approach was identified by Lamer J. in *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 (S.C.C.) when he questioned the basis for making distinctions between errors of fact and errors of law in a legal regime which stressed the reasonableness of alleged error. As he said at p. 494, "The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than one of law".

18 The notion that patently unreasonable findings of fact within jurisdiction were subject to judicial review was confirmed in *W.W. Lester (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644 (S.C.C.). Since that time, there have been numerous illustrations of the Court reviewing the evidence presented to a tribunal with a view to assessing the reasonableness of the tribunal's findings of fact. See, for example: *Attis v. New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 (S.C.C.); *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002]

1 S.C.R. 3 (S.C.C.). As Cory J. recognized in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.) at paras 47 and 48:

> In order to decide whether a decision of an administrative tribunal is patently unreasonable, a court may examine the record to determine the basis for the challenged findings of fact or law ... where the arbitral findings are based upon inferences made from the evidence, it is necessary for a reviewing court to examine the evidence...

19 It is readily apparent therefore that the scope of judicial review has evolved significantly in the 55 years since the *Northumberland* case was decided. In contrast, the conception of what is properly before the court in a judicial review application has been largely static. As a result, we are currently at a point where, on one hand, the factual findings of administrative decision-makers made within jurisdiction can be reviewed from the perspective of reasonableness but, on the other hand, the evidence on which those findings are made cannot be put before the courts. This situation frequently creates serious injustices and precludes meaningful review. In my opinion, there is a pressing need to bring the law concerning the materials which can be placed before the courts in judicial review applications into line with the substance of contemporary administrative law doctrine.

20 The Hartwig, Senger and Police Association motions are an illustration of the difficulties inherent in the existing state of affairs. Each applicant argues that various findings made by the Commission are unreasonable or patently unreasonable. There is no suggestion from the Minister or elsewhere that, if they have standing, the applicants are not entitled to make these submissions. But, of course, the only way their positions can be properly advanced is if they are entitled to point to the evidence placed before the Commission and attempt to show how it was misunderstood, overlooked or otherwise wrongly interpreted. As a result, the position taken by the Minister as to the scope of the materials properly before the Court would, as a matter of practical reality, deny the applicants any prospect of successfully advancing the arguments they are otherwise entitled to make.

21 This sort of problem has been solved, or at least avoided, in most Canadian jurisdictions by way of legislation aimed specifically at judicial review or by way of provisions included in rules of court. In Ontario, for example, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22 requires any tribunal to which it applies to compile a record consisting of, *inter alia*, "the transcript, if any, of the oral evidence given at the hearing" and "all documentary evidence filed with the tribunal". Similar enactments can be found in other jurisdictions. See: Brown and Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2005) at paras. 6:5420 *et seq*.

22 No such provisions exist in Saskatchewan. Judicial review applications proceed within the framework of Part Fifty-Two of *The Rules of Court*. Rule 669 is of particular relevance here as

it spells out the requirements concerning the "return" which a tribunal is obliged to make if an application is launched. In relevant part, it reads as follows:

> **669** (1) Where an application is made for an order by way of *certiorari* or to quash proceedings, a notice to the following effect, adapted as may be necessary and addressed to the court, tribunal or other authority shall be endorsed in or on the notice of motion:
>
> > You are required by the rules of court forthwith to return to the local registrar of this court at the Court House (address in full) Saskatchewan, the conviction, order, decision, (or as the case may be) and the reasons therefor, together with the process commencing the proceeding, and the warrant, if any, issued thereon.
>
> (2) All things required by Subrule (1) to be returned to the local registrar shall be deemed to be part of the record.

23 I note, however, that there is nothing in Rule 669 which would be inconsistent with a ruling to the effect that, in appropriate circumstances, parties to judicial review applications are entitled to put before the reviewing court the evidence considered by the tribunal when it made the decision in issue. The fact that the decision of the tribunal, its reasons and the process commencing the proceeding are deemed "part of" the record by Rule 669 does not in itself exclude other materials from the consideration of a court. Indeed, Rule 671 contemplates orders requiring information beyond the return to be brought forward.

24 In my opinion, therefore, it is necessary to recognize and give effect to the reality that, in order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question. No other result is fully consistent with the present substance of administrative law.

25 All of that said, and before concluding on this issue, it is necessary to deal directly with some of the more specific ideas advanced by the Minister with respect to what might be called sub-themes of the *Northumberland* approach. First, counsel stressed the comment found in *Northumberland* and some of its progeny to the effect that affidavit evidence may be admitted to supplement the traditional content of the record only if that evidence relates to a *jurisdictional* issue. In my view, this line of argument does not take the analysis to the conclusion desired by the Minister. There is an obvious initial issue as to whether reliance on the notion of "jurisdiction" in this context is particularly helpful in light of the functional and pragmatic approach to judicial review adopted by the Supreme Court. See: *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), at 1086-90; *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at 1004-05. In any event, if that approach is used, counsel properly accepted that a patently unreasonable finding of fact is jurisdictional in character. See: Mullan, *Administrative*

Law (Irwin Law, 2001) p. 96, f.n. 17. This is an important concession. Hartwig, Senger and the Association each argue that various findings made by the Commission are patently unreasonable. It would follow, therefore, that they are entitled to introduce affidavit materials in relation to this "jurisdictional" issue. That would presumably include the evidence on which the alleged unreasonable findings were made. Thus, fastening on the notion of jurisdiction does not generate the outcome sought by the Minister.

26 Second, and on a related note, the Minister argues that, although the applicants' notices of motion contend the Commission's findings are patently unreasonable, the applicants are in fact asking the Court to weigh and evaluate the evidence with a level of care and detail which is not consistent with the notion of patent unreasonableness. This might or might not be a convincing argument when the substance of the applications is ultimately considered by the Court. However, the distinctions the Minister attempts to make between various levels of scrutiny which might be applied to the evidence are much too subtle to serve as the basis of a preliminary decision to exclude the Commission transcripts. Hartwig, Senger and the Association have filed notices of motion alleging that the Commission made unreasonable and patently unreasonable findings of fact. In the ordinary course, as I have said, this should entitle them to bring the evidence presented to the Commission before the Court. It would be inappropriate at this early stage of the proceedings to reach behind the language of their pleadings for the purpose of striking out the evidence to which the Minister objects.

27 Third, it may also be useful to comment briefly on the notion of "no evidence". The Minister quite rightly pointed out that there are some decisions to the effect that a finding of fact made by an administrative tribunal may be attacked by way of judicial review, and with reliance on affidavit materials, if the decision is made in the absence of evidence to support it. He argues that, in this case, the evidence before the Commission is not properly before the Court because Hartwig, Senger and the Association do not suggest there was no evidence to support findings they are attacking. Rather, according to the Minister, the applicants contend only that the Commission failed to properly weigh, assess and evaluate the evidence.

28 I do not find this line of reasoning to be convincing. My initial concern is that the Minister's position assumes a complete correspondence between the authority of the courts to review a finding on the basis of "no evidence" and their authority to review on the basis of patent unreasonableness. In my opinion, this assumption is unwarranted if "no evidence" is taken to mean a complete absence of evidence. If "no evidence" carries that strict meaning, the Minister's argument narrows the scope of judicial review in ways which cannot be reconciled with the approach taken by the Supreme Court of Canada to such matters. I do not read the Court's decisions as meaning the factual finding of a tribunal may be set aside only if it is supported by no evidence at all.

29 In any event, as noted by Brown and Evans in *Judicial Review of Administrative Action in Canada*, *supra*, at 15:2142, the "no evidence" test has generally not meant that an application for

judicial review will succeed only if there is no evidence of any sort to support the finding in issue. Rather, it has more commonly been taken to mean that there is "no evidence that is *sufficient in law* to do so". If this is the case, then obviously an argument alleging "no evidence" could not be mounted without resort to the evidence itself. There would be no other way to establish whether the evidence is sufficient to warrant the findings that were made.

30 Finally, counsel for the Minister argues that, if the evidence presented to a tribunal is available to a court conducting a judicial review of the tribunal's decision, judicial review will take on the character of an appeal. This is not a significant concern. The system of standards of review erected by the Supreme Court was created for the express purpose of maintaining the appropriate institutional relationship between courts and administrative agencies and, more particularly, to ensure that courts approach the decision-making of administrative bodies with an appropriate level of deference. As noted above, the substantial majority of Canadian jurisdictions already provide that the evidence before tribunals must be available to reviewing courts. There has been no suggestion that this has somehow created a significant problem by wholly collapsing the distinction between appeals and judicial review proceedings.

31 In the result, therefore, the Minister has not established that the evidence from the Commission hearings, and relied on by Hartwig, Senger and the Association, should be excluded for purposes of their applications. To the contrary, in my view, it is necessary to revisit and revise traditional notions about the scope of the material properly before a court on a judicial review application.

32 As indicated, I prefer to base my conclusion in this regard on the straightforward proposition that the parties to a judicial review application should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make. If a tribunal decision can be challenged because it involves a patently unreasonable finding of fact, then the evidence underpinning that finding should be available for the Court to consider. This is ultimately a sounder and more transparent approach to this issue than one couched in terms of the sometimes elusive notion of "jurisdiction" or framed around the complex and rather uncertain and unsatisfactory body of case law relating to the concept of decisions based on "no evidence".

33 Thus, in all of the circumstances, the best course in this area for now is to simply recognize the right of participants in judicial review proceedings to bring forward the evidence which was before the administrative decision-maker. This may be done by way of an affidavit which identifies how the evidence relates to the issues before the court and which otherwise lays the groundwork for its admission. That was the general approach taken by Hartwig.

B. The Status of the Evidence from the Police Act Appeal

34 The second major feature of the Minister's application involves a request to strike those aspects of Hartwig's affidavit which deal with the evidence presented during the appeal of his

dismissal pursuant to s. 61 of *The Police Act, 1990*. More specifically, the Minister's complaint relates to Hartwig's desire to base his judicial review application, in part, on the testimony of Gary Robertson during that appeal. The Minister says it is improper to introduce post-hearing evidence of this sort.

35 Some re-statement of the relevant background may be helpful at this point. Robertson is an expert in photogrammetry who testified before the Commission and offered the opinion that marks on Stonechild's face were consistent with the forceful application of handcuffs. In his affidavit, Hartwig says Roberston's evidence in this regard was discredited during the appeal of his dismissal pursuant to *The Police Act, 1990*. He says Robertson admitted to errors in the measurements he made in arriving at his conclusions. Referring to *Reference re Milgaard*, [1992] 1 S.C.R. 866 (S.C.C.), Hartwig submits the evidence advanced in the *Police Act* appeal is reasonably capable of belief and, when considered with the other evidence presented at the Commission, would reasonably be expected to affect its findings. In this regard, Hartwig relies on the principles for admitting new evidence spelled out in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.). He argues it would be a serious miscarriage of justice to let the Commission's findings stand.

36 I am not persuaded that the criminal law authorities concerning the introduction of new evidence and relied on by Hartwig are controlling in the present context. A judicial review application is not an appeal. In broad terms, the focus of judicial review is the lawfulness of the decision at issue rather than its correctness. See: Wade and Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994) at 38. This distinction, although not conclusive, does weigh against allowing new evidence to be introduced on a judicial review application.

37 That said, I note that Hartwig did not bring the Robertson testimony forward by way of an application to introduce new evidence. Rather, the transcript from the *Police Act* appeal was simply filed with the Court as an exhibit to his affidavit.

38 In any event, I have considerable difficulty concluding, on the basis of the materials which have been filed, that the *Palmer* test could be satisfied in the circumstances of this case. That test has four elements: (a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial; (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (c) the evidence must be credible in the sense that it is reasonably capable of belief; and (d) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

39 Aspects (a) and (d) of the *Palmer* test are problematic. As to (a), Hartwig's affidavit says that, at the time of the *Police Act* appeal, he was able to obtain some of the "working material" Robertson had used to prepare his evidence. This material is apparently what led to the testimony which, in Hartwig's view, discredited what Robertson had told the Commission. However, Hartwig's

affidavit does not explain why those materials were not unearthed at the time Robertson testified before the Commission.

40 In relation to requirement (d) of the *Palmer* test, it is necessary to note that, in discussing Robertson's evidence, the Commissioner concluded at p. 172 of his Report that "It is not necessary for me to accept [Robertson's] evidence as to the cause(s) of the marks on Neil Stonechild's body in order to reach the conclusion set out hereafter." In view of the Commissioner's clear statement on the matter, it is not apparent how the testimony revealed in the *Police Act* appeal transcript could reasonably be expected to have affected the result he arrived at.

41 Of course, as discussed above, there are authorities which have allowed applicants in judicial proceedings to resort to evidence outside of the "record". The most common illustration of this phenomenon relates to situations where there are allegations of a lack of procedural fairness. However, Hartwig has identified no case, similar to the matter at hand, where a reviewing court has permitted the introduction of evidence which was not before the tribunal when its decision was made. There are, however, numerous authorities which have refused to supplement the record with wholly new evidence. See, for example: *VIA Rail Canada Inc. v. Canada (Human Rights Commission)* (1997), [1998] 1 F.C. 376 (Fed. T.D.); *Farhadi v. Canada (Minister of Citizenship & Immigration)*, [1998] 3 F.C. 315 (Fed. T.D.), rev'd (2000), 257 N.R. 158 (Fed. C.A.) but not on this point; *Moussa v. Canada (Public Service Commission)*, 2003 FCT 530 (Fed. T.D.) aff'd 2006 FCA 21 (F.C.A.); *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.).

42 Hartwig does rely on the following passage from Brown and Evans, *Judicial Review of Administrative Action in Canada*, *supra*, at 15:2122:

> On the other hand, while applicants may resort to evidence outside the tribunal's record to establish that there was no evidence for a particular finding of fact, they will not be permitted to introduce evidence that was not before the administrative decision-maker, unless, *possibly, the decision-maker ought to have been aware of it*. The reasons for this limitation seem to be twofold; to preserve the integrity of the administrative decision-making process, and to give effect to the public interest and finality. [Emphasis added by Hartwig] [Footnotes omitted]

43 This authority does not help his case. The authors' use of the words "ought to have been aware of it" does not refer generally to evidence which might have somehow made the decision-making of the tribunal more informed. The Canadian cases cited in the footnote which accompanies this passage concern situations where a human rights commission with a fact-finding responsibility does not properly discharge its obligation and thereby breaches a duty of fairness. This is obviously not the case here. Robertson testified at length before the Commission and was thoroughly cross-examined. The Commission had no independent investigatory duty which was left undischarged.

44 The only other case cited by Brown and Evans is *Secretary of State for Education & Science v. Tameside Metropolitan Borough Council* (1976), [1977] A.C. 1014 (Eng. C.A.). It dealt with a situation where the Secretary of State could make certain orders if a local education authority acted "unreasonably". The House of Lords found that the Secretary had no grounds for believing the authority in question was acting in that way. Their Lordships relied, in part, on evidence admitted without objection in their court which revealed certain facts which Lord Scarman believed the Secretary "ought to have been apprised of but had not sought out." This is quite a different situation than the one here where there was a formal inquiry and where the Commission proceedings involved a full opportunity for the parties to call evidence and cross-examine witnesses.

45 In my view, it would not be appropriate to allow Hartwig to introduce evidence from his *Police Act* hearing for purposes of pursuing his judicial review application. Such an approach is not supported by the authorities and is not commended by either larger considerations of public policy or the specific circumstances of this case.

C. Other Concerns about the Hartwig Affidavit

46 The Minister also advances other arguments about the Hartwig affidavit. He says paras. 10, 11, 12, 16, 18, 19 and 20 of the affidavit run afoul of Rule 319 because they are opinionated, argumentative and tendentious. I do not agree. These paragraphs may not be drafted in the most neutral or antiseptic terms possible but they do not run afoul of Rule 319 on the score that they are argumentative.

D. The Status of the Goertzen Affidavit

47 The Minister also submits that the affidavit of Stanley Goertzen, filed by the Association, is not properly before the Court. His arguments in this regard track those made in connection with Hartwig's affidavit in that he suggests the material before the Court should be limited to that which falls within the traditional view of the record. He also raises a number of more specific concerns about the affidavit.

48 The Goertzen affidavit runs for some 24 paragraphs. Most notably, it (i) exhibits some 27 newspaper articles relating to the creation of the inquiry and to some of its aftermath (para. 7 and exhibits (a) to (aa)), (ii) exhibits extracts from the transcript of the proceedings before the Commission (para. 8, exhibits (bb) to (cc)), (iii) describes and exhibits "notices of potential adverse finding" served on Hartwig, Senger and Keith Jarvis during the course of the inquiry (para. 13, exhibits (dd) to (ff)), (iv) states that prior to the Commission report no member of the Police Association had been the subject of any disciplinary, civil or criminal proceeding in relation to the death of Neil Stonechild (para. 14), (v) recounts the dismissals of Hartwig and Senger and indicates that appeals have been initiated pursuant to *The Police Act, 2000*, (paras. 15, 16 and 17), (vi) refers to a disciplinary charge laid against Daniel Wiks (para. 18), and (vii) describes a civil

action commenced by Stonechild's mother and his estate against a number of past and present members of the Saskatoon Police Service (paras. 19, 20).

49 Counsel for the Minister did not press his arguments about the affidavit during oral argument. I propose, therefore, to deal with his submissions in a summary fashion and to do so without reproducing the specific wording of the various parts of the affidavit which have been put in issue.

50 The Minister contends that paras. 12, 13, 14, 21 and 23 of the affidavit offend Rule 319 in that they contain comments based on information and belief. In my view, the statement in para. 12 to the effect that Hartwig and Senger were interviewed on a number of occasions should be struck in that it clearly appears to be based on information and belief.

51 Paragraph 13 serves no purpose other than to exhibit the Notices of Potential Adverse Finding. I am not inclined to strike it at this point.

52 The alleged problem with para. 14 appears to be one of drafting style more than of substance. Goertzen, as President of the Police Association, obviously has a degree of personal knowledge about whether members of the Association have been subject to civil proceedings or criminal or discipline charges in connection with the death of Stonechild. Thus, while the paragraph contains the words "to the best of my knowledge, information and belief", it would not be appropriate to strike it in its entirety. Rather, I think it must be read as meaning that, to Goertzen's personal knowledge, no member of the Association has been a subject to the proceedings described in the paragraph.

53 I agree that paras. 21 and 23 of the affidavit are based on information and belief and should be struck.

54 The Minister also objects to paragraph 8 of the affidavit and to exhibits "bb" and "cc". These are, respectively, a reference to the transcript of the Commission proceedings and excerpts from it. The Minister says they are inadmissible for the reasons described above under the heading "The Status of the Evidence Presented to the Commission". As indicated, I do not accept those arguments.

55 The Minister's next submission relates to paras. 15 to 22 of the affidavit. He says they should be struck because they relate to matters which arose after the Commission had concluded. I am not prepared to strike these paragraphs by way of a preliminary application on the broad ground put forward by the Minister. The relevance and admissibility of these paragraphs will be better assessed in the course of the Court's deliberations on the merits of the Association's application.

56 The Minister says, as well, that exhibits "a", "j", "m", "n" and "p" to the affidavit should be struck on the basis that they are irrelevant to the issues at hand. These exhibits are press releases and news items relating to cabinet shuffles and departures from cabinet. I agree that their relevance

is not apparent. However it would be inappropriate to strike specific features of an affidavit on a preliminary application on the ground of irrelevance. The relevance of these exhibits is best addressed on the application proper.

57 The Minister takes exception, as well, to exhibit "t" to the Goertzen affidavit. It is a *StarPhoenix* article about the Commission. The relevance of this exhibit is also questionable but, again, its status will be best resolved at the hearing on the merits.

58 Finally, the Minister objects to exhibits "a" to "aa" of the affidavit. They consist of some 27 press releases and news stories. The Minister says they should be struck because the Association relies on them to discredit the Commission's findings. That motive is not apparent on the face of the affidavit and I do not understand the exhibits to have been tendered for that purpose. I am not prepared to accept the Minister's submissions on this point. Perhaps more will become clear at the hearing proper.

E. The Police Association's Standing

59 The Minister's last submission is that the application of the Police Association should be struck on the basis that the Association does not have a "sufficient interest" to bring it. This argument, of course, is grounded on Rule 665(1). It provides that an application for judicial review may be made by "any person having such interest as the court considers sufficient in the matter to which the application relates". In this regard, the Minister says the Association should not be allowed to use the circumstances of its members to claim private interest standing and that the Association itself has no interest in the Commission's report. The Minister argues, as well, that the Association cannot claim public interest standing.

60 The Association is a trade union within the meaning of *The Trade Union Act*, R.S.S. 1978, c. T-17 and, since 1958, has been the bargaining agent for all uniform members of the Saskatoon City Police Service below the rank of inspector. Hartwig and Senger both belonged to the Association. Counsel advises that 21 of the 64 witnesses called at the Commission Inquiry were past or present members of the Association. Many of them were existing members of the Association at the time they gave evidence.

61 The central difficulty with the Minister's position is that the Association was given "full standing" before the Commission. In granting that status, the Commissioner said this in a decision reproduced at p. A96 of his Report:

> 3. Saskatchewan (*sic*) City Police Association. I am satisfied that the Association should, similarly, have full standing. The Association represents the interests of the bulk of the Police Service membership. Constables Hartwig and Senger are members of the Association. It acts as a mediator and advocate for its members. It will have full standing.

62 A party with full standing had the following rights at the inquiry:

> 1. access to documents relevant to the Inquiry collected by the Commission subject to the Rules of Procedure and Practice;
>
> 2. advance notice of documents which are proposed to be introduced into evidence;
>
> 3. advance provision of statements of anticipated evidence;
>
> 4. a seat at counsel table;
>
> 5. the opportunity to suggest witnesses to be called by Commission counsel, and if Commission counsel declines to do so, the opportunity to apply to me to call such witness;
>
> 6. the opportunity to apply to me to lead the evidence of a particular witness if the Commission counsel declines to do so;
>
> 7. the opportunity to cross-examine witnesses on matters relevant to the basis upon which standing was granted;
>
> 8. the opportunity to review transcripts at Commission offices ...;
>
> 9. the opportunity to make closing submission; and
>
> 10. the opportunity to apply for funding.

63 The Association participated fully in the Commission proceedings with a view to protecting the interests of its members.

64 In dealing with the issue of the Association's standing, it is also important to consider the nature of the remedies it seeks. As noted above, in addition to asking for the relief requested by Hartwig and Senger, the Association seeks to quash in excess of 20 matters, each of which it styles as a "finding/conclusion". With one exception, each of these findings/ conclusions relates to an individual who, as I understand it, is either an existing or former member of the Association. For example, the Association seeks to quash the conclusion that a staff sergeant in charge of the Morality Unit reviewed and closed the Stonechild file without answering the many questions surrounding the matter.

65 The Minister relies on the decision of this Court in *S.G.E.U. v. Saskatchewan* (1998), 172 Sask. R. 83 (Sask. C.A.) for the proposition that the Association does not have standing. However, in my view, his argument overstates the effect of that case. It concerned a situation where a trade union had commenced a civil action against the government. The substance of the claim involved an allegation that union members had been improperly denied the ability to participate in specific

superannuation plans. The decision of the Court turned on s. 29 of *The Trade Union Act* which provides that every trade union is a "person" and may sue or be sued "under its own name". The Court rejected the Union's argument to the effect that s. 29 allowed it to be a party to an action along side its members even when it itself did not have a cause of action.

66 The issue in the present case is not whether the Association has a civil cause of action against the Commission. It is whether the Association has a sufficient interest in the Commission's findings to warrant it being allowed to proceed with its application for judicial review. I note that, in the administrative law context such as is at issue here, there have been numerous cases where trade unions have been allowed to seek judicial review in relation to matters of importance to their members. See, for example: *B.C.G.E.U. v. British Columbia (Minister of Health Services)* (2005), 27 Admin. L.R. (4th) 125 (B.C. S.C.); *Civil Service Assn. of Alberta v. Farran* (1976), 68 D.L.R. (3d) 338 (Alta. C.A.); *O.E.C.T.A. v. Bishop* (1976), 12 O.R. (2d) 657 (Ont. C.A.); *C.A.L.F.A.A. v. Pacific Western Airlines Ltd.* (1979), 105 D.L.R. (3d) 477 (B.C. S.C.) aff'd [1981] 5 W.W.R. 455 (B.C. C.A.).

67 I do not mean by this to suggest that a union itself will always be entitled to seek judicial review in a situation where the interests of its members are affected by an administrative decision. My point is only to underline that the issue of whether a union has a cause of action which would entitle it to launch a civil claim is different from the issue of whether it has a sufficient interest to seek judicial review.

68 Brown and Evans in *Judicial Review of Administrative Action in Canada*, *supra* at para. 4:3431 offer the general view that parties to an administrative proceeding, including those granted standing at a hearing, are persons aggrieved by an error made by the decision-maker and are therefore entitled to seek judicial review. Whether or not this is necessarily true as a universal principle, it must be the case here. The Association was granted full standing by the Commission in recognition of the fact that it "represents the interests of the bulk of the Police Service membership" and that it "acts as a mediator and advocate for its members". It participated in the Inquiry and discharged that very role. It now wishes to challenge several of the specific conclusions of the Commission as they relate to its existing and former members. In light of these circumstances, the Association must be considered to have a "sufficient interest" to bring its judicial review application.

IV. Timelines

69 The applications of Hartwig, Senger and the Police Association are set to be argued during the week of September 24, 2007. It is therefore necessary to confirm the filing dates required to ensure the hearing will proceed as scheduled.

70 The first point to be addressed concerns the evidence presented to the Commission. Counsel for Hartwig has filed some 36 volumes of transcript. This was apparently done after asking counsel

for the other parties to indicate whether additional materials should be included and receiving no response to that effect. Counsel for the Commission suggests that, if the Minister's motion to strike Hartwig's materials is denied, then *all* of the evidence presented to the Commission should be before the Court. Counsel for the FSIN is of the same view.

71 I see no point in putting before the Court, or requiring the parties to manage and digest, evidence which is not relevant to the issues being advanced by Hartwig, Senger and the Police Association. In this regard, it does seem rather unlikely that each and every exhibit and each and every word of testimony presented to the Commission will bear on the outcome of the three applications at hand. At the same time, of course, if the evidence presented to the Commission is properly before the Court, care should be taken to avoid a situation where relevant material is overlooked.

72 In my view, it is the responsibility of the parties to identify those aspects of the evidence which they believe bear on the issues which have been raised. Counsel for the Commission has volunteered to take the lead in putting the relevant materials together. Accordingly, each of the parties should advise Mr. Hesje in writing by end of day on July 23, 2007 as to any parts of the transcript or exhibits not already included in the volumes filed by Hartwig which they see as pertaining to the resolution of either the Hartwig, Senger or Association motions and which they wish to see placed before the Court. Mr. Hesje will then arrange to have any such additional evidence bound, served on the parties and filed with the Court. This should be done as expeditiously as possible and, in any event, no later than July 31, 2007. It will be the Court, of course, which determines the ultimate relevance of the material placed before it.

73 The memoranda of argument on behalf of Hartwig, Senger and the Association shall be served and filed on or before August 24, 2007. The Memoranda of Argument on behalf of any party opposing the Hartwig, Senger or Association applications shall be served and filed on or before September 14, 2007.

74 Counsel may contact the Court through the office of the Registrar if this timeline appears to be unworkable and/or if there is a view that it can be improved upon in some significant way.

V. Conclusion

75 The Minister's application is granted to the following extent:

(a) Paragraphs 14 to 20 inclusive and exhibit "f" of Hartwig's affidavit are struck and will not be considered by the Court;

(b) The words "and to the best of my knowledge, information and belief interviewed on a number of occasions" are struck from para. 12 of the Goertzen affidavit; and

(c) Paragraphs 21 and 23 of the Goertzen affidavit are struck.

76 In all other respects, the Minister's application is dismissed.

77 The costs of this motion may be spoken to when the applications are argued on their merits.

***Klebuc C.J.S.*:**

I concur.

***Hunter J.A.*:**

I concur.

Application granted in part.

Footnotes

* Corrigendum issued by the court on July 20, 2007 has been incorporated herein.

2018 SCC 26, 2018 CSC 26
Supreme Court of Canada

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall

2018 CarswellAlta 1044, 2018 CarswellAlta 1045, 2018 SCC 26, 2018 CSC 26, [2018] 1 S.C.R. 750, [2018] 6 W.W.R. 427, [2018] A.W.L.D. 2281, [2018] A.W.L.D. 2375, 16 C.P.C. (8th) 223, 291 A.C.W.S. (3d) 685, 33 Admin. L.R. (6th) 175, 421 D.L.R. (4th) 381, 68 Alta. L.R. (6th) 1

Judicial Committee of the Highwood Congregation of Jehovah's Witnesses (Vaughn Lee - Chairman and Elders James Scott Lang and Joe Gurney) and Highwood Congregation of Jehovah's Witnesses (Appellants) and Randy Wall (Respondent) and Canadian Council of Christian Charities, Association for Reformed Political Action Canada, Canadian Constitution Foundation, Evangelical Fellowship of Canada, Catholic Civil Rights League, Christian Legal Fellowship, World Sikh Organization of Canada, Seventh-day Adventist Church in Canada, Justice Centre for Constitutional Freedoms, Church of Jesus Christ of Latter-day Saints in Canada, British Columbia Civil Liberties Association and Canadian Muslim Lawyers Association (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 2, 2017
Judgment: May 31, 2018
Docket: 37273

Proceedings: reversing *Wall v. Highwood Congregation of Jehovah's Witnesses (Judicial Committee)* (2016), 365 C.R.R. (2d) 40, 2016 CarswellAlta 1669, 12 Admin. L.R. (6th) 302, 2016 ABCA 255, [2017] 2 W.W.R. 641, 404 D.L.R. (4th) 48, 43 Alta. L.R. (6th) 33, Marina Paperny J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.)

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Barry W. Bussey, Philip A.S. Milley, for Intervener, Canadian Council of Christian Charities
John Sikkema, André Schutten, for Intervener, Association, for Reformed Political Action Canada
Mark Gelowtiz, Karin Sachar, for Intervener, Canadian Constitution Foundation

Albertos Polizogopoulos, for Interveners, Evangelical Fellowship of Canada and the Catholic Civil Rights League
Derek Ross, Deina Warren, for Intervener, Christian Legal Fellowship
Balpreet Singh Boparai, Avnish Nanda, for Intervener, World Sikh Organization of Canada
Gerald Chipeur, Q.C., Jonathan Martin, for Interveners, Seventh-day Adventist Church in Canada and the Church of Jesus Christ of Latter-day Saints in Canada
Jay Cameron, for Intervener, Justice Centre, for Constitutional Freedoms
Roy Millen, Ariel Solose, for Intervener, British Columbia Civil Liberties Association
Shahzad Siddiqui, Yavar Hameed, for Intervener, Canadian Muslim Lawyers Association

Rowe J. **(McLachlin C.J.C. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ. concurring):**

I. Overview

1 The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

2 For the reasons that follow, I would allow the appeal. Mr. Wall sought to have the Judicial Committee's decision reviewed on the basis that the decision was procedurally unfair. There are several reasons why this argument must fail. First, judicial review is limited to public decision makers, which the Judicial Committee is not. Second, there is no free-standing right to have such decisions reviewed on the basis of procedural fairness. In light of the foregoing, Mr. Wall has no cause of action, and, accordingly, the Court of Queen's Bench has no jurisdiction to set aside the Judicial Committee's membership decision. Finally, the ecclesiastical issues raised by Mr. Wall are not justiciable.

II. Facts and Judicial History

3 The Highwood Congregation of Jehovah's Witnesses ("Congregation") is an association of about one hundred Jehovah's Witnesses living in Calgary, Alberta. The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or

pecuniary benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.

4 To become a member of the Congregation, a person must be baptized and must satisfy the elders that he or she possesses a sufficient understanding of relevant scriptural teachings and is living according to accepted standards of conduct and morality. Where a member deviates from these scriptural standards, elders meet and encourage the member to repent. If the member persists in the behaviour, he or she is asked to appear before a committee of at least three elders of the Congregation.

5 The committee proceedings are not adversarial, but are meant to restore the member to the Congregation. If the elders determine that the member does not exhibit genuine repentance for his or her sins, the member is "disfellowshipped" from the Congregation. Disfellowshipped members may still attend congregational meetings, but within the Congregation they may speak only to their immediate family and limit discussions to non-spiritual matters.

6 Randy Wall became a member of the Congregation in 1980. He remained a member of the Congregation until he was disfellowshipped by the Judicial Committee.

7 Mr. Wall unsuccessfully appealed the Judicial Committee's decision to elders of neighbouring congregations (Appeal Committee) and to the Watch Tower Bible and Tract Society of Canada. After the Congregation was informed that the disfellowship was confirmed, Mr. Wall filed an originating application for judicial review pursuant to Rule 3.15 of the *Alberta Rules of Court*, Alta. Reg. 124/2010, seeking an order of *certiorari* quashing and declaring void the Judicial Committee's decision. In his application, Mr. Wall claimed that the Judicial Committee breached the principles of natural justice and the duty of fairness, and that the decision to disfellowship him affected his work as a realtor as his Jehovah's Witness clients declined to work with him.

8 An initial hearing was held to determine whether the Court of Queen's Bench had jurisdiction. The chambers judge found that the court did have jurisdiction as Mr. Wall's civil rights might have been affected by the Judicial Committee's decision: File No. 1401-10225, April 16, 2015. The judge also noted that expert evidence could be heard regarding the interpretation by Jehovah's Witnesses of Christian scripture as to what is sinful and the scriptural criteria used by elders to determine whether someone said to have sinned has sufficiently repented.

9 The majority of the Court of Appeal of Alberta dismissed the Congregation's appeal, affirming that the Court of Queen's Bench had jurisdiction to hear Mr. Wall's originating application for judicial review: 2016 ABCA 255, 43 Alta. L.R. (6th) 33 (Alta. C.A.). The majority held that the courts may intervene in decisions of voluntary organizations concerning membership where property or civil rights are at issue. The majority also held that even where no property or civil rights are engaged, courts may intervene in the decisions of voluntary associations where there is

a breach of the rules of natural justice or where the complainant has exhausted internal dispute resolution processes.

10 The dissenting judge would have allowed the Congregation's appeal on the basis that the Judicial Committee is a private actor, and as such is not subject to judicial review, and that in any event, Mr. Wall's challenge of the Judicial Committee's decision did not raise a justiciable issue.

III. Question on Appeal

11 This appeal requires the Court to determine whether it has jurisdiction to judicially review the disfellowship decision for procedural fairness concerns.

IV. Analysis

12 Courts are not strangers to the review of decision making on the basis of procedural fairness. However, the ability of courts to conduct such a review is subject to certain limits. These reasons address three ways in which the review on the basis of procedural fairness is limited. First, judicial review is reserved for state action. In this case, the Congregation's Judicial Committee was not exercising statutory authority. Second, there is no free-standing right to procedural fairness. Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake. Third, even where review is available, the courts will consider only those issues that are justiciable. Issues of theology are not justiciable.

A. The Availability of Judicial Review

13 The purpose of judicial review is to ensure the legality of state decision making: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (S.C.C.), at paras. 24 and 26; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at pp. 237-38; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29 (Alta. C.A.), at paras. 14-15. Judicial review is a public law concept that allows s. 96 courts to "engage in surveillance of lower tribunals" in order to ensure that these tribunals respect the rule of law: *Knox*, at para. 14; *Constitution Act, 1867*, s. 96. The state's decisions can be reviewed on the basis of procedural fairness or on their substance. The parties in this appeal appropriately conceded that judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to solve disputes that may arise between them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution.

14 Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not

subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 (F.C.A.), at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

15 Further, while the private law remedies of declaration or injunction may be sought in an application for judicial review (see, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)2; *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2 and 3(3)), this does not make the reverse true. Public law remedies such as *certiorari* may not be granted in litigation relating to contractual or property rights between private parties: *Knox*, at para. 17. *Certiorari* is only available where the decision-making power at issue has a sufficiently public character: D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:2252.

16 The Attorney General has a right to be heard on an originating application for judicial review, and must be served notice where an application has been filed: *Alberta Rules of Court*, Rules 3.15 and 3.17. Other originating applications have no such requirements: *ibid.*, Rule 3.9. This suggests that judicial review is properly directed at public decision making.

17 Although the public law remedy of judicial review is aimed at government decision makers, some Canadian courts, including the courts below, have continued to find that judicial review is available with respect to decisions by churches and other voluntary associations. These decisions can be grouped in two categories according to the arguments relied on in support of the availability of judicial review. Neither line of argument should be taken as authority for the broad proposition that private bodies are subject to judicial review. Both lines of cases fail to recognize that judicial review is about the legality of state decision making.

18 The first line of cases relies on the misconception that incorporation by a private Act operates as a statutory grant of authority to churches so constituted: *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191 (Ont. Div. Ct.), at para. 21; *Davis v. United Church of Canada* (1991), 8 O.R. (3d) 75 (Ont. Gen. Div.), at p. 78. The purpose of a private Act is to "confer special powers or benefits upon one or more persons or body of persons, or to exclude one or more persons or body of persons from the general application of the law": Canada, Parliament, House of Commons, *House of Commons Procedure and Practice* (2nd ed. 2009), by A. O'Brien and M. Bosc, at p. 1177. Thus, by its nature, a private Act is not a law of general application and its effect can be quite limited. The federal *Interpretation Act*, R.S.C. 1985, c. I-21, s. 9, states that "[n]o provision in a private Act affects the rights of any person, except only as therein mentioned and referred to." For instance, *The United Church of Canada Act* (1924), 14 & 15 Geo. 5, c. 100, gives effect to an agreement regarding the transfer of property rights (from the Methodist,

Congregationalist and certain Presbyterian churches) upon the creation of the United Church of Canada; it is not a grant of statutory authority.

19 A second line of cases that allows for judicial review of the decisions of voluntary associations that are not incorporated by any Act (public or private) looks only at whether the association or the decision in question is sufficiently public in nature: *Graff v. New Democratic Party*, 2017 ONSC 3578 (Ont. Div. Ct.), at para. 18; *Erin Mills Soccer Club v. Ontario Soccer Assn.*, 2016 ONSC 7718, 15 Admin. L.R. (6th) 138 (Ont. S.C.J.), at para. 60; *West Toronto United Football Club v. Ontario Soccer Assn.*, 2014 ONSC 5881, 327 O.A.C. 29 (Ont. Div. Ct.), at paras. 17-18. These cases find their basis in the Ontario Court of Appeal's decision in *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481 (Ont. C.A.). The court in *Setia* found that judicial review was not available since the matter did not have a sufficient public dimension despite some indicators to the contrary (such as the existence of a private Act setting up the school) (para. 41).

20 In my view, these cases do not make judicial review available for private bodies. Courts have questioned how a private Act — like that for the United Church of Canada — that does not confer statutory authority can attract judicial review: see *Greaves v. United Church of God Canada*, 2003 BCSC 1365, 27 C.C.E.L. (3d) 46 (B.C. S.C.), at para. 29; *Setia*, at para. 36. The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff*, at para. 18; *West Toronto United Football Club*, at para. 24. These cases fail to distinguish between "public" in a generic sense and "public" in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.

21 Part of the confusion seems to have arisen from the courts' reliance on *Air Canada* to determine the "public" nature of the matter at hand. But, what *Air Canada* actually dealt with was the question of whether certain public entities were acting as a federal board, commission or tribunal such that the judicial review jurisdiction of the Federal Court was engaged. The proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true. Thus it does not follow that "public" decisions of a private body — in the sense that they have some broad import — will be reviewable. The relevant inquiry is whether the legality of state decision making is at issue.

22 The present case raises no issues about the rule of law. The Congregation has no constating private Act and the Congregation in no way is exercising state authority.

23 Finally, Mr. Wall submitted before this Court that he was not seeking judicial review, but in his originating application for judicial review this is what he does. In his application, he seeks

an order of *certiorari* that would quash the disfellowship decision. I recognize that Mr. Wall was unrepresented at the time he filed his application. These comments do not reflect that the basis for my disposition of the appeal is a matter of form alone or is related to semantic errors in the application. However, the implications of granting an appeal must still be considered. This appeal considers only the question of the court's jurisdiction; it is not clear what other remedy would be sought if the case were returned to the Court of Queen's Bench for a hearing on the merits. However, as I indicate above, judicial review is not available.

B. The Ability of Courts to Review Decisions of Voluntary Associations for Procedural Fairness

24 Even if Mr. Wall had filed a standard action by way of statement of claim, his mere membership in a religious organization — where no civil or property right is granted by virtue of such membership — should remain free from court intervention. Indeed, there is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.

25 The majority in the Court of Appeal held that there was such a free-standing right to procedural fairness. However, the cases on which they relied on do not stand for such a proposition. Almost all of them were cases involving an underlying legal right, such as wrongful dismissal (*McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 (Ont. C.A.); *Pedersen v. Fulton* [1994 CarswellOnt 814 (Ont. Gen. Div.)], 1994 CanLII 7483, or a statutory cause of action (*Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59 (B.C. S.C.)). Another claim was dismissed on the basis that it was not justiciable as the dispute was ecclesiastical in nature: *Hart v. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354 (Ont. C.A.).

26 In addition, it is clear that the English jurisprudence cited by Mr. Wall similarly requires the presence of an underlying legal right. In *Shergill v. Khaira*, [2014] UKSC 33, [2015] A.C. 359 (U.K. S.C.), at paras. 46-48, and *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (Eng. C.A.), the English courts found that the voluntary associations at issue were governed by contract. I do not view *Shergill* as standing for the proposition that there is a free-standing right to procedural fairness as regards the decisions of religious or other voluntary organizations in the absence of an underlying legal right. Rather, in *Shergill*, requiring procedural fairness is simply a way of enforcing a contract (para. 48). Similarly, in *Lee*, Lord Denning held that "[t]he jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied" (p. 1180).

27 Mr. Wall argued before this Court that *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 (S.C.C.), could be read as permitting courts to review the decisions of voluntary organizations for procedural fairness concerns where the issues raised were "sufficiently important", even where no property or contractual right is in issue. This is a misreading of *Lakeside Colony*. What is required is that a *legal right* of sufficient importance — such as a property or contractual right — be at stake: see also *Ukrainian Greek Orthodox Church v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586 (S.C.C.). It is not enough that a matter be of "sufficient importance" in some abstract sense. As Gonthier J. pointed out in *Lakeside Colony*, the legal right at issue was of a different nature depending on the perspective from which it was examined: from the colony's standpoint the dispute involved a property right, while from the members' standpoint the dispute was contractual in nature. Either way, the criterion of "sufficient importance" was never contemplated as a basis to give jurisdiction to courts absent the determination of legal rights.

28 Mr. Wall argues that a contractual right (or something resembling a contractual right) exists between himself and the Congregation. There was no such finding by the chambers judge. No basis has been shown that Mr. Wall and the Congregation intended to create legal relations. Unlike many other organizations, such as professional associations, the Congregation does not have a written constitution, by-laws or rules that would entitle members to have those agreements enforced in accordance with their terms. In *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229 (Alta. C.A.), at paras. 22-25, the Court of Appeal of Alberta ruled that membership in a similarly constituted congregation did not grant any contractual right in and of itself. The appeal can therefore be distinguished from *Hofer v. Hofer*, [1970] S.C.R. 958 (S.C.C.), at pp. 961 and 963, *Senez c. Montreal Real Estate Board*, [1980] 2 S.C.R. 555 (S.C.C.), at pp. 566 and 568, and *Lakeside Colony*, at p. 174. In all of these cases, the Court concluded that the terms of these voluntary associations were contractually binding.

29 Moreover, *mere* membership in a religious organization, where no civil or property right is formally granted by virtue of membership, should remain outside the scope of the *Lakeside Colony* criteria. Otherwise, it would be devoid of its meaning and purpose. In fact, members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization, since "[a] religious contract is based on norms that are often faith-based and deeply held": R. Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008), 42 *S.C.L.R.* (2d) 37, at p. 45. Where one party alleges that a contract exists, they would have to show that there was an intention to form contractual relations. While this may be more difficult to show in the religious context, the general principles of contract law would apply.

30 Before the chambers judge, Mr. Wall also argued his rights are at stake because the Judicial Committee's decision damaged his economic interests in interfering with his client base. On this point, I would again part ways with the courts below. Mr. Wall had no property right in maintaining

his client base. As Justice Wakeling held in dissent in the court below, Mr. Wall does not have a right to the business of the members of the Congregation: Court of Appeal reasons, at para. 139. For an illustration of this, see *Mott-Trille v. Steed*, [1998] O.J. No. 3583 (Ont. Gen. Div.), at paras. 14 and 45, rev'd on other grounds, 1999 CanLII 2618 [1999 CarswellOnt 4143 (Ont. C.A.)].

31 Had Mr. Wall been able to show that he suffered some detriment or prejudice to his legal rights arising from the Congregation's membership decision, he could have sought redress under appropriate private law remedies. This is not to say that the Congregation's actions had no impact on Mr. Wall; I accept his testimony that it did. Rather, the point is that in the circumstances of this case, the negative impact does not give rise to an actionable claim. As such there is no basis for the courts to intervene in the Congregation's decision-making process; in other words, the matters in issue fall outside the courts' jurisdiction.

C. Justiciability

32 This appeal may be allowed for the reasons given above. However, I also offer some supplementary comments on justiciability, given that it was an issue raised by the parties and dealt with at the Court of Appeal. In addition to questions of jurisdiction, justiciability limits the extent to which courts may engage with decisions by voluntary associations even when the intervention is sought only on the basis of procedural fairness. Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?

33 Lorne M. Sossin defines justiciability as

> a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
>
> (*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7)

Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": *ibid.*, at p. 1.

34 There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).

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35 By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding: Court of Appeal reasons, at paras. 82-84, per Wakeling J.A.

36 This Court has considered the relevance of religion to the question of justiciability. In *Marcovitz v. Bruker*, 2007 SCC 54, [2007] 3 S.C.R. 607 (S.C.C.), at para. 41, Justice Abella stated: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable." That being said, courts should not decide matters of religious dogma. As this Court noted in *Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (S.C.C.), at para. 50: "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." The courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them: see *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733 (B.C. S.C. [In Chambers]), at para. 33; *Amselem*, at paras. 49-51.

37 In *Lakeside Colony*, this Court held (at p. 175 (emphasis added)):

> In deciding the membership or residence status of the defendants, the court must determine whether they have been validly expelled from the colony. It is not incumbent on the court to review the merits of the decision to expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without *mala fides*. This standard goes back at least to this statement by Stirling J. in *Baird v. Wells* (1890), 44 Ch. D. 661, at p. 670:
>
> > The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*.

The foregoing passage makes clear that the courts will not consider the merits of a religious tenet; such matters are not justiciable.

38 In addition, sometimes even the procedural rules of a particular religious group may involve the interpretation of religious doctrine. For instance, the *Organized to Do Jehovah's Will* handbook (2005) outlines the procedure to be followed in cases of serious wrongdoing: "After taking the steps outlined at Matthew 18:15, 16, some individual brothers or sisters may report to the elders cases of unresolved serious wrongdoing" (p. 151). The courts lack the legitimacy and institutional capacity to determine whether the steps outlined in Matthew have been followed. These types of procedural issues are also not justiciable. That being said, courts may still review procedural rules where they are based on a contract between two parties, even where the contract is meant to give

effect to doctrinal religious principles: *Marcovitz*, at para. 47. But here, Mr. Wall has not shown that his legal rights were at stake.

39 Justiciability was raised in another way. Both the Congregation and Mr. Wall argued that their freedom of religion and freedom of association should inform this Court's decision. The dissenting justice in the Court of Appeal made comments on this basis and suggested that religious matters were not justiciable due in part to the protection of freedom of religion in s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. As this Court held in *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.), at p. 603, the *Charter* does not apply to private litigation. Section 32 specifies that the *Charter* applies to the legislative, executive and administrative branches of government: *ibid.*, at pp. 603-4. The *Charter* does not directly apply to this dispute as no state action is being challenged, although the *Charter* may inform the development of the common law: *ibid.*, at p. 603. In the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.

V. Disposition

40 I would allow the appeal and quash the originating application for judicial review filed by Mr. Wall. As the appellants requested that no costs be awarded, I award none.

Appeal allowed.

Pourvoi accueilli.

2007 ABCA 295
Alberta Court of Appeal

Knox v. Conservative Party of Canada

2007 CarswellAlta 1397, 2007 ABCA 295, [2007] A.W.L.D. 4061, [2007] A.W.L.D. 4065, [2007] A.W.L.D. 4124, [2007] A.W.L.D. 4125, [2007] A.J. No. 1046, [2008] 3 W.W.R. 588, 160 A.C.W.S. (3d) 645, 286 D.L.R. (4th) 129, 415 W.A.C. 29, 422 A.R. 29, 49 C.P.C. (6th) 216, 65 Admin. L.R. (4th) 167, 85 Alta. L.R. (4th) 34

John Knox, John Stewart-Smith, Jim Hawkes, Roy Thurm, Gerald Radke, Nelson Meyers, R.W. (Bert) Sparrow, Ronald W. Jones, Norma Sparrow, Lindsay Blackett, and Francois Aubin (Respondents / Appellants on Cross-Appeal) and Conservative Party of Canada and the Calgary West Conservative Association (Appellants / Respondents on Cross-Appeal) and Rob Anders (Intervener)

R. Berger, J. Watson, F. Slatter JJ.A.

Heard: June 14, 2007
Judgment: September 21, 2007 *
Docket: Calgary Appeal 0701-0071-AC, 0701-0091-AC

Proceedings: reversing in part *Knox v. Conservative Party of Canada* (2007), 2007 CarswellAlta 351, [2007] 6 W.W.R. 551, 72 Alta. L.R. (4th) 25, 2007 ABQB 180, 57 Admin. L.R. (4th) 143 (Alta. Q.B.)

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***Per curiam*:**

1 This appeal calls upon the Court to determine whether decisions taken by political parties are subject to judicial review.

2 The factual underpinnings are fully canvassed in the decision under appeal: *Knox v. Conservative Party of Canada*, [2007] A.J. No. 303, 2007 ABQB 180, 72 Alta. L.R. (4th) 25, [2007] 6 W.W.R. 551 (Alta. Q.B.). They may be summarized as follows. The Respondents are members of both the Conservative Party of Canada (the "Party") and the Calgary West

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Conservative Association (the "Association") who object to the way the nomination process, and the acclamation of Robert Anders (the sitting Member of Parliament for the Riding), proceeded in Calgary West between June and August, 2006. Three days after Mr. Anders was acclaimed, they sought judicial review of the nomination process (the "first judicial review"), applying to quash the decisions setting the date for the nomination meeting, to set aside the acclamation, and to replace the Committee Chair. In a second application made several weeks later (the "second judicial review"), the Respondents also sought judicial review of a decision of the Party's Arbitration Panel on related matters. The Arbitration Panel's decision found that the nomination process had not met the requirements of the Party's Candidate Nomination Rules and Procedures (the "Rules"), but that the variations were acceptable because the Director of Political Operations had appropriately exercised his discretion to vary those Rules.

3 The Appellants unsuccessfully sought to strike the first application for judicial review, a decision which was upheld by this Court: *Knox v. Conservative Party of Canada*, 2006 ABCA 342 (Alta. C.A.). Subsequently, Hawco, J. heard both judicial review applications at the same time. He dismissed the first because there was an adequate alternate remedy available through the Party's arbitration procedure. The Respondents have cross-appealed that portion of his decision. The Party submits that arbitration was not an "alternate" remedy but was the only remedy immediately available to the members. Hawco, J. allowed the second application on the basis that the Party had failed to follow its own Rules. His decision with respect to the second judicial review forms the subject of the appeal brought by the Appellants.

Detailed Factual Underpinnings

4 The following are the central factual underpinnings:

1. September 2, 2006 was initially fixed as the nomination date for the Calgary West Electoral District; the nomination date was later changed to August 31, 2006.

2. Nominations closed August 16, 2006, nine days after notice was given. Two people were nominated: Mr. Anders and Mr. Wakula. Mr. Wakula was disqualified by the National Candidates Selection Committee on August 17, 2006 for reasons which have not been publicly disclosed. Mr. Wakula appealed his disqualification to the National Council.

3. The next day, twelve members of the Calgary West Conservative Association brought a petition pursuant to s. 19.1 of the Conservative Party of Canada Constitution. The petition initiated the dispute resolution processes set out in the Constitution and the Rules.

4. The Appellants concede that not all of the nomination procedures set out in the Rules were followed to the letter. By way of illustration, the campaign period was less than thirty days and the notice provided to the members did not contain all of the requisite information. The

Appellants maintain, however, that all deviations were authorized by the Director of Political Operations in accordance with Rules 4(a) and 7(a).

5. On August 26, 2006, the National Council rejected Mr. Wakula's appeal of his disqualification and Mr. Anders, being the only remaining candidate, was considered acclaimed.

6. Notwithstanding the acclamation, the dispute resolution procedures set out in the Constitution and the Rules were followed. The Secretary of the Committee decided not to intervene in the dispute and the matters set out in the petition were accordingly deemed to be referred to an Arbitration Panel pursuant to Article 19.3 and Rule 9(b).

7. On October 17, 2006, the Arbitration Panel ruled as follows:

> (a) The nomination procedures did not comply with the Rules in several respects.
>
> (b) The Rules may be altered or abridged by the Director of Political Operations in consultation with the President of the National Council, where necessary, to ensure a fair and effective candidate recruitment and selection, and
>
> (c) In this case, the Rules were altered, abridged and suspended by the Director in consultation with the President of the National Council to ensure a fair and effective candidate recruitment selection.

8. The panel also dealt with a further issue, holding that Ms. Mason was not biased and did not need to be removed as Chair of the Nominating Committee.

9. The Arbitration Panel's decision was communicated to the members on October 17, 2006.

10. The members applied for judicial review of the Arbitration Panel's final decision on November 24, 2006 - more than thirty days after the final decision was rendered.

11. The chambers judge concluded that the Arbitration Panel had erred in holding that the Appellants had not breached the Party's Rules and Constitution through the abbreviated nomination process. The chambers judge set aside the panel's decision, set aside Mr. Anders' acclamation, ordered the removal of the Committee Chair and directed that a new nomination process and meeting be held.

Is the Appeal Moot?

5 The order under appeal was filed March 22, 2007. On April 18, 2007, Hawco, J. directed that the nomination process proceed and be completed no later than June 30, 2007. The National Council of the Conservative Party of Canada adopted new Candidate Nomination Rules and Procedures designed specifically for the Federal Riding of Calgary West. The deadline for nominations was Tuesday, June 5, 2007. The intervener, Robert Anders, was acclaimed as the

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Conservative candidate under the new rules. The Respondents and Cross-Appellants brought a Notice of Motion returnable before this Court seeking a declaration that the issues before this Court are moot.

6 On March 16, 2007, the Appellants applied to stay the order under appeal pending that appeal. Hawco, J. dismissed the application. The Appellants then sought a stay of the order before Hunt, J.A. That application was dismissed on April 18, 2007. In rendering her decision on the Party's stay application, Hunt, J.A. addressed, in part, the issue of mootness. She stated:

> I do agree, however, that if a stay is not granted, at least part of the appeal could, in certain circumstances, become nugatory. A number of unpredictable things would have to occur for that to be the case. It would require that, as a result of the nomination process, someone other than Anders was selected and then ran in a federal election, all before the Court of Appeal determined the appeal. I emphasize that, even in this possible confluence of several events, only part of the appeal would become nugatory, because, subject to possible mootness arguments, the appellants' interest in broader issues such as the role of courts in overseeing political parties, the effect of the *Election Act* and the *Arbitration Act*, and the interpretation of the Party's Rules, would remain live issues. ...
>
> [emphasis added]
>
> *Knox v. Conservative Party of Canada*, 2007 ABCA 143, 404 A.R. 383, 39 C.P.C. (6th) 242 (Alta. C.A.) at para. 16

7 We respectfully concur. In our opinion, the issues have not become academic. There remains a live controversy: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) at paras. 16-17. We agree with the Appellants that significant issues are still extant. They include:

> a) Whether the dispute resolution procedures under the Conservative Party of Canada Constitution are obligatory.
>
> b) Whether those procedures result in final and binding resolution of all disputes.
>
> c) The finality or otherwise of the Arbitration Panel's decisions.
>
> d) The jurisdiction of the courts to superintend a political party's nomination process.

8 We conclude, accordingly, that the appeal is not moot.

Issues on Appeal

9 The Appellants raise the following issues:

a. Did the chambers judge err in finding that s. 44 of the *Arbitration Act* does not govern the review of the Arbitration Panel's decision?

b. Did the chambers judge err in finding that the decision of the Arbitration Panel was subject to judicial review?

c. Did the chambers judge err in finding that the standard of review applicable to the Arbitration Panel's decision was correctness?

d. Did the chambers judge err in finding that the Arbitration Panel's decision should be overturned?

Relevant Provisions of the Conservative Party of Canada Constitution

10 Articles 19.1, 19.3 and 19.6 read as follows:

Dispute Resolution

19.1 Except for any dispute related to the leadership selection process, any ten (10) members of an electoral district association or affiliated organization may give notice in writing to the National Council of a dispute as to whether the requirements of the Constitution, a by-law or any rules and procedures are being met by the electoral district association or affiliated organization or any committee thereof.

19.3 If the members appointed pursuant to Article 19.2 decide not to intervene or are unsuccessful in resolving the dispute, National Council shall, in writing, refer the matter to the Arbitration Committee.

19.6 The decision of an Arbitration Committee panel is final and binding and there shall be no appeal or review on any ground whatsoever.

Relevant Provisions of the Conservative Party of Canada's Candidate Nomination Rules and Procedures

11 Rules 4(a), 7(a) and 9(b) read as follows:

4(a) Except where otherwise provided by the Director of Political Operations, Electoral District Associations must meet the following criteria to start the candidate nomination process;

. . .

7(a) Where necessary to ensure fair and effective candidate recruitment and selection, the Director of Political Operations in consultation with the President of National Council may

alter, abridge or suspend any of the requirements in these Rules except section 9 in particular circumstance set out by National Council or, where so authorized by National Council, in such circumstances as he sees fit.

. . .

9(b) Where the Secretariat Committee decides not to intervene or is unsuccessful in resolving a dispute described in section 9a and the dispute remains outstanding, the Secretary shall forthwith report same to the Chair of the Arbitration Committee at which time the matter shall be deemed to stand referred to the Arbitration Committee pursuant to Article 19.3 for adjudication by a panel.

Relevant Provisions of the Arbitration Act, RSA 2000, c. A-43

12 Sections 3, 4, 11, 13, 37, 44(1), (2) & (3), 45 and 46(1)(a), (b) and (c) read as follows:

3 The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except sections 5(2), 19, 39, 44(2), 45, 47 and 49.

4 A party to an arbitration who is aware of a non-compliance with a provision of this Act, except with a provision referred to in section 3, or with the arbitration agreement and who does not object to the noncompliance within the time limit provided or, if none is provided, within a reasonable time, is deemed to have waived the right to object.

. . .

11(1) An arbitrator shall be independent of the parties and impartial as between the parties.

(2) Before accepting an appointment as arbitrator, a person shall disclose to all parties to the arbitration any circumstances of which that person is aware that may give rise to a reasonable apprehension of bias.

(3) An arbitrator who, during an arbitration, becomes aware of circumstances that may give rise to a reasonable apprehension of bias shall promptly disclose the circumstances to all the parties.

. . .

13(1) A party may challenge an arbitrator only on one of the following grounds:

(a) circumstances exist that may give rise to a reasonable apprehension of bias;

(b) the arbitrator does not possess qualifications that the parties have agreed are necessary.

(2) A party who appointed an arbitrator or participated in the arbitrator's appointment may challenge the arbitrator only on grounds of which the party was unaware at the time of the appointment.

(3) A party who wishes to challenge an arbitrator shall send the arbitral tribunal a statement of the grounds for the challenge within 15 days after becoming aware of them.

(4) The other parties may agree to remove the arbitrator who is being challenged, or the arbitrator may resign.

(5) If the arbitrator is not removed by the parties or does not resign, the arbitral tribunal, including the arbitrator who is being challenged, shall decide the issue and shall notify the parties of its decision.

(6) Within 10 days after being notified of the arbitral tribunal's decision, a party may make an application to the court to decide the issue.

(7) While an application is pending, the arbitral tribunal, including the arbitrator who is being challenged, may continue the arbitration and make an award, unless the court orders otherwise.

. . .

37 An award binds the parties unless it is set aside or varied under section 44 or 45.

. . .

44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

. . .

598

45(1) On a party's application, the court may set aside an award on any of the following grounds:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid or has ceased to exist;

(c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement.

(d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with the matter, was not in accordance with this Act;

(e) the subject-matter of the arbitration is not capable of being the subject of arbitration under Alberta law;

(f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;

(g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;

(h) an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;

(i) the award was obtained by fraud.

(2) If subsection (1)(c) applies and it is reasonable to separate the decisions on matters covered by the arbitration agreement from the impugned ones, the court shall set aside the impugned decisions and allow the others to stand.

(3) The court shall not set aside an award on grounds referred to in subsection (1)(c) if the applicant has agreed to the inclusion of the matter in dispute, waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what matters in dispute have been referred to it.

(4) The court shall not set aside an award on grounds referred to in subsection (1)(h) if the applicant had an opportunity to challenge the arbitrator on those grounds under section 13 before the award was made and did not do so or if those grounds were the subject of an unsuccessful challenge.

(5) The court shall not set aside an award on a ground to which the applicant is deemed under section 4 to have waived the right to object.

(6) If the ground alleged for setting aside the award could have been raised as an objection to the arbitral tribunal's jurisdiction to conduct the arbitration, the court may set the award aside on that ground if it considers the applicant's failure to make an objection in accordance with section 17 justified.

(7) When the court sets aside an award, it may remove an arbitrator or the arbitral tribunal and may give directions about the conduct of the arbitration.

(8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.

46(1) The following must be commenced within 30 days after the appellant or applicant received the award, correction, explanation, change or statement of reasons on which the appeal or application is based:

(a) an appeal under section 44(1);

(b) an application for leave to appeal under section 44(2);

(c) an application to set aside an award under section 45.

Analysis

13 The rulings below require this Court to consider whether the disaffected members of the Association properly invoked judicial review to challenge the nomination process. The relevant inquiry is whether the decisions of the Party are subject to the public law remedy of judicial review, or whether the decisions of the Party are only subject to review by the Court of Queen's Bench pursuant to the provisions of the *Arbitration Act*.

14 Judicial review is a feature of public law whereby the superior courts under s. 96 of the *Constitution Act 1867* engage in surveillance of lower tribunals to ensure that the fundamentals of legality and jurisdiction are respected by those tribunals. The tribunals which are subject to judicial review are, for the most part, those which are court-like in their nature, or administer a function for the benefit of the public on behalf of a level of government. Those which are empowered by legislation to supervise and regulate a trade, profession, industry or employment, those which are empowered by legislation to supervise an element of commerce, business, finance, property or legal rights for the benefit of the public generally, or which set standards for the benefit of the public may also be subject to judicial review. Issues of contractual or property rights as between individuals or as between individuals and organizations, are generally addressed through ordinary

court processes at common law, or by statute or through arbitration or alternative dispute resolution as agreed by the parties.

15 The difficult question is deciding whether a particular body is public or private. The distinction between a public and a private tribunal is whether the tribunal exercises powers and duties of a public nature: *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.), at pp. 617, 622-3, 628; *Reynolds v. Ontario (Registrar, Information & Privacy Commissioner)* (2006), 217 O.A.C. 146, 27 M.P.L.R. (4th) 24 (Ont. Div. Ct.) at para. 33; *R. v. Panel on Take-overs & Mergers*, [1987] Q.B. 815 (Eng. C.A.); *R. v. Disciplinary Committee of the Jockey Club Ex p. Aga Khan* (1992), [1993] 1 W.L.R. 909 (Eng. C.A.).

16 History may explain part of the confusion over whether a tribunal is a public body subject to public law remedies, or only a consensual tribunal subject to private law remedies. Judicial review was originally done through the prerogative writs: *certiorari, mandamus*, prohibition, *habeus corpus*, and *quo warranto*. These were clearly public law remedies, and were not available to review privately created tribunals. The private law remedies of injunction and declaration were not originally available as public law remedies. This was because both injunctions and declarations developed in the court of Chancery, whereas judicial review was always done by the Court of Queen's Bench.

17 Upon the merger of the courts of equity and the common law courts, it quickly became apparent that the declaration and the injunction might be useful public law remedies as well, and they came to be used for that purpose. The situation was then that private law remedies could be used in public law, but the opposite was not true: the prerogative writs were not available for private disputes.

18 A procedural impediment still existed, namely the rule that neither a declaration nor an injunction could be applied for in the same proceeding as a prerogative remedy. This procedural obstacle was removed in 1987, when the *Rules of Court* were amended to provide that prerogative relief, injunctions and declarations could be applied for in the same proceeding: see Rule 753.04. At this point the distinction between the review of a private tribunal and a public tribunal came to be blurred, because in some cases a declaration and injunction could be used for both. The confusion was exacerbated because the same document (an originating notice of motion) was used for judicial review, as well as the review under Rule 410 of disputes that did not involve any unsettled facts, and depended primarily on the interpretation of documents.

19 The whole situation became further confused by the proliferation of tribunals, some of which were quite difficult to characterize as either public or private. In some instances later cases misinterpreted and misapplied earlier cases, resulting in what were essentially private tribunals being subject to "judicial review" in the technical sense.

20 It follows that if a tribunal is exercising powers that do not accrue to private organizations, and that are only vested on the tribunal by statute for the benefit of the public, then it is subject to judicial review. Otherwise it is a private consensual tribunal and *prima facie* subject only to private law remedies.

21 An examination of the *Pushpanathan* test, which is used to set the standard of judicial review, shows that it is largely inapplicable to private consensual tribunals. The first part of the test is the existence of a privative clause, which is purely a matter of statute. The second part of the test is the expertise of the tribunal. However, where the parties have consented to a particular dispute resolution mechanism, it hardly lies in their mouths to say that the tribunal that they have selected themselves lacks expertise. The third factor, the intention of the statute as a whole, also does not apply to private tribunals. While analogies to each of these factors can undoubtedly be found when the Court is asked to adjudicate on the activities of a private tribunal, the absence of any public dimension to those activities undermines the *raison d'etre* of the *Pushpanathan* test.

22 In some instances a tribunal may have both public and private powers. The tribunal is generally only subject to judicial review when and to the extent that its public powers are in question. When it exercises its private powers, only private remedies are generally available.

23 There are some tribunals that have traditionally been regarded as exercising public powers. For example, Chiefs of Police are considered to be public officials. Professional disciplinary bodies fall into the same category, although in most cases statutes now provide a direct appeal from the decisions of those bodies, leaving judicial review as a residual remedy only. The appointment and removal of public officers is subject to judicial review because they exercise public powers and functions, whereas the employment of ordinary employees, generally, is not: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.). An illustration of the outer boundaries of what is a public body subject to judicial review is found in *Kaplan v. Canadian Institute of Actuaries* (1994), 25 Alta. L.R. (3d) 108, 161 A.R. 321 (Alta. Q.B.) affm'd (1997), 151 D.L.R. (4th) 481, 56 Alta. L.R. (3d) 205, 206 A.R. 268 (Alta. C.A.). The Canadian Institute of Actuaries was created by statute, but did not have the exclusive right to decide who could practice as an actuary. There were, however, a number of statutes that required certificates by an actuary who was registered with the Institute, meaning that non-membership in the Institute was a significant detriment to practising as an actuary. Kaplan in fact practised in such an area, and his discipline by the Institute therefore had a public aspect to it, making its decisions subject to judicial review.

24 Labour arbitrators have traditionally been treated as being subject to judicial review because arbitration is mandatory under the various labour statutes. As such it has been held that labour arbitrators exercise powers of a public nature.

25 It should be noted that the mere fact that a tribunal or an organization is incorporated is not decisive. There is no such thing as a common law corporation, and all corporations therefore

originate through statute. There are, however, a great many private corporations and their internal workings and decisions are not subject to judicial review. As said, the corporation must be discharging public duties or exercising powers of a public nature before it is subject to judicial review. Merely because a corporation is expressly or implicitly authorized by statute to retain staff or engage in other business does not make its decisions subject to judicial review.

26 Neither constituency associations nor political parties are given any public powers under the *Canada Elections Act*, S.C. 2000, c. 9. They are essentially private organizations. It is true that their financial affairs are regulated: they may only give tax receipts in certain circumstances, and they may only spend the money they raise in certain ways. However, merely because an organization is subject to public regulation does not make it a public body subject to judicial review. The fact that the organization may require or may hold a licence or permit of some kind is also not sufficient, nor is the fact that the organization may receive public money. Many organizations are subject to public regulation. For example, all charities must be registered in order to issue charitable receipts, but that does not mean that they are exercising public functions and therefore are subject to judicial review.

27 It is argued that the democratic process, elections, and the activities of political parties are of great public importance. That is undoubtedly true, but public importance is not the test for whether a tribunal is subject to judicial review. When arranging for the nomination of their candidate in Calgary West, the Party and the Association were essentially engaged in private activities, and their actions, in this case, are not subject to judicial review. They are, however, subject to private law remedies that may be engaged. Like many private organizations, the Appellants in this case have constitutions, bylaws and rules. Members are entitled to have those documents enforced in accordance with their terms and the proper interpretation of those terms. The remedies available are, however, private law remedies.

28 In adjudicating on the activities of a private tribunal, the first step is to see whether the constitution itself defines the remedies to which the members are entitled, and the procedures that are to be used to obtain those remedies. In this case, the Constitution and Rules of the Party and of the Association incorporate a system which provides for the internal arbitration of disputes, such as disputes arising from the nomination of the Party's candidate for that constituency for the next Federal Election. That detailed dispute resolution mechanism was engaged by the parties.

29 Indeed (albeit with respect to the first judicial review application), the chambers judge found that the parties had submitted their dispute to arbitration and that the Court should be reluctant to intervene in such circumstances:

> ... [A]s stated by my colleague Justice Hart in *G. v. G.*, (2000) 264 A.R. 22 at para. 23:

> ... once the parties have agreed to submit their differences to arbitration the court should intervene to relieve the parties of their contractual obligation only in the clearest of circumstances.
>
> The parties have, pursuant to the Rules, agreed to submit the matter to arbitration. ... (A.B. Digest, F16)

We agree with the Appellant that once this finding was made, the chambers judge was bound to apply the provisions of the *Arbitration Act*. We see no jurisdictional distinction between the two applications for judicial review. Instead of limiting his review to the provisions of the *Arbitration Act*, the chambers judge applied an administrative law analysis in the second judicial review to the Arbitration Panel's decision. This was an error of law: the Court cannot modify the language of the Act to add grounds of review beyond those permitted in s. 37.

30 It is not necessary for us to consider what would happen if the Constitution itself provided no internal dispute resolution mechanism, or rules of procedure. In such cases, the Court might be prepared to infer certain basic procedural protections, and in the absence of any specific remedial procedure, the courts would undoubtedly use their general jurisdiction to provide the relief to which the parties are entitled.

31 In this case, however, the Constitution specifically provides for arbitration, and says that the result of the arbitration will be final and binding. We need not decide whether this wording precludes an application for leave to appeal on a question of law, as provided for in s. 44(2) of the *Arbitration Act*, because no such application was brought within the limitation period in s. 46. Since judicial review is not available, and a timely application for leave to appeal was not filed, any rights of the members to challenge the decision of the arbitration panel have expired.

32 Likewise, s. 13 of the *Arbitration Act* provides a specific procedure for challenging the tribunal for bias. This was not a prototypical arbitration panel, where the arbitrators are completely independent from the parties in dispute. Here the parties have covenanted to select their arbitration panel "in house", something they are perfectly entitled to do. The provisions on impartiality of the arbitral board under s. 11 of the Act can be contracted away under s. 3 or waived under s. 4. Section 13(3) provides that within 15 days after becoming aware of the grounds for a challenge based on bias, a statement of those grounds must be sent to the arbitral tribunal. Within 10 days of the arbitrator's decision whether to resign or not, a party must make any application to the Court to decide the issue. No such application was brought in the case at bar within that period.

33 The Respondents argue that the dispute was never properly placed before the panel. We note, however, that the letter dated September 1, 2006 from the Conservative Party of Canada to the Respondents (A.B. Vol. II, p. 111) that referred the matter to arbitration, made reference to the letter of August 17, 2006 from the Respondents (A.B. Vol. II, p. 101). The August 17th letter was

six pages long and raised every complaint about the nomination process that formed the basis of the applications for judicial review. Those matters were all resolved by the arbitral panel and the result is final and binding.

34 In the result, we conclude that:

a) judicial review (a public law remedy) is not available in this case.

b) the parties had selected their own private law dispute resolution mechanism (arbitration).

c) the private law resolution was final and binding, and in any event other remedies were not engaged in a timely way.

35 For these reasons, the appeal with respect to the second judicial review is allowed. The judgment below is set aside; the decision of the Arbitration Panel is restored. Mindful of these reasons, the cross-appeal is dismissed.

Appeal allowed; cross-appeal dismissed.

Footnotes

* Leave to appeal refused at *Knox v. Conservative Party of Canada* (2008), 2008 CarswellAlta 278, 2008 CarswellAlta 279 (S.C.C.).

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CHRISTOPHER LILL (Applicant) and ATTORNEY GENERAL OF CANADA (Respondent)

Denis Gascon J.

Heard: January 14, 2020
Judgment: April 24, 2020
Docket: T-2563-14, T-204-15

Counsel: Cynthia Chénier, Emmanuelle Arcand, for the Applicant
Marjolaine Breton, Toni Abi Nasr, for the Respondent

***Denis Gascon J.*:**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

I. Overview

1 Before this Court are two appeals brought by the applicant, Mr. Christopher Lill, pursuant to section 51 of the *Federal Courts Rules*, SOR/98 106 [Rules], against two orders made on November 25, 2019, by Prothonotary Tabib [Prothonotary].

2 In the first order [Order No. 1], the Prothonotary dismissed a motion filed by Mr. Lill on September 20, 2019, in docket T-204-15, in which Mr. Lill requested documents in the possession of the Correctional Service of Canada [CSC] pursuant to section 317 of the Rules [Motion for Discovery of Documents]. Mr. Lill was seeking access to those documents in connection with a different motion he had filed in July 2019 under subsection 467(2) of the Rules for an order directing the Attorney General of Canada [AGC] to appear on behalf of CSC and respond to allegations of contempt of court [Motion for Contempt of Court]. In her second order, dated November 25, 2019, the Prothonotary dismissed the Motion for Contempt of Court that Mr. Lill had filed in dockets T-204-15 and T-2563-14 [Order No. 2].

3 The only issue in the two appeals is whether the Prothonotary erred in dismissing Mr. Lill's two motions.

4 For the reasons that follow, the appeals will be dismissed because Mr. Lill has not demonstrated an error of law or a palpable and overriding error of fact, or mixed fact and law, in either of the Prothonotary's two orders. In my view, Mr. Lill's argument that he could avail himself of the remedy under rule 317 to obtain documents in the context of his Motion for Contempt of Court is totally without merit, and the Prothonotary was correct in dismissing his Motion for Discovery of Documents. Moreover, the Prothonotary made no reviewable error in dismissing Mr. Lill's Motion for Contempt of Court. The Prothonotary had jurisdiction to consider this motion as it was part of the first step in the two-stage contempt process set out in the Rules. Furthermore, there was no breach of the rules of procedural fairness, because in making her order, the Prothonotary relied solely on Mr. Lill's motion record, without considering either the AGC's response or Mr. Lill's possible reply. Finally, the Prothonotary correctly concluded that CSC had complied with all aspects of the judgment granting the applications for judicial review that gave rise to these motions, including the instructions contained in them. I therefore see no basis for intervening to overturn the two orders of the Prothonotary.

II. Background

A. Facts

5 Since 2007, Mr. Lill has been serving a life sentence for first degree murder, with no possibility of parole for 25 years.

6 On October 21, 2011, while Mr. Lill was incarcerated at La Macaza medium-security penitentiary, a violent incident occurred involving another inmate. As a result of that incident, Mr. Lill was placed in administrative segregation three days later. He remained there until November 30, 2011.

7 On November 7, 2011, Mr. Lill's security classification was increased to maximum. On November 30, 2011, he was transferred to the maximum-security Port-Cartier Institution. Mr. Lill remained in maximum security until May 2, 2014, at which time he was transferred to a medium-security institution, owing to the reassessment of his security classification from maximum to medium in January 2014.

8 Following the events of the fall of 2011, Mr. Lill grieved the legality of his involuntary placement in administrative segregation, the reassessment of his security classification and his involuntary transfer to a maximum-security institution. On January 31, 2014, after reconsideration, CSC's Acting Senior Deputy Commissioner issued two decisions dismissing the substance of Mr.

Lill's grievances. Mr. Lill then filed applications for judicial review of both of these decisions, under Court file numbers T-2563-14 and T-204-15.

9 Dockets T-2563-14 and T-204-15 were heard jointly. On October 19, 2016, Justice Martineau allowed in part Mr. Lill's applications for judicial review (*Lill v Canada (Attorney General)*, 2016 FC 1151 [*Lill*]). In his judgment [Martineau Judgment], Justice Martineau set aside CSC's two January 2014 decisions and ordered that four grievances filed by Mr. Lill against CSC be redetermined. He referred the file back to CSC with instructions. The operative part of the Martineau Judgment establishes that certain specific information concerning Mr. Lill must not be taken into account by prison authorities in the redetermination of the grievances in question or in any future decision-making processes. Specifically, the conclusions of the Martineau Judgment contain the following instructions:

> a) Grievance V30R00018783 filed by the applicant concerning his placement in involuntary administrative segregation is allowed for the purpose of applying the following additional corrective measure: the information about the incident on October 21, 2011, and the maintenance of the applicant in involuntary segregation must no longer be used or taken into consideration by correctional authorities in any future decision-making process; and
>
> b) Grievances V30R0001876, V30R00018784 and V30R00018785 filed by the applicant concerning the reassessment of his security classification and his transfer to a maximum-security institution are allowed for the purpose of applying the following corrective measure: the security reclassification on November 7, 2011, and the applicant's involuntary transfer to a maximum-security institution on November 24, 2011, must no longer be taken into consideration by correctional authorities in future decision-making processes.

10 Justice Martineau also stated in his conclusions that the judgment must be placed in Mr. Lill's institutional file.

11 As Mr. Lill expressly acknowledges in his Motion for Contempt of Court and the accompanying affidavit of July 24, 2019, following its redetermination, CSC upheld Mr. Lill's four grievances in their entirety. Thus, as ordered by the Martineau Judgment, CSC indicated in Mr. Lill's file that information relating to the October 2011 incident, his involuntary placement in administrative segregation, the reassessment of his security classification and his involuntary transfer to a maximum-security institution could not be used in any future decision-making processes. Specifically, in a November 21, 2016, decision, CSC stated that [TRANSLATION] "as a corrective measure, the warden of Cowansville Institution will ensure that a memorandum is prepared in order to advise that any information related to the 2011-10-21 incident (at La Macaza Institution), and subsequent decisions related to your administrative segregation, security reclassification and involuntary transfer to Port-Cartier Institution, will no longer be considered in any future decision-making process". A note to file using the same wording is dated December

9, 2016, and was placed in Mr. Lill's file. A copy of the Martineau Judgment was also placed in Mr. Lill's file on that date.

12 In the spring of 2019, Mr. Lill applied for escorted temporary absences [ETAs] for parental responsibility, including attending the birth of his child, which was expected in September 2019, and for family contact. Since he is serving a life sentence, authority to grant such permission lies with the Parole Board of Canada [Board], and not CSC (*Corrections and Conditional Release Act*, SC 1992, c 20 [Act], section 17.1; *Criminal Code*, SC 1985, c C-46, section 746.1). As part of the ETA approval process, however, CSC has an obligation to disclose all relevant information to the Board, and the Board must rely on this information in reaching a decision (*Mooring v Canada (Parole Board)*, [1996] 1 SCR 75 at para 21; Lill at para 16).

13 In April 2019, CSC therefore completed a correctional plan and a psychological/psychiatric assessment report [Assessments], which it shared with the Board, and in which it recommended granting the ETAs Mr. Lill was requesting.

14 Mr. Lill was unhappy with the content of the Assessments provided by CSC and filed a Motion for Contempt of Court in July 2019 in each of dockets T-2563-14 and T-204-15. In these two identical motions, Mr. Lill asked the Court to issue an order requiring the AGC to appear before the Court on behalf of CSC to hear evidence of the facts alleged against him and to assert any defence he might have to avoid a contempt conviction. According to Mr. Lill's allegations in his Motion for Contempt of Court, CSC failed to comply with the Martineau Judgment in that the Assessments produced by CSC for the hearing before the Board on his ETA applications made direct reference to the October 21, 2011 incident, his placement in administrative segregation, and his subsequent transfer to a maximum-security institution.

15 After several procedural steps involving the records for Mr. Lill's Motion for Contempt of Court, on August 19, 2019, Justice Lafrenière issued an order accepting the filing of those records and establishing a timetable for the AGC's response and Mr. Lill's reply [Justice Lafrenière's Order]. In his order, Justice Lafrenière granted the AGC the right to make submissions to the effect that Mr. Lill's record did not establish a *prima facie* case of the contempt alleged of CSC, but denied his request for a hearing on Mr. Lill's Motion for Contempt of Court. Finding no factors that would justify holding such a hearing, Justice Lafrenière concluded that the Court would be able to rule fairly on Mr. Lill's motion solely on the basis of the parties' written submissions.

16 In September 2019, a conference call was held at Mr. Lill's request. Following this conference call, and after hearing the parties' arguments regarding the production of the documents requested by Mr. Lill in support of his Motion for Contempt of Court, Justice Gagné issued an order dated September 12, 2019, establishing a timetable for the filing of the Motion for Discovery of Documents sought by Lill, the AGC's response to that motion, and Mr. Lill's reply in his Motion for Contempt of Court [Justice Gagné's Order]. Specifically, Justice Gagné's Order granted: (1) Mr.

Lill, until September 20, 2019, to file his [TRANSLATION] "motion for disclosure of additional documents by the respondent"; (2) the AGC, 20 days from the filing of Mr. Lill's motion for disclosure of additional documents to file its respondent's record; and (3) Mr. Lill, 10 days from the Court's decision on his motion for disclosure of documents to file his reply record in his Motion for Contempt of Court.

17 On September 20, 2019, Mr. Lill served and filed his Motion for Discovery of Documents. In it, Mr. Lill asks that CSC be ordered to provide [TRANSLATION] "all internal emails and memos from [CSC] mentioning the name [of Mr. Lill] or his FPS number, since the March 13, 2019 mediation conference, and specifically during the period of exchanges between the parties in T-204-15 and T-2563-14, i.e., from March 13 to July 24, 2019".

18 The AGC served and filed his response to the Motion for Contempt of Court on October 9, 2019. Mr. Lill served his reply a few days later, on October 15, 2019, and filed it with the Court the next day.

B. Prothonotary's orders

19 On November 25, 2019, the Prothonotary issued her two orders dismissing both of Mr. Lill's motions, namely his Motion for Discovery of Documents and his Motion for Contempt of Court.

20 In Order No. 1, the Prothonotary dismissed the Motion for Discovery of Documents, holding that rule 317 can only be used in the context of judicial review and that Mr. Lill had in fact used the wrong procedural vehicle. The Prothonotary concluded that, contrary to Mr. Lill's contentions, his Motion for Discovery of Documents was not related to a judicial review of a decision of CSC, but in fact involved a case in which his main remedy was his Motion for Contempt of Court.

21 In Order No. 2, the Prothonotary also dismissed Mr. Lill's Motion for Contempt of Court on the grounds that, on its face, the motion was without merit, [TRANSLATION] "in that it wrongly equates failure to comply with the results of the grievance with failure to comply with the [Martineau Judgment]". The Prothonotary was of the view that the Martineau Judgment was limited to setting aside the 2014 decisions subject to judicial review and referring them back to CSC for redetermination, along with certain instructions. The Prothonotary concluded that [TRANSLATION] "these instructions do not constitute an injunctive order or an order in the nature of mandamus issued by the Court" against the AGC or CSC. She also found that Mr. Lill had not demonstrated that the AGC or CSC had disobeyed a court order. Although Justice Gagné's Order provided that, in his Motion for Contempt of Court, Mr. Lill had until judgment on his Motion for Discovery of Documents to file his reply, the Prothonotary did not give Mr. Lill time to file that reply, instead deciding his Motion for Contempt of Court without considering either the AGC's response or Mr. Lill's forthcoming reply.

22 Mr. Lill's appeals against the two orders of the Prothonotary are being dealt with by the Court in a single hearing.

C. Standard for intervention

23 An appeal from a decision of a Prothonotary to a judge of the Federal Court is permitted by rule 51. Since the judgment of the Federal Court of Appeal (FCA) in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], it is well-established that the standard for intervention on appeals from discretionary orders by prothonotaries is the standard enunciated by the Supreme Court of Canada (SCC) in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. Thus, on questions of law and questions of mixed fact and law where there is an extricable question of law, prothonotaries' orders will be reviewed on a standard of correctness. On all other questions, particularly questions of fact or mixed fact and law and inferences of fact, the Court may only interfere if the prothonotaries made a "palpable and overriding error" (*Housen* at paras 19-37; *Maximova v Canada (Attorney General)*, 2017 FCA 230 [*Maximova*] at para 4; *Hospira* at paras 64-66, 79).

24 The FCA has repeatedly affirmed that the "palpable and overriding error" standard is a "highly deferential standard" (*Figueroa v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 12 at para 3; *Montana v Canada (National Revenue)*, 2017 FCA 194 at para 3; *1395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2017 FCA 185 at para 3; *NOV Downhole Eurasia Limited v TLL Oilfield Consulting Ltd*, 2017 FCA 32 at para 7; *Revcon Oilfield Constructors Incorporated v Canada (National Revenue)*, 2017 FCA 22 at para 2). As Justice Stratas metaphorically stated in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] and *Canada v South Yukon Forest Corporation*, 2012 FCA 165 [*South Yukon*], in order to meet this standard, "it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall" (*Mahjoub* at para 61; *South Yukon* at para 46). Describing what is meant by "palpable" and "overriding", Justice Stratas further wrote in *Mahjoub*:

> [62] "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
>
> [63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.
>
> [64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If

this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.

25 A palpable and overriding error has also been described by the FCA as an error that is obvious, plainly seen and apparent, the effect of which is to vitiate the integrity of the reasons (*Madison Pacific Properties Inc v Canada*, 2019 FCA 19 at para 26; *Maximova* at para 5). In *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2017 FCA 216 [*Candiac*], the FCA further noted that the standard of palpable and overriding error is particularly difficult to meet when the decision under judicial review is a procedural one (*Candiac* at para 50; see also *Boily v Canada*, 2019 FC 323 at paras 16-22 and *Curtis v Canada (Canadian Human Rights Commission)*, 2019 FC 1498 at paras 14-17).

26 The SCC recently echoed these principles in *Salomon v Matte-Thompson*, 2019 SCC 14 [*Salomon*]: "Where the deferential standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case" (*Salomon* at para 33, citing *Benhaim v St-Germain*, 2016 SCC 48 at para 38). The SCC also referred to another metaphor used by the Quebec Court of Appeal in *J.G. v Nadeau*, 2016 QCCA 167 at para 77, where the Court affirmed that [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye". Simply put, "palpable" means an error that is obvious and apparent, while "overriding" refers to an error that goes to the core of the outcome of a case and has the effect of changing the result (*Maximova* at para 5; *South Yukon* at para 46).

27 In this case, both of Mr. Lill's appeals involve questions of mixed fact and law, and therefore can only be reviewed by the Court if there is a palpable and overriding error, unless an extricable question of law or legal principle is present *(Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 180; *Mahjoub* at paras 73-74).

III. Analysis

28 Having reviewed the Prothonotary's two orders, read the records and considered the written and oral submissions of the parties, I find that Mr. Lill has failed to demonstrate any error of law or any palpable and overriding error of fact or mixed fact and law in either of the orders.

A. Motion for discovery of documents

29 With respect to his Motion for Discovery of Documents, Mr. Lill submits that the Prothonotary erred in giving rule 317 an unduly restrictive and limiting interpretation, while simultaneously ignoring the express terms of Justice Gagné's Order. According to Mr. Lill, that order is clear and unambiguous: it orders him to [TRANSLATION] "file his motion for disclosure of additional documents by the respondent". In opting for this wording, Mr. Lill notes, Justice Gagné did not use rule 41 to compel the appearance of a witness or the production of documents

612 in a proceeding (*Lavigne v Canada Post Corporation*, 2009 FC 756 [*Lavigne*] at para 29), nor did she order the filing of material as she could have done in an action (*Jolivet v Canada (Justice)*, 2011 FC 806 [*Jolivet*] at para 25). Under these circumstances, Mr. Lill submits that he was free to use the rule 317 as a vehicle for formulating his Motion for Discovery of Documents, and that the Prothonotary erred in declaring his motion to be without merit.

30 Mr. Lill acknowledges that a party requesting documents under rule 317 is generally only entitled to everything that was, or should have been, before the administrative decision maker at the time the decision at issue was made (*Canadian National Railway Company v Louis Dreyfus Commodities Ltd.*, 2016 FC 101 at para 26). However, he adds that the case law nevertheless establishes exceptions to this rule, and that other documents may be considered by the Court if they are intended to show that the decision maker breached procedural fairness or exceeded its jurisdiction.

31 According to Mr. Lill, although his Motion for Contempt of Court is a remedy under Part 12 of the Rules, entitled "Enforcement of Orders", and not an application for judicial review per se under Part 5, "Applications", his Motion for Discovery of Documents under rule 317 falls within the exceptions referred to in the case law. In Mr. Lill's view, the documents requested in his Motion for Discovery of Documents are highly relevant in that they have a direct and significant impact on the decision to be rendered by the Court regarding his Motion for Contempt of Court. Indeed, Mr. Lill claims that obtaining internal CSC emails and memoranda mentioning his name or FPS number between March 13 and July 24, 2019, would have a decisive influence on the main outcome of his Motion for Contempt of Court, as they will prove that numerous exchanges took place after Mr. Lill's warnings and demonstrate that CSC knowingly and deliberately contravened the Martineau Judgment.

32 I disagree with Mr. Lill's claims. I am of the view that, for the reasons that follow, the Prothonotary did not commit an error justifying the intervention of this Court when she held that rule 317 simply does not apply here. Indeed, it is clear that Mr. Lill's Motion for Discovery of Documents does not fall within the scope of a decision subject to judicial review, as required by rule 317.

(1) Rule 317

33 Rule 317 is found in Part 5 of the Rules, which applies to "Applications", including applications for judicial review (rule 300). Rule 317 allows any party, in the context of an application for judicial review, to "request material relevant to an application that is in the possession of a tribunal *whose order is the subject of the application* and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested" (emphasis added). Such a request must specify the documents or material requested.

In addition to being relevant, the documents or material must relate to the "order" of the federal board, commission or other tribunal that is the subject of the application for judicial review.

34 Rule 317 therefore requires that there be a judgment or decision of a federal board, commission or other tribunal. Indeed, there can be no production of documents under rule 317 "unless an order of the tribunal exists and is under review" (*Lavigne* at para 26).

35 An application under rule 317 is intended to obtain documents from an administrative decision maker whose decision is under judicial review. It allows for the disclosure of documents that were before the federal board, commission or other tribunal that made a decision subject to judicial review, so as to allow the Court to consider and decide on the merits of the judicial review with all the material that was before the administrative decision maker.

36 Moreover, it is trite law that rule 317 can generally only permit the production of documents that were before the decision maker at the time the decision was made (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20; *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 (CA), 94 FTR 80 at page 460; *Hiebert v Canada (Correctional Service)*, 1999 FCJ No 1957, 182 FTR 18 (QL) at para 10). As Mr. Lill correctly noted, however, there are recognized exceptions to the general rule that only evidence that was before the administrative decision maker is admissible in the reviewing court (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh*] at paras 97-98). These include situations where an affidavit provides general background that may assist the reviewing court in understanding the issues relevant to the judicial review, or where an affidavit is necessary to bring to the attention of the reviewing court procedural defects that cannot be found in the evidentiary record of the administrative decision maker. However, such "exceptional evidence" must always be related to an order or decision of the federal board, commission or other tribunal in question (*Tsleil-Waututh* at para 100).

37 On the other hand, rule 317 is not a general tool for the production of documents that the applicant may use unconditionally. In *Jolivet*, which was cited by Mr. Lill, the Court clearly states that rules 317 and 318 are not "equivalent to the disclosure of documents in an action" (*Jolivet* at para 25). The FCA incidentally recalled that a rule 317 request does not serve the same purpose or function as disclosure or documentary discovery in an action (*Lukacs v Swoop Inc.*, 2019 FCA 145 [Lukacs] at para 16; *Tsleil-Waututh* at para 115; *Access Information Agency Inc. v Canada (Attorney General)*, 2007 FCA 224 at para 17). Thus, rule 317 cannot be used for discovery purposes where a party believes that there is insufficient evidence to support one of its allegations (*Lukacs* at para 19).

(2) Facts in this case

38 In this case, the proceeding underlying Mr. Lill's Motion for Discovery of Documents is his Motion for Contempt of Court. It is not an application for judicial review of a CSC decision.

614 Here, Mr. Lill's Motion for Discovery of Documents is ancillary to his motion alleging that the AGC and CSC committed contempt of court by failing to comply with the Martineau Judgment rendered in the context of the judicial review of two decisions issued by CSC in 2014 on certain of his grievances. As the Prothonotary noted in Order No. 1, the Motion for Discovery of Documents requests that CSC [TRANSLATION] "disclose documents in its possession that are allegedly necessary [for Mr. Lill] to prove contempt". These are not, therefore, documents that are relevant to an underlying application for judicial review.

39 Moreover, if there were an underlying application for judicial review, it would involve applications that had already been finally adjudged in the Martineau Judgment of October 2016. As the Prothonotary correctly pointed out, the merits of the applications for judicial review at the source of the Martineau Judgment had already been determined, and there was no longer any decision or order subject to judicial review to which rule 317 could apply. Since there was no decision or order made by a federal board, commission or other tribunal underlying Mr. Lill's Motion for Discovery of Documents, there is no possible application of rule 317.

40 I would also point out, as I noted at the hearing, that the "order" referred to in rule 317 is an order or decision made by a federal board, commission or other tribunal or by an administrative decision maker, and not an order or decision subsequently issued by the Court on an application for judicial review. It is therefore clear that, contrary to the claims advanced by Mr. Lill, the order referred to in rule 317 can certainly not extend to the Martineau Judgment itself.

41 Finally, even if I were to agree that the order of the federal board, commission or other tribunal that gave rise to the Motion for Discovery of Documents could include the CSC decisions that led to the Martineau Judgment, the documents requested by Mr. Lill in his motion cover a period (from March 13 to July 24, 2019) that goes well beyond the time frame of the grievances that gave rise to the CSC decisions in 2014.

42 The Prothonotary's finding that Mr. Lill's application under rule 317 is not the proper procedural vehicle for his Motion for Discovery of Documents is not a "palpable and overriding" error; it is entirely correct in law. The Prothonotary rightly stated that rule 317 [TRANSLATION] "cannot be used as a mechanism of general application to permit the discovery of documents that might be useful or relevant to the determination of interlocutory motions or, as in this case, to obtain enforcement of orders". In concluding, I note that while Justice Gagné's Order did not in fact refer to rule 41 or any other procedural mechanisms in its conclusions authorizing Mr. Lill to [TRANSLATION] "file his motion for disclosure of additional documents by the respondent", she did not invite him to rely on rule 317 to do so either.

(3) Mr. Lill's possible remedies

43 That said, I must recognize that Justice Gagné's Order expressly authorized Mr. Lill to [TRANSLATION] "file his motion for disclosure of additional documents by the respondent", and that the order, as Mr. Lill argues in his submissions, must mean something.

44 In the appeal before me, it is not my role to advise Mr. Lill on the procedural mechanism that he should or could have used to comply with what Justice Gagné's Order otherwise permitted him to do. Mr. Lill opted for a request under rule 317, and it was the validity of that recourse that the Prothonotary (and the Court) had to rule on. For the reasons set out above, a request under rule 317 was clearly not the appropriate procedural vehicle in the particular circumstances of Mr. Lill's proceedings against the AGC and CSC, and this is sufficient to dismiss his appeal of the Prothonotary's decision on his Motion for Discovery of Documents. I nevertheless offer the following observations.

45 The Rules provide for different ways of obtaining documents in the possession of a federal board, commission or other tribunal, an opposing party or a third party, whether in the context of applications for judicial review or other types of proceedings before the Court.

46 In the specific context of orders for contempt under rules 466 *et seq.*, there are no specific rules providing a procedural mechanism for making a motion for discovery of documents. Moreover, Mr. Lill was unable to refer the Court to any precedent recognizing the possibility of bringing a motion for discovery of documents in the context of contempt proceedings. Nor did the Court find any.

47 The absence of a specific procedural mechanism allowing a party alleging contempt of court to obtain discovery of documents from the person accused of contempt is easily explained by the criminal and highly exceptional nature of this remedy. In *Morasse v Nadeau-Dubois*, 2016 SCC 44 [*Morasse*], the SCC recalled that the power to find an individual in contempt of court is an exceptional one (*Morasse* at para 19). Courts have consistently refused its routine use to obtain compliance with court orders. It is, in short, an enforcement power of last resort. Moreover, because of its criminal nature, "the formalities for contempt proceedings must be strictly complied with" (*Morasse* at para 20). A finding of contempt of court should only occur where it is genuinely necessary to safeguard the administration of justice.

48 Under subsection 467(3) of the Rules, the party alleging contempt bears the burden of establishing a *prima facie* case that contempt has been committed. Once the Court is of the opinion that the plaintiff has met that burden, the judge hearing the motion may make an originating order against the defendant under subsection 467(1) of the Rules. This order requires the alleged offender to appear before a judge to hear evidence of the contempt. At that hearing, the alleged contempt must be proved beyond a reasonable doubt, as specifically prescribed by rule 469. And under rule 472, when a person is found in contempt, the Court may impose a term of imprisonment or a fine, which may be high. Given the criminal nature of contempt and the seriousness of the potential

consequences for the alleged perpetrator, it is not surprising that there is no specific procedural mechanism for ordering the alleged perpetrator to disclose potentially incriminating documents that are prejudicial to his or her rights. It bears mentioning that subsection 470(2) of the Rules provides that "a person alleged to be in contempt may not be compelled to testify".

49 Indeed, the FCA has recognized that a procedure for proving contempt will be improper where the effect of the procedure is to infringe the right of the person accused of contempt to remain silent and place the burden of proof on the party bringing the contempt motion (*Apple Computer, Inc v Mackintosh Computers Ltd* (1988), 22 FTR 320, 20 CPR (3d) 221 at para 13.

50 That said, there are some more general procedural mechanisms in the Rules to allow a party to have access to documents in actions or applications before the Court involving an administrative decision maker.

51 These procedures vary depending on whether the documents are in the possession of a party to the proceedings (who may be examined without the need for judicial leave) or a third party. If the former, discovery may be obtained either through an undertaking given by the witness during examination for discovery, or through a direction to produce documents. If the documents are in the possession of a third party, discovery may be obtained by a direction for discovery of documents authorized by the Court.

52 In the context of applications for judicial review under Part 5 of the Rules, with the exception of the provision for obtaining documents from a tribunal under rule 317, there is no such thing as a "production order" for exceptional evidence other than evidence in the possession of the tribunal within the meaning of rule 317. However, a party may gather "exceptional evidence" through cross-examination of a witness or through a subpoena to produce documents or other material pursuant to a request under rule 41, or where an application is heard as if it were an action under subsections 18.4(2) and 28(2) of the *Federal Courts Act*, RSC 1985, c F-7 (*Tseil-Waututh* at para 148). In appropriate circumstances, the Court may also require undertakings from a witness to compel the production of exceptional evidence. The power of subpoena conferred by rule 41 applies to a "proceeding", and according to rule 300, an application for judicial review constitutes such a "proceeding".

53 In actions under Part 4 of the Rules, in addition to this remedy under rule 41, rules 222 to 233 dealing with discovery of documents also provide that every party is required to serve an affidavit of documents relevant to the case. The Court may order disclosure of relevant documents (*Abdelrazik v Canada*, 2015 FC 548 at para 26), relevance being the test for determining which documents a party can request (*Khadr v Canada*, 2010 FC 564 at paras 9-11). Similarly, rules 234 to 248, which deal with examinations for discovery, may lead to orders for disclosure of documents following an examination.

54 Finally, I note that section 4 of the Rules, commonly referred to as the "gap rule", allows a party to bring an unnamed motion where the Rules do not expressly provide for the remedy sought, asking the Court to fill in the gaps where the Rules or federal legislation is silent and to determine the procedure that could be applicable by analogy or by reference to the practice of a superior court of a province. However, this section is a last resort, and its use cannot amount to an indirect amendment of the Rules (*R v CAE Industries Ltd*, [1977] 2 SCR 566). As such, the FCA has interpreted this section restrictively, stating that it is not open to the Court to use it to create rights (*Ignace v Canada (Attorney General)*, 2019 FCA 239 at paras 22-24; *Exeter v Canada (Attorney General)*, 2016 FCA 234 at paras 9-14).

55 I am not required to determine whether, in the present case, Mr. Lill could have successfully availed himself of any of these procedural mechanisms to frame the motion for discovery of documents that Justice Gagné's Order authorized him to file. However, the Prothonotary certainly did not commit any error of law, or any overriding and palpable error of fact, or mixed fact and law, in determining that Mr. Lill's Motion for Discovery of Documents under rule 317 was without merit and should be dismissed.

B. Motion for Contempt of Court

56 With respect to his Motion for Contempt of Court, Mr. Lill asked the Court to set aside Order No. 2 of the Prothonotary and to allow him to present his reply, the filing of which had been authorized by both Justice Lafrenière and Justice Gagné in their respective orders.

57 Mr. Lill first alleges that the Prothonotary did not have jurisdiction to deal with his Motion for Contempt of Court given that it had reached the second step of the contempt process under the Rules. Mr. Lill submits that his motion is entitled [TRANSLATION] "Motion by the applicant for a special order to appear on a charge of contempt of court under subsection 467(2) of the Rules" and that, by ordering the filing of his motion under that rule in his August 2019 order, Justice Lafrenière implicitly acknowledged that the first step of the contempt process had already been completed. Indeed, Mr. Lill argues that Justice Lafrenière ordered the AGC to be prepared to present a defence pursuant to rule 467(1)(c), which would imply that the requirement for the appearance notice had already been met. However, rule 50(1)(d) provides that a Prothonotary may not make an order relating to a motion for contempt following a notice for appearance ordered under rule 467(1)(a).

58 Secondly, Mr. Lill maintains that the Prothonotary erred in issuing Order No. 2 solely on the basis of his motion record. In so doing, Mr. Lill says, the Prothonotary improperly exercised her discretion and ignored Justice Lafrenière's Order, which provided for the submission of a response by the AGC and a reply by Mr. Lill, such that, [TRANSLATION] "thanks to the written submissions of the parties", the Court would be in a position to rule fairly on the motion for contempt of court without holding a hearing. In Mr. Lill's view, in acting as she did, the

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Prothonotary breached the *audi alteram partem* rule and his right to an actual hearing, by depriving him of his right to respond to all matters that will affect the Court's decision.

59 Lastly, Mr. Lill submits that the Prothonotary erred in her interpretation of the Martineau Judgment and adopted an overly restrictive interpretation of the concepts of "judgment" and "instruction". Relying on *Mikail v Canada (Attorney General)*, 2011 FC 674, Mr. Lill argues that courts tend to extend the scope of judicial review to encompass broader issues rather than apply a restrictive conception of the words "decision" or "order". He maintains that rule 2 establishes that an order includes "a decision or other disposition of a tribunal" and that these terms can easily be associated with the instructions set out in the Martineau Judgment, which he submits the AGC and CSC failed to comply with. In Mr. Lill's view, the instructions form part of the judgment rendered by Justice Martineau, and cannot be treated as mere recommendations. Mr. Lill argues that in concluding that [TRANSLATION] "the judgment cannot have the effect of confirming and giving effect, as if it were a judgment of the Federal Court, to the decision on the grievance rendered in accordance with the judgment", the Prothonotary interpreted the word "judgment" too restrictively.

60 I am not persuaded by Mr. Lill's arguments. Whether on the issue of jurisdiction, procedural fairness, or the scope of the Martineau Judgment, I am of the opinion that the Prothonotary did not commit any error warranting the intervention of this Court. CSC complied fully with the Martineau Judgment, as Mr. Lill himself acknowledges, and this is sufficient to render Mr. Lill's Motion for Contempt of Court [TRANSLATION] "without merit" on its face, as the Prothonotary concluded. Nor did the Prothonotary err in fact or in law when she found that Mr. Lill had not met his burden of proving a *prima facie* case that anyone had disobeyed an order or judgment of the Court.

61 Once again, Mr. Lill has not demonstrated any error of law or any palpable and overriding error in the Prothonotary's dismissal of the Motion for Contempt of Court.

(1) Prothonotary's jurisdiction

62 There is no doubt that paragraph 50(1)(d) of the Rules excludes from the powers granted to prothonotaries the power to decide a motion for contempt of court once an order to appear for a hearing has been served under paragraph 467(1)(a) of the Rules.

63 It is nevertheless well established that the provisions for contempt orders, found in sections 466 to 472 of the Rules, establish a two-step procedure. The first step is an order to appear under rule 467(3). At this first stage, the Court may make an order requiring the person alleged to be in contempt to appear before the Court to hear proof of the act and prepare to respond to it, if the Court is satisfied that the party alleging contempt has established a *prima facie* case (*Telus Mobility v Telecommunications Workers Union*, 2002 FCT 656 [*Telus*] at para 9). The burden on the applicant at the first step is the standard of a *prima facie* case, and that standard is not a high one (*Telus* at para 45). As set out in rule 467(2), a party may apply *ex parte* for such an order to appear, which is what Mr. Lill did.

64 Both prothonotaries and judges have jurisdiction to issue an order to appear at the first step of contempt proceedings, and Mr. Lill does not contest this.

65 The second step is the contempt hearing itself, under rule 467(1)(a). This is a procedure analogous to a trial for a criminal offence, where evidence of the alleged contempt must be established beyond a reasonable doubt and only judges have jurisdiction. I pause for a moment to point out that the only circumstance in which this two-step process can be merged into a single step is where contempt of court is committed in the presence of a judge, as set out in rule 468.

66 A summary reading of Justice Lafrenière's Order is sufficient to conclude that the Prothonotary's Order No. 2 indeed falls within the first step of the contempt process since, as of that date, no notice to appear had been issued on Mr. Lill's Motion for Contempt of Court. In his order, Justice Lafrenière expressly pointed out that Mr. Lill was seeking an order requiring the AGC to [TRANSLATION] "appear at an unspecified time and place to hear evidence of the facts alleged against him and to present any defence he may have to avoid being convicted of contempt". Justice Lafrenière went on to note that the [TRANSLATION] "new motion record [of Mr. Lill] *at the first step of the contempt proceedings* was not filed because the registry had to confirm the filing with the Court" (emphasis added).

67 Further on in his decision, following the AGC's request to submit written submissions in response to Mr. Lill's motion, Justice Lafrenière gave the AGC leave to [TRANSLATION] "make submissions to the effect that the record does not establish a prima facie case of contempt". Finally, in his conclusion, the judge ordered that Mr. Lill's motion record be accepted for filing. All these references expressly show that Mr. Lill's Motion for Contempt of Court was indeed at the step set out in rule 467(3), where the Court must be satisfied that there is a *prima facie* case of contempt. At that step, the Court must determine whether an order should be made requiring the AGC and CSC to appear before a judge at a specific date, time and place and to be prepared to present a defence against the alleged contempt.

68 Contrary to Mr. Lill's claims, I see nothing in Justice Lafrenière's Order that would lead to the conclusion that we are at the second step of contempt proceedings and that the requirement for the first step has been satisfied. The fact that Justice Lafrenière allowed the AGC to make written submissions on the existence of a *prima facie* case for the alleged contempt does not cause the contempt proceedings to advance to the second step; it simply has the effect of ensuring that this first step does not proceed *ex parte*, as Mr. Lill was seeking through his Motion for Contempt of Court. Justice Lafrenière had the discretion to allow the AGC to make written submissions in response, so that the Court would have everything it needed to determine whether the requirement of a *prima facie* case of contempt had been met. Incidentally, he also had just as much discretion to deny the AGC's parallel request for a hearing on Mr. Lill's motion at the first step. In exercising his discretion, Justice Lafrenière determined that, armed with both Mr. Lill's motion record and

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the respondent's record of the AGC, the Court could decide the contempt motion on written submissions alone.

69 In these circumstances, and since Mr. Lill's Motion for Contempt of Court was specifically aimed at obtaining an order to appear at an eventual contempt hearing, there is no doubt that the Prothonotary had full jurisdiction to consider and hear the motion.

(2) Right to be heard

70 Secondly, Mr. Lill submits that the Prothonotary breached the rules of procedural fairness by not waiting for him to file his reply before ruling on his Motion for Contempt of Court.

71 I disagree. In Order No. 2, the Prothonotary expressly stated that she did not consider the AGC's response, given that she was satisfied that Mr. Lill's motion was on its face without merit, and that it should be dismissed without even considering the AGC's response. Having not considered the AGC's written submissions in response, the Prothonotary therefore did not have to wait for Mr. Lill's reply since his right to reply became moot, given that only his initial allegations were taken into account in the Prothonotary's decision.

72 The duty to act fairly does not relate to the merits or content of a decision rendered, but rather to the process followed. This duty has two components: the right to be heard and the right to a fair and impartial hearing before an independent tribunal (*Re Therrien*, 2001 SCC 35 at para 82). The right of any party to make its case and to produce admissible evidence to support its position is a pillar of procedural fairness with which, although it is not unlimited, courts do not intervene lightly (*Porto Seguro Companhia De Seguros Gerais v Belcan S.A.*, [1997] 3 SCR 1278 at para 29). The right to be heard means that parties affected by a decision must have the right to be heard and the opportunity to be informed of the case to be met and to respond to it.

73 It is well established that a right of reply exists only if there is a defence or response to which to reply. Mr. Lill's right of reply would have been relevant and its recognition would have been necessary to respect the right to be heard if the Prothonotary had in fact considered the AGC's response to the Motion for Contempt of Court, or if the Motion for Discovery of Documents had provided Mr. Lill with any additional documents in support of his arguments. That is not the case, and under the circumstances, it was appropriate and procedurally fair for the Prothonotary to dismiss Mr. Lill's contempt of court motion without giving him an opportunity to present a reply.

74 Once again, I do not find in Order No. 2 of the Prothonotary any error of law or any overriding and palpable error that would warrant the Court's intervention.

(3) Scope of Martineau Judgment

75 Finally, Mr. Lill submits that the Prothonotary erred in her reading of the Martineau Judgment and adopted an overly restrictive interpretation of the concepts of "judgment" and "instruction". I do not share Mr. Lill's opinion as to the content of the Martineau Judgment and how CSC implemented it.

76 A finding of contempt of court is always a profoundly serious matter, as it sanctions the violation of a court order. Civil contempt is criminal or quasi-criminal, reflecting the fact that "[t]he penalty for contempt of court, even when it is used to enforce a purely private order, still involves an element of 'public law', because respect for the role and authority of the courts, one of the foundations of the rule of law, and a proper administration of justice are always at issue" (*Vidéotron Ltée v Industries Microlec Produits Électroniques Inc.*, [1992] 2 SCR 1065 [*Vidéotron*] at page 1075). When a person is found to be in contempt of court, the Court may impose a prison sentence or a severe fine, and must therefore exercise these extraordinary powers with great care. A motion for contempt of court is an exceptional remedy with limited conditions of application.

77 Civil contempt has three elements that must be established beyond a reasonable doubt. The first element is that the order alleged to have been breached must state clearly and unequivocally what should and should not be done. The second element is that the party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge of the order on the basis of the wilful blindness doctrine. Finally, for the third element, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*Carey v Laiken*, 2015 SCC 17 [*Carey*] at paras 32-35).

78 In *Carey*, the SCC pointed out that the purpose of the requirement of clarity is to ensure that a party will not be found in contempt where an order is unclear. An order may be deemed to be unclear if, for example, it incorporates overly broad language (*Carey* at para 33). In cases of failure to obey an order, where there is doubt as to the legal effect of the order that has allegedly been violated, the respondent is to be given the benefit of that doubt (*Vidéotron* at page 1077).

79 In order to establish a *prima facie* case and satisfy the Court that his Motion for Contempt of Court should proceed, Mr. Lill was required to sufficiently demonstrate "a prima facie case of wilful and contumacious conduct on the part of the contemnor" (*Chaudhry v Canada*, 2008 FCA 173 at para 6). An essential element of the alleged contempt is therefore proof that an order has been violated. The facts in this case indicate, however, that CSC complied fully with the Martineau Judgment and took all reasonable steps to follow his instructions.

80 Moreover, as the Prothonotary states in her order, Mr. Lill himself admits that CSC [TRANSLATION] "upheld the grievances in their entirety as ordered by the Federal Court" in the Martineau Judgment. However, Mr. Lill argues that the AGC and CSC subsequently contravened the judgment because the Assessments produced by CSC in April 2019 for the hearing before

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the Board on his ETA applications made direct reference to the October 21, 2011, incident, his placement in administrative segregation and his transfer to a maximum-security institution.

81 Let us return first to the Martineau Judgment and what it prescribes. The Martineau Judgment refers Mr. Lill's grievances to CSC for redetermination, with specific instructions. It orders the prison authorities to allow the grievances for the purpose of applying a series of corrective measures, namely, not to use and not to consider in any future decision-making process the information relating to the October 21, 2011, incident and Mr. Lill's placement in involuntary segregation. Further, it directs prison authorities to no longer consider in future decision-making processes the reassessment of Mr. Lill's security classification as of November 7, 2011, and his involuntary transfer on November 24, 2011, to a maximum-security institution. It should be noted that this decision is binding solely on individuals and entities associated with CSC, and not the Board.

82 The judgment relates solely to the events that occurred in October and November 2011, namely the precipitating incident on October 21, 2011, Mr. Lill's involuntary administrative segregation, the reassessment of his security classification, and his transfer on November 24, 2011. At no time does Justice Martineau deal with events that may have occurred following Mr. Lill's transfer in late November 2011. Finally, with respect to proscribed actions, the Martineau Judgment prohibits CSC from taking into account the events of October and November 2011 in its decision-making processes. The decision does not, however, order CSC to strike any information from Mr. Lill's institution file, nor does it prevent CSC from providing the Board with relevant information in its possession, as it is legally required to do under the Act.

83 I will dwell for a moment on the distinction between judgment and instructions, which Mr. Lill criticizes the Prothonotary for having interpreted too restrictively. According to the FCA, the Court's instructions will form part of the Court's judgment when they are expressed directly and explicitly in the conclusions of the judgment on judicial review: "only instructions explicitly stated in the judgment bind the subsequent decision-maker" (*Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 [*Yansane*] at para 19; see also *Ouellet v Canada (Attorney General)*, 2018 FCA 25 at para 7). Conversely, where instructions are simply expressed in the reasons for judgment, they "would have to be considered mere obiters, and the decision-maker would be advised to consider them but not required to follow them" (*Yansane* at para 19).

84 Thus, the administrative decision maker to whom a case is returned must always comply with the reasons and findings of the judgment allowing the judicial review, as well as with the directions or instructions explicitly stated by the reviewing court in its conclusions (*Yansane* at para 31). The FCA recently reaffirmed this principle in *Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169 at para 82, stating that instructions must be incorporated into the judgment to have the same weight as the judgment. I therefore take it as a given, in the case of the Martineau Judgment,

that the instructions set out by Justice Martineau are an integral part of his judgment since they are indeed found in his conclusions.

85 However, as the evidence on the record again reveals, CSC did indeed follow the Martineau Judgment to the letter and complied with the full range of its conclusions (both the obligation to redetermine the grievances in question and the obligation to follow and implement the instructions issued by the judge). Thus, as ordered by the Martineau Judgment, in the redetermination of grievances ordered by the Martineau Judgment, CSC allowed the grievances and indicated in Mr. Lill's file that the information relating to the October 2011 incident, his placement in involuntary administrative segregation, the reassessment of his security classification and his involuntary transfer to a maximum-security institution could not be used in any future decision-making processes. In addition, in a November 21, 2016, decision, CSC stated that [TRANSLATION] "as a corrective measure, the Warden of Cowansville Institution must ensure that a memorandum is prepared to reflect that any information related to the 2011-10-21 incident (at La Macaza Institution), and the subsequent decisions related to your administrative segregation, security reclassification and involuntary transfer to Port-Cartier Institution, will no longer be considered in any future decision-making processes". A note to file using the same language was prepared in December 2016 and placed in Mr. Lill's file, along with a copy of the Martineau Judgment.

86 Thus, the Martineau Judgment imposed a duty to redetermine Mr. Lill's grievances from 2014, and to do so in accordance with the instructions pertaining to the events of the fall of 2011. That is precisely what CSC did. To the extent that the Martineau Judgment can be interpreted as imposing an obligation, that obligation related to the duty to redetermine the grievances and to comply with the instructions in making that redetermination. As Mr. Lill himself admits, CSC complied with these obligations, as the grievances were redetermined in accordance with the instructions given. Therefore, Mr. Lill cannot claim that either the AGC or CSC disobeyed any order.

87 What Mr. Lill accuses CSC of having done in the spring of 2019 is not acting in accordance with the results of the grievances as redetermined by CSC in light of the Court's instructions in the Martineau Judgment. Mr. Lill may indeed be able to argue that by providing the Assessments to the Board, CSC failed to comply with what the new decision on the grievances now prohibits it from doing. However, this does not constitute a failure to comply with the Martineau Judgment as such, as that would give the judgment a scope that it does not have. It is in this sense that the Prothonotary correctly observed that the judgment could not have the effect of ratifying and rendering enforceable, as if it were a judgment of the Court, the decision on grievances rendered by CSC following the Martineau Judgment.

88 In order for this conduct on the part of CSC in the spring of 2019 to give rise to contempt proceedings, the Martineau Judgment would have had to include a clear order in this regard. That is not the case. I am therefore of the opinion that the Prothonotary correctly concluded that Mr. Lill's Motion for Contempt of Court was manifestly without merit, in that it erroneously equates

failure to comply with the results of CSC's decision on the redetermination of Mr. Lill's grievances resulting from the Martineau Judgment with failure to comply with the Martineau Judgment itself.

89 If Mr. Lill felt that CSC did not comply with the implementation of the Martineau Judgment's instructions following the redetermination of his grievances, and that CSC ignored the requirements of the new decision on his grievances of 2014, he was not without recourse. He could have filed new grievances, under the complaint and grievance process he had previously used, to challenge CSC's conduct and actions. And if he were dissatisfied with CSC's handling of these potential grievances, he could have sought judicial review of CSC's decision before this Court if necessary once he had exhausted his internal remedies. But his recourse was certainly not a motion for contempt of court with respect to the Martineau Judgment.

IV. Conclusion

90 For the reasons set out above, Mr. Lill's appeals are dismissed. The Prothonotary made no reviewable error in dismissing Mr. Lill's Motion for Discovery of Documents and his Motion for Contempt of Court. If Mr. Lill felt that CSC's actions and decisions in 2019 in connection with his ETA application did not properly implement the instructions in the Martineau Judgment that had been incorporated into the redetermination of his grievances in 2014, he had a grievance procedure available to him to challenge CSC's actions and decisions regarding him.

91 After considering all the circumstances of this case and the factors set out in rule 400(3), and in the exercise of my discretion, I am of the opinion that Mr. Lill should not be ordered to pay costs.

JUDGMENT in T-2563-14 and T-204-15

THIS COURT'S JUDGMENT is as follows:

1. The applicant's motions on appeal from the two orders of Prothonotary Tabib dated November 25, 2019, in dockets T-2563-14 and T-204-15, are dismissed. A copy of this judgment and reasons will be filed in each of the records.

2. No costs are awarded.

Appeal dismissed.

2014 CAF 76, 2014 FCA 76
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2014 CarswellNat 5441, 2014 CarswellNat 722, 2014 CAF 76, 2014 FCA 76, 239 A.C.W.S. (3d) 2, 456 N.R. 186, 71 Admin. L.R. (5th) 175

Dr. Gábor Lukács, Appellant and Canadian Transportation Agency, Respondent

Eleanor R. Dawson, Wyman W. Webb JJ.A., Edmond P. Blanchard J.A. (ex officio)

Heard: January 29, 2014
Judgment: March 19, 2014
Docket: A-279-13

Counsel: Dr. Gábor Lukács, Appellant, for himself
Simon-Pierre Lessard, for Respondent

***Eleanor R. Dawson J.A.*:**

Introduction

1 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 (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), 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 (*A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), 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 *A.T.A.*, 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 *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, 452 N.R. 340 (S.C.C.), 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, *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15, [2007] 1 S.C.R. 650 (S.C.C.), at paragraph 92 and *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), 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 & Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286 (N.L. C.A.), and *Yates v. Central Newfoundland (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317 (N.L. T.D.).

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 *A.T.A.* 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 (S.C.C.) at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 (S.C.C.) at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) 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 (S.C.C.) at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 (S.C.C.) 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 & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.) 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 (S.C.C.) 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 (*Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.), 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. R.*, [2000] F.C.J. No. 894, 257 N.R. 193 (Fed. C.A.) at paragraph 12.

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 Ltd.* 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 Ltd.* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act*, *1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (a) the sittings of the Agency and the carrying on of its work;
>
> (b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which in camera hearings may be held; and
>
> (c) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.
>
> (2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum.
>
> [Emphasis added.]
>
> 22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:
>
> a) ses séances et l'exécution de ses travaux;
>
> b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;
>
> c) le nombre de membres qui doivent connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.
>
> (2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres.
>
> [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

50 The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

51 First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

52 Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

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

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005 stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors & Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347 (F.C.A.), 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.

***Wyman W. Webb J.A.*:**

I agree.

***Edmond P. Blanchard J.A. (ex officio)*:**

I agree.

Appeal dismissed.

2016 CAF 103, 2016 FCA 103
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2016 CarswellNat 984, 2016 CarswellNat 9918,
2016 CAF 103, 2016 FCA 103, 265 A.C.W.S. (3d) 553

Dr. Gábor Lukács, Applicant and Canadian Transportation Agency, Respondent

David Stratas J.A.

Judgment: April 5, 2016
Docket: A-39-16

Counsel: Dr. Gábor Lukács, for himself
John Dodsworth, for Respondent

***David Stratas J.A.*:**

1 The parties are working to perfect this application for judicial review. The applicant has requested under Rule 317 that the respondent Agency transmit the record it relied upon when making its decisions that are the subject of the application. In response, the Agency has objected under Rule 318(2) to disclosure of some of the record and has informed the applicant and the Court of the reasons for the objection.

2 Under Rule 318(3), the applicant now requests directions as to the procedure for making submissions on the objection.

3 The Court has read the Agency's reasons for objection. Although unnecessary under Rule 318, the applicant has supplied his responses to the Agency's reasons.

4 A reading of the parties' reasons and responses shows that they may not have a clear idea of the relationship between Rules 317 and 318 and the Court's remedial flexibility in this area. This affects the submissions on the objection that this Court will need. Before giving directions concerning the steps the parties need to take concerning the objection, it is necessary to clarify matters.

A. Rules 317-318 and the Court's remedial flexibility

5 Rules 317-318 do not sit in isolation. Behind them is a common law backdrop and other Rules that describe how the record of the administrative decision-maker can be placed before a reviewing court. This was all explained in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 (F.C.A.) at paras. 7-18 and will not be repeated here. On admissibility of evidence before the reviewing court on judicial review, see, most recently, *Bernard v. Canada Revenue Agency*, 2015 FCA 263 (F.C.A.).

6 Under Rule 317, a party can request from the administrative decision-maker material relevant to the application for judicial review. Under Rule 318, the requesting party is entitled to be sent everything that it does not have in its possession and that was before the decision-maker at the time it made the decision under review, unless the decision-maker objects under Rule 318(2): *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 (F.C.A.) at para. 7; *1185740 Ontario Ltd. v. Minister of National Revenue* (1999), 247 N.R. 287 (Fed. C.A.). The Saskatchewan Court of Appeal set out the guiding principle on this entitlement rather well:

> In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question [absent well-founded objection by the tribunal].

(*Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 (Sask. C.A.) at para. 24.)

7 This passage recognizes the relationship between the record before the reviewing court and the reviewing court's ability to review what the administrative decision-maker has done. If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the administrative decision-maker. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds. Our judge-made law in the area of administrative law develops in a way that furthers the accountability of public decision-makers in their decision-making and avoids immunization, absent the most compelling reasons: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 (F.C.A.) at paras. 314-15 (dissenting reasons, but not opposed on this point).

8 Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).

9 In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.

10 In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

11 Regardless of the manner in which the Court proceeds, when determining the validity of an objection under Rule 318(2) what standpoint should it adopt? Is the Court reviewing the administrative decision-maker's decision to object?

12 No. When determining the validity of an objection, the Court is tasked with deciding the content of the evidentiary record in the proceeding — the application for judicial review — before it. Like all proceedings before the Court, it must consider what evidence is admissible before it. The Court, regulating its own proceedings, must apply its own standards and not defer to the administrative decision-maker's view. See *Slansky*, above at para. 274. (Much of the discussion that follows is based on *Slansky*.)

13 What can the Court do when determining the validity of an objection? Quite a bit. There is much remedial flexibility. The Court can do more than just accept or reject the administrative decision-maker's objection to disclosure of material. It is not an all-or-nothing proposition.

14 In this regard, Rule 318 should not been seen in isolation. Other rules and powers inform and assist the Court in determining an objection. For example:

- Rules 151 and 152 allow for material before the reviewing court to be sealed where confidentiality interests established on the evidence outweigh the substantial public interest in openness: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.).

- Rule 53 allows terms to be attached to any order and Rule 55 allows the Court to vary a rule or dispense with compliance with a Rule. The exercise of these discretionary powers is informed by the objective in Rule 3 (recently given further impetus by the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.)): to "secure the

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just, most expeditious and least expensive determination of every proceedings on its merits." It is also informed by s. 18.4 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: "an application shall be heard and determined without delay and in a summary way."

• The Court can draw upon its plenary powers in the area of supervision of tribunals to craft procedures to achieve certain legitimate objectives in specific cases: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 (S.C.C.) at paras. 35-38; *Ministre du Revenu national c. Derakhshani*, 2009 FCA 190, 400 N.R. 311 (F.C.A.) at paras. 10-11; *Minister of National Revenue v. RBC Life Insurance Co.*, 2013 FCA 50, 443 N.R. 378 (F.C.A.) at paras. 35-36.

15 These Rules and powers allow the Court determining a Rule 318 objection to do more than just uphold or reject the administrative decision-maker's objection to disclosure of material. The Court may craft a remedy that furthers and reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions in accordance with Rule 3 and s. 18.4 of the *Federal Courts Act* and the principles discussed at paras. 6-7 above; (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court's principles in *Sierra Club*.

16 Where there is a valid confidentiality interest that could sustain an objection against inclusion of a document into the record, the Court must ask itself, "Confidential from whom?" Perhaps the general public cannot access the confidential material, but the applicant and the Court can, perhaps with conditions attached. Perhaps the only party that can access the confidential material is the Court, but a benign summary of the material might have to be prepared and filed to further meaningful review, as much procedural fairness as possible, and openness. In other cases, the objection may be such that confidentiality must be upheld absolutely against all, including the Court. Legal professional privilege is an example of this.

17 And the fact that part of a document may be confidential does not necessarily mean that the whole document must be excluded from the record. The Court must consider whether deleting or obscuring the confidential parts of a document is enough or whether the entire document should be excluded from the record.

18 In short, the Court's determination of the Rule 318(2) objection — a determination aimed at furthering and reconciling, as much as possible, the three objectives set out in para. 15, above — can result in an order of any shape and size, limited only by the creativity and imagination of counsel and courts: see, for example, the creative and detailed sealing order made in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281 (B.C. S.C. [In Chambers]).

B. The directions to be given in this case

19 In some cases, the Court might be able to determine an administrative decision-maker's Rule 318(2) objection solely on the basis of the reasons the decision-maker has provided under Rule 318(2). This case — a complex one requiring evidence to establish the objection — is not one of those cases. Thus, in the circumstances of this case, the Agency should file a motion record under Rule 369 seeking an order vindicating its objection.

20 Without limiting whatever other relief the Agency might wish to seek, the Agency must address, both in its evidence and in written representations, the requirements for confidentiality and the test set out in *Sierra Club*.

21 The Agency should be specific in its motion record concerning the type of order it wants. In doing so, it should have regard to the above discussion — in particular, the remedial flexibility the Court possesses and the Court's desire to craft a remedy that furthers and reconciles, as much as possible, the three objectives set out in para. 15, above.

22 The Agency shall file its motion under Rule 369 within ten days of today's date and then the times set out under Rule 369 shall follow for the respondent's responding record and the reply. The Registry shall forward the motion to me for determination immediately after the reply has been filed or the time for reply has expired, whichever is first. An order shall go to this effect.

23 To the extent the Agency wishes part of its motion record to be sealed under Rules 151-152, the Agency should request that in its notice of motion and support its request with evidence. Any confidential material may then be included in a confidential volume within a sealed envelope, filed only with the Court. At the time of determining the motion, the Court will review the material and assess whether further submissions on this point are needed from the applicant or whether the claim of confidentiality is made out.

24 The parties have agreed to expedite this matter. The Court agrees that expedition is warranted and, following the motion, will schedule the remaining steps in this application. The parties should immediately discuss an expedited schedule on the footing that the motion will be determined by the end of April at the latest. The parties should also consider whether the application should be heard as soon as possible by videoconference rather than waiting for the Court's next sittings in Halifax after April. The parties shall make their submissions on these matters in their written representations in their motion records.

25 The parties are also encouraged to engage in discussions to try to settle the record that should be placed before this Court in this application. Through their agreement to expedite this matter, the parties now recognize that there is a public interest in expedition. Quick agreement on this issue will speed this matter considerably. One possibility is to agree that the matter proceed with a public record and a sealed disputed record and the admissibility of the disputed record can be argued before the Court hearing the application, if necessary with affidavits filed in the parties'

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respective records for the purpose of resolving the dispute. If the parties truly recognize there is a public interest in expedition, then this is probably the best way to proceed.

Order accordingly.

1993 CarswellNat 537
Trial Division

Majeed v. Canada (Minister of Employment & Immigration)

1993 CarswellNat 537, [1993] F.C.J. No. 908, 68 F.T.R. 75

Abdul Majeed, Applicant v. The Minister of Employment and Immigration, Respondent

Reed J.

Judgment: September 14, 1993
Docket: Doc. A-628-92

Counsel: *Mr. Greg Coleman* , Representing the Applicant.
Ms. Cheryl D. Mitchell , Representing the Applicant.

Reed J. **reasons for order:**

1 The applicant seeks certain documents and records which are in the possession of the respondent, the Minister of Employment and Immigration:

> Pursuant to Rule 1612 of the Federal Court Rules, the Applicant hereby requests that the Immigration and Refugee Board provide to the Applicant certified copies of the following material:
>
> > (a) all personnel and other employment records and documents created by the Board in respect of Board member Anna Ker;
> >
> > (b) any document of record, whether public or otherwise, relating to refugee claims heard and decisions made on such claims by Ms. Ker, including without limitation any information regarding (i) the number of refugee claims heard by Ms. Ker while a member of the Board, and (ii) the number of refugee claims accepted/rejected by Ms. Ker while a member of the Board;
> >
> > (c) any document or record, whether public or otherwise, written or created by Ms. Ker in her capacity as a Board member or administrator dealing specifically with the policy or procedures of the Board in determining refugee claims;

(d) any document or record, whether public or otherwise, dealing in whole or part with any complaint or allegation by any other party of misconduct, bias or prejudice on the part of Ms. Ker;

(e) any correspondence, whether public or otherwise, from any Board member or administrator to the Board complaining of or alleging misconduct, bias or prejudice on the part of Ms. Ker;

(f) any correspondence, whether public or otherwise, from the Board in response to (e), if any;

(g) any document or record, whether public or otherwise, the subject matter of which is in whole or in part the Board's position on or intended course of action in respect of any allegations or complaints of misconduct, bias or prejudice on the part of Ms. Ker;

(h) any document or record, whether public or otherwise, relating to the removal of Ms. Ker from any position on the Board, the reduction by the Board of any power of or authority granted to Ms. Ker or any other remedial or punitive action taken by the Board in respect of Ms. Ker;

(i) any document or record, whether public or otherwise, relating to any policy developed or action contemplated or taken in response to allegations or complaints of misconduct, bias or prejudice on the part of other Board members or administrators;

(j) any document or record, whether public or otherwise, relating to any review by the Board of refugee claims determined by Ms. Ker;

(k) any document or record, whether public or otherwise, relating to statistical data on other allegations or complaints of misconduct, bias or prejudice on the part of the Board; and

(l) any document or record, whether public or otherwise, relating to any general policy or procedure of the Board in respect of allegations or complaints of misconduct, bias or prejudice by the Board.

2 The Minister resists production of these documents on a number of grounds, some of these being:

Firstly, any documentation written by, or about, Anna Ker is irrelevant because (i) Anna Ker is no longer a member of the Immigration and Refugee Board; (2) *the Respondent does not contest in this particular case the Applicant's allegation that the contents of the Affidavit of Kenneth Rosenthal give rise to a reasonable apprehension of bias on the part of Anna Ker; and* (iii) *the Respondent consents to an application for judicial review setting aside this*

> *decision of Anna Ker and Arthur Harnett and sending the matter back for a rehearing by a differently constituted panel* to be redetermined in accordance with the law. The matter is only proceeding to a hearing before this Honourable Court because the Respondent will not agree to the primary or alternate remedy sought by the Applicant (AAR, pp. 192-193).
>
> Secondly, any documentation written by, or about, *other* Board members or the Board in general on the topics of misconduct, bias or prejudice is irrelevant because Rule 1612 is not a discovery procedure whereby an Applicant, who has failed to adduce in his own Application Record any factual evidence whatsoever to buttress his theme of institutional or systemic bias on the part of unknown other Board members or "administrators", can engage in a fishing expedition. ...
>
> (underlining added)

3 An applicant is entitled to the production of documents in the possession of the Tribunal or the respondent which demonstrate, or tend to demonstrate bias on the part of a Board member, or the Board generally, even though such documentation is not part of the Tribunal Record. Secondly, the fact that personal information is not released pursuant to the terms of the *Privacy Act* does not make that information immune from production for the purposes of litigation. I would not want to be taken as suggesting however that *all* of the documentation sought by the applicant would be relevant in the present context but it is clear that a more narrowly framed request, relating only to documents relevant to the allegations of bias, would be relevant.

4 In any event, in the context of the present application, I see no purpose in granting an order for the production of the documents, even a more narrowly framed one than that which is requested. The only issue before the Trial Division is the validity of the particular decision in the applicant's case. The respondent does not contest that that decision should be quashed and the applicant's appeal sent back for rehearing by a differently constituted panel of the Board. The applicant does not consent to such a proceeding. He seeks a remedy which was open to him before the enactment of the amendments to the *Immigration Act* which became effective February 1, 1993: a decision by the Court on the merits of his claim rather than a referral back to the C.R.D.D. [1] The applicant does not want his appeal determined by the Trial Division which only has authority to quash the Board's decision and remit the case back for rehearing.

5 Since the documents which are relevant to the allegation of bias on the part of the Board members who heard the applicant's appeal are not required, the respondent having conceded that that decision should be quashed, and since the documents sought to establish bias on a broader basis, by the Board generally, are not relevant, the Trial Division having no jurisdiction to itself give the decision which the C.R.D.D. should have given, the application seeking the production of documents will be dismissed.

6 The applicant is of course entitled to appeal this decision to the Court of Appeal. Direction 17 which was issued by the Chief Justice on February 1, 1993, and which applies to the present application, states:

> ... each of those appeals shall be heard and disposed of by the Trial Division as an application for judicial review under section 82.1 of the *Immigration Act as though section 73 of the Act had not been enacted* .
>
> (underlining added)

Thus, with respect to the present application, there is no restriction on the applicant's right to appeal this decision to the Federal Court of Appeal.

7 For the reasons given the applicant's motion to require the production of documents is dismissed.

Footnotes

1 Section 82.3(1) of the *Immigration Act* , R.S.C. 1985, c. I-2, repealed on February 1, 1993 stated:
An appeal lies to the Federal Court of Appeal with leave of a judge of that Court from a decision of the Refugee Division under section 69.1 on a claim or under section 69.3 on an application, on the ground that the Division
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making its decision, whether or not the error appears on the face of the record;

(d) based its decision 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.
The power of the Court of Appeal to substitute its own decision for that of the tribunal was derived from s. 52(c) of the *Federal Court Act* :

52. The Federal Court of Appeal may:

. . . . .
(c) in the case of an appeal other than an appeal from the Trial Division,
(i) dismiss the appeal or give the decision that should have been given, or

(ii) in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate;

Majeed v. Canada (Minister of Employment and Immigration) (F.C.A.)

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

Hugessen, Létourneau and McDonald JJ.

Heard: September 26, 1994

Oral judgment: September 26, 1994

Appeal No. A-541-93

[1994] F.C.J. No. 1401 | *[1994] A.C.F. no 1401* | *50 A.C.W.S. (3d) 1074*

Between Abdul Majeed, appellant, and The Minister of Employment and Immigration, respondent

(3 pp.)

Greg Coleman, for the appellant. Cheryl D. Mitchell, for the respondent.

The judgment of the Court was delivered orally by

HUGESSEN J.

1 The issue of bias on the part of one of the members of the Board who heard the Appellant's claim has been conceded by the Respondent. That being the case, we are all of the view that the learned motion judge reached the right conclusion in dismissing the Appellant's application under R.1612. There was simply no evidentiary basis in the material before her which would have justified a wide-ranging order for production (in effect a discovery)[1] of the type sought by the Appellant. Even if, contrary to the record before us, the judge had had evidence that 5 members of this very large Board had been properly disciplined for misconduct, that would still not support the Appellant's present position that the whole Board is tainted with institutional bias.

2 The appeal will be dismissed.

HUGESSEN J.

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1 The Appellant's "Request for Documents and Records" reads as follows:

Pursuant to Rule 1612 of the Federal Court Rules, the Applicant hereby requests that the Immigration and Refugee Board provide to the Applicant certified copies of the following material;

(a) all personnel and other employment records and documents created by the Board in respect of Board member Anna Ker;

(b) any document or record, whether public or otherwise, relating to refugee claims heard and decisions made on such claims by Ms. Ker, including without limitation any information regarding (i) the number of refugee claims heard by Ms. Ker while a member of the Board, and (ii) the number of refugee claims accepted/rejected by Ms. Ker while a member of the Board;

(c) any document or record, whether public or otherwise, written or created by Ms. Ker in her capacity as a Board member or administrator dealing specifically with the policy or procedures of the Board in determining refugee claims;

(d) any document or record, whether public or otherwise, dealing in whole or part with any complaint or allegation by any other party of misconduct, bias or prejudice on the part of Ms. Ker;

(e) any correspondence, whether public or otherwise, from any Board member or administrator to the Board complaining of or alleging misconduct, bias or prejudice on the part of Ms. Ker;

(f) any correspondence, whether public or otherwise, from the Board in response to (e), if any;

(g) any document or record, whether public or otherwise, the subject matter of which is in whole or in part the Board's position on or intended course of action in respect of any allegations or complaints of misconduct, bias or prejudice on the part of Ms. Ker;

(h) any document or record, whether public or otherwise, relating to the removal of Ms. Ker from any position on the Board, the reduction by the Board of any power of or authority granted to Ms. Ker or any other remedial or punitive action taken by the Board in respect of Ms. Ker;

(i) any document or record, whether public or otherwise, relating to any policy developed or action contemplated or taken in response to allegations or complaints of misconduct, bias or prejudice on the part of other Board members or administrators;

(j) any document or record, whether public or otherwise, relating to any review by the Board of refugee claims determined by Ms. Ker;

(k) any document or record, whether public or otherwise, relating to statistical data on other allegations or complaints of misconduct, bias or prejudice on the part of the Board; and

(l) any document or record, whether public or otherwise, relating to any general policy or procedure of the Board in respect of allegations of complaints of misconduct, bias or prejudice by the Board.

[AB 20-21]

End of Document

1979 CarswellNat 2
Supreme Court of Canada

Martineau v. Matsqui Institution

1979 CarswellNat 2, 1979 CarswellNat 3, [1979] S.C.J. No. 121, [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385, 13 C.R. (3d) 1 (Eng.), 15 C.R. (3d) 315 (Fr.), 30 N.R. 119, 50 C.C.C. (2d) 353

MARTINEAU v. MATSQUI INSTITUTION INMATE DISCIPLINARY BOARD (No. 2)

Laskin C.J.C., Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

Heard: May 3, 1979
Judgment: December 13, 1979
Judgment: December 3, 1979

Counsel: *B. A. Crane, Q.C.*, and *J. Conroy*, for appellant.
T. B. Smith, Q.C., and *H. Molot*, for respondent.

***Pigeon J. (Martland, Ritchie, Beetz, Estey* and *Pratte JJ.* concurring):**

1 For a disciplinary offence dealt with as "flagrant or serious" the appellant was sentenced to 15 days in the special corrections unit of the institution in which he is held pursuant to the Penitentiary Act, R.S.C. 1970, c. P-6. He made applications to the Federal Court for certiorari in the Trial Division and for judicial review under s. 28 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), before the Court of Appeal. This application was dealt with first, while the other was kept pending. It was dismissed by the Federal Court of Appeal [[1976] 2 F.C. 198, 31 C.C.C. (2d) 39, 12 N.R. 150] and this dismissal was affirmed by a majority in this court [[1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, 14 N.R. 285].

2 In view of the wording of s. 28, the affirmation of the denial of judicial review means that it was determined that the disciplinary sentence in question was "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". The reasons of the majority, except one judge who agreed with the reasons of the Court of Appeal, show that, in their view, the "directives" governing the procedure for dealing with disciplinary offences were considered to be administrative directions, rather than "law", although the regulations defining disciplinary offences and specifying the penalties that may be inflicted by the penitentiary authorities were in the nature of law.

3 After the judgment of this court, proceedings were resumed on the application for certiorari in the Trial Division. The parties appeared before Mahoney J., who issued an order that the court had jurisdiction [[1978] 1 F.C. 312, 37 C.C.C. (2d) 58, 22 N.R. 250]. At the outset of his reasons, he said (at p. 58):

> By agreement, this is deemed to be an application by the applicant, Robert Thomas Martineau, under Rule 474 of the Rules of this Court for a preliminary determination of a question of law: namely, whether or not the Federal Court of Canada, Trial Division, has jurisdiction to grant relief by way of *certiorari* in the circumstances.

4 Having quoted s. 18 of the Federal Court Act, s. 29(1) and (2) [re-en. R.S.C. 1970, c. 22 (2nd Supp.), s. 15] of the Penitentiary Act and relevant parts of ss. 2.28 [am. SOR/79-398] and 2.29 [now ss. 38 and 39] of the Penitentiary Service Regulations, SOR/62-90 [now C.R.C., vol. XIII, c. 1251], he went on to say (at pp. 61 and 63):

> I take it that the jurisdiction to grant the relief sought depends upon the material in support of the application disclosing that some right of the applicant has been abridged or denied. A punishment consisting only of a 'loss of privileges' would not, by definition, involve a denial or abridgement of any right. The liability to forefeiture of statutory remission when an inmate 'is convicted in disciplinary court of any disciplinary offence' is expressly provided by s-s. 22(3) of the Act. The liability to dissociation as punishment depends entirely on the Regulation made by authority of s. 29 of the Act. With respect to that authority, it was not argued that s-s. 29(2) of the Act is to be construed as not authorizing the inclusion of a penalty for its violation in a Regulation made under para. 29(1)(*b*) and that, therefore, Regulations made by authority of para. 29(1)(*b*) are not 'law' ...
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> The disciplinary offences of which the appellant was convicted were created by law. The punishment imposed was authorized by law. The law required that, as a precondition to the imposition of the punishment, he be 'convicted' of the offence. I am mindful of, and accept, the caveat of Chief Justice Jackett not to place too much significance on the fact that the phraseology of criminal proceedings is imported into the Regulations. Neverthless, it is manifest that the law envisages some process by which an inmate is to be determined to have committed a disciplinary offence, prescribed by law, as a condition precedent to the imposition of a punishment, also prescribed by law. The law, the statute and Regulations which prescribe both offence and punishment, is silent as to that process.

Finally, after quoting from the reasons of the majority in *Re Howarth and Nat. Parole Bd.*, [1976] 1 S.C.R. 453, 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 391, 3 N.R. 349, he said (at p. 64):

> I take it that in Canada, in 1975, a public body, such as the respondent, authorized by law to impose a punishment, that was more than a mere denial of privileges, had a duty to act

> fairly in arriving at its decision to impose the punishment. Any other conclusion would be repugnant. The circumstances disclosed in this application would appear to be appropriate to the remedy sought. I am not, of course, deciding whether the remedy should be granted but merely whether it could be granted by the Federal Court of Canada, Trial Division. In my view it could.

5 This judgment was reversed in the Federal Court of Appeal [[1978] 2 F.C. 637, 40 C.C.C. (2d) 325, 22 N.R. 250]. The ratio of this decision appears to be in these three paragraphs (on pp. 638-39):

> The originating notice of motion relates to 'convictions' that were the subject of a section 28 application to this Court as a result of which it was decided by the Supreme Court of Canada that this Court had no jurisdiction under that section because, as we understand that decision, the 'convictions' were administrative decisions that were 'not required by law to be made on a judicial or quasi-judicial basis' within the meaning of those words in that section.
>
> In our view, it follows from that decision that the 'convictions' in question cannot be attacked under section 18 of the Federal Court Act by a writ of certiorari or proceedings for relief in the nature of that contemplated by such a writ.
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> While the ambit of certiorari has expanded over the period that has elapsed since it was a writ whose sole function was to enable a superior court of law to review decisions of inferior courts of law, in our opinion, it continues to have application only where the decision attacked is either judicial in character or is required by law to be made on a judicial or quasi-judicial basis. We have not been referred to any decision to the contrary.

6 From these quotations it is apparent that the reason for which the Federal Court of Appeal reversed the judgment of the Trial Division is that it did not accept that the common law remedy of certiorari may be available in the case of violation of the duty to act fairly in an administrative decision "not required by law to be made on a judicial or quasi-judicial basis". A footnote on p. 639 ends with this sentence:

> Any decision that is not judicial but is 'sufficiently near a judicial decision to be the subject of a writ of certiorari' is, in our view, a decision that is required to be made on a 'quasi-judicial basis' within the meaning of those words in section 28.

7 With respect, I cannot agree with this view. In *Bates v. Lord Hailsham of St. Marylebone*, [1972] 1 W.L.R. 1373, [1972] 3 All E.R. 1019, Megarry J. said (at p. 1024):

> Let me accept *that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness*. Neverthless, these considerations do not seem to me to affect the process of legislation,

> whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy.

8 The words I have italicized in this passage were accepted "as a common law principle" in the reasons of the majority of this court in *Nicholson v. Haldimand-Norfolk Regional Bd. of Police Commrs.*, [1979] 1 S.C.R. 311 at 324, 88 D.L.R. (3d) 671, 23 N.R. 410. In that judgment, delivered subsequent to the decision of the Federal Court of Appeal herein, judicial review under the Judicial Review Procedure Act, 1971 (2nd Sess.) (Ont.), c. 48, was allowed against the decision of a police commission to dispense with the services of a constable. By the relevant regulation, the right to a quasi-judicial hearing was not available to the appellant because he was still within his 18-month probationary period. Although accepting (at p. 318) that the termination of "a master servant relationship would not, *per se*, give rise to any legal requirement of observance of any of the principles of natural justice", the majority held that, in the case of the holder of a public office such as a constable, there was a common law duty to act fairly which fell short of a duty to act quasi-judicially but neverthless could be enforced by judicial review. Under the Ontario Act, this includes precisely the remedies contemplated in s. 18 of the Federal Court Act.

9 More recently, an important judgment was given by the United Kingdom Court of Appeal in *R. v. Hull Prison Bd. of Visitors; Ex parte St. Germain*, [1979] 1 All E.R. 701. I do not think I can better summarize some of the views expressed than by quoting from the headnote the following:

> The courts were the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties were as the result of some punitive or other process, unless Parliament by statute decreed otherwise. There was no rule of law that the courts were to abdicate jurisdiction merely because the proceedings under review were of an internal disciplinary character and, having regard to the fact that under the Prison Act 1952 a prisoner remained invested with residuary rights regarding the nature and conduct of his incarceration despite the deprivation of his general liberty, the Divisional Court had been in error in refusing to accept jurisdiction ...
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> Per Megaw and Waller L.JJ. Although proceedings of boards of visitors in respect of offences against discipline are subject to judicial review by the courts, such interference will only be justified if there has been some failure to act fairly, having regard to all relevant circumstances, and such unfairness can reasonably be regarded as having caused a substantial, as distinct from a trivial or merely technical, injustice which is capable of remedy. Moreover the requirements of natural justice are not necessarily identical in all spheres ...
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> Semble. Certiorari does not lie against a disciplinary decision of a prison governor.

10 Although in this judgment some dicta in *Ex parte Fry*, [1954] 1 W.L.R. 730, [1954] 2 All E.R. 118 (C.A.), were put in doubt, no doubt was expressed as to the correctness of the decision of

the Court of Appeal in *Fraser v. Mudge*, [1975] 1 W.L.R. 1132, [1975] 3 All E.R. 78. In that case, a prisoner charged with an offence against prison discipline (assaulting a prison official) and due to appear before a board of visitors had applied for an injunction. The prisoner sought a declaration that he was entitled to the assistance of counsel, and prayed for an injunction restraining the board from inquiring into the charge until he had an opportunity of appearing by lawyers. The Court of Appeal unanimously upheld the refusal of the injunction. Lord Denning M.R. said (at pp. 1133-34):

> We all know that, when a man is brought up before his commanding officer for a breach of discipline, whether in the armed forces or in ships at sea, it never has been the practice to allow legal representation. It is of the first importance that the cases should be decided quickly. If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation. I do not think we ought to alter the existing practice.

11 Roskill L.J. added, after a reference to the Prison Rules, 1964 (at p. 1134):

> One looks to see what are the broad principles underlying these rules. They are to maintain discipline in prison by proper, swift and speedy decisions, whether by the governor or the visitors; and it seems to me that the requirements of natural justice do not make it necessary that a person against whom disciplinary proceedings are pending should as of right be entitled to be represented by solicitors or counsel or both.

12 It appears to me that the proper view of the situation of a prison inmate in respect of disciplinary offence proceedings was taken in what I have just quoted. The requirements of judicial procedure are not to be brought in and, consequently, these are not decisions which may be reviewed by the Federal Court of Appeal under s. 28 of the Federal Court Act, a remedy which, I think, is in the nature of a right of appeal. However, this does not mean that the duty of fairness may not be enforced by the Trial Division through the exercise of the discretionary remedies mentioned in s. 18 of the Federal Court Act.

13 I must, however, stress that the order issued by Mahoney J. deals only with the jurisdiction of the Trial Division, not with the actual availability of the relief in the circumstances of the case. This is subject to the exercise of judicial discretion and in this respect it will be essential that the requirements of prison discipline be borne in mind, just as it is essential that the requirements of the effective administration of criminal justice be borne in mind when dealing with applications for certiorari before trial, as pointed in *A. G. Que. v. Cohen*, [1979] 2 S.C.R. 305, 13 C.R. (3d) 36, 46 C.C.C. (2d) 473, 97 D.L.R. (3d) 193. It is specially important that the remedy be granted only in cases of serious injustice and that proper care be taken to prevent such proceedings from being used to delay deserved punishment so long that it is made ineffective, if not altogether avoided.

14 I would allow the appeal, set aside the judgment of the Federal Court of Appeal and restore the order of Mahoney J. of the Federal Court, Trial Division. There should be no costs in this court nor in the Federal Court of Appeal.

Dickson J. **(concurring in the result) (*Laskin C.J.C.* and *McIntyre J.* concurring):**

15 The applicant, an inmate of a federal penitentiary in British Columbia known as "Matsqui Institution", seeks an order in the nature of a writ of certiorari removing into the Trial Division of the Federal Court of Canada, for the purpose of quashing, a conviction by the Inmate Disciplinary Board of the penitentiary.

I

16 The appeal raises in general terms the question of the supervisory role, if any, of the Federal Court, Trial Division, in respect of disciplinary boards within Canadian penitentiaries. It also calls for consideration of three related issues of importance in Canadian administrative law.

17 First, it compels resolution of the continuing debate concerning the review jurisdiction of the Trial Division and Court of Appeal under, respectively, ss. 18 and 28 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), an issue left open by this court in earlier judgments. If the Court of Appeal lacks jurisdiction under s. 28 to entertain an application to review and set aside, then the question which must be asked, and to which this case must give the answer, is whether the impugned decision or order can be challenged by application for certiorari under s. 18 of the Act.

18 Second, the case calls for closer analysis of the duty to act fairly — the English "fairness doctrine" — than has hitherto been necessary.

19 Third, the appeal raises the question of the potential breadth of the common law remedy of certiorari in Canada.

20 Helpful comment upon these several issues thus raised will be found in a number of scholarly articles. See, for example: D. J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973), 23 University of Toronto L.J. 14; D. J. Mullan, "Fairness: The New Natural Justice?" (1975), 25 University of Toronto L.J. 281; N. M. Fera, "Certiorari in the Federal Court and Other Matters" (1977), 23 McGill L.J. 497; N. M. Fera, "While Certiorari May Live in the Trial Division of the Federal Court, the Fairness Concept Has Suffered a Serious Blow: The Recent *Martineau* Decisions" (1979), 11 Ottawa L. Rev. 78; R. R. Price, "Doing Justice to Corrections?" (1977), 3 Queen's L.J. 214; H. N. Janisch, "What is 'Law'?" (1977), 55 Can. Bar Rev. 576; J. M. Evans, "The Duty to Act Fairly" (1973), 36 Modern L. Rev. 93; J. M. Evans, "The Trial Division of the Federal Court: An Addendum" (1977), 23 McGill L.J. 132; J. F. Northey, "Pedantic or Semantic", [1974] N.Z.L.J. 133; J. F. Northey, "The Aftermath of the *Furnell*

Decision" (1974), 6 N.Z. University L. Rev. 59; G. D. S. Taylor, "The Unsystematic Approach to Natural Justice" (1973), 5 N.Z. University L. Rev. 373; G. D. S. Taylor, "Natural Justice — The Modern Synthesis" (1974), 1 Monash University L. Rev. 258; M. Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978), 28 University of Toronto L.J. 215; E. I. Sykes and R. R. S. Tracey, "Natural Justice and the Atkin Formula" (1976), 10 Melbourne University L. Rev. 564.

II

21 At the outset, it will be recalled that s. 18 provides that the Trial Division has exclusive original jurisdiction 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. Section 28(1) provides:

> 28.(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal
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> (*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
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> (*c*) 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.

Section 28(3) goes on to say:

> (3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

22 It has been argued that s. 18 purports to transfer jurisdiction from provincial courts to the Trial Division of the Federal Court and clothes the latter with exclusive jurisdiction to grant relief by way of certiorari against federal boards, commissions or other tribunals, but that s. 28 removes that jurisdiction from the Trial Division in respect of certiorari, despite the express words of s. 18. In other words, the terms of s. 28 completely exclude what s. 18 apparently granted. If that view be correct, and s. 18 is indeed sterile and without independent life, then a narrow reading of s. 28 will virtually deny Canadians recourse against federal tribunals. It is not disputed that the Inmate Disciplinary Board of Matsqui Institution is a federal board, commission or other tribunal.

III

23 It is important to emphasize that the point, and the only point, in this appeal is as to jurisdiction. We are not concerned at this time with whether Martineau has a valid complaint.The only question before us is whether he has the right to have that complaint considered in the Trial Division of the Federal Court.

24 A detailed recital of the facts set out in the affidavits is unnecessary. Martineau and one Butters, both inmates at Matsqui Institution, were charged with having committed two offences: (i) two inmates in a cell; and (ii) committing an indecent act (homosexual). The offences were categorized as "flagrant or serious" and thus were referred to a staff disciplinary board (assistant director of security, a security guard and a living unit officer) for a hearing of the charges.

25 Martineau pleaded guilty to the first charge. On the second charge he was found guilty of the lesser offence of being in an indecent position and was sentenced to the special corrections unit (punitive isolation) for 15 days on a restricted diet and loss of privileges. He challenged the conviction, relying upon directive 213 of the Commissioner of Penitentiaries (issued pursuant to s. 29(3) of the Penitentiary Act, R.S.C. 1970, c. P-6, and ss. 2.28 [am. SOR/72-398], 2.29, 2.30 and 2.31 [now ss. 38 to 41] of the Penitentiary Service Regulations, SOR/62-90 [now C.R.C., Vol. XIII, c. 1251]. Section 13(c) of the directive provides that no finding shall be made against an inmate for a serious or flagrant offence unless: (i) he has received written notice of the charge and a summary of the evidence alleged against him at least 24 hours before the hearing; (ii) he has appeared personally at the hearing so that the evidence against him is given in his presence; and (iii) he has been given an opportunity to make full answer and defence to the charge. Martineau alleges a number of departures from these procedural safeguards. He says that neither he nor anyone representing him was permitted to be present when the disciplinary board heard evidence from the person alleged to have participated with him in the offence of which he was convicted. In essence, his claim is grounded upon a breach of procedural fairness on the part of the disciplinary board.

26 So far as I have been able to determine, there is no provision for appeal to a higher authority by an inmate who feels aggrieved by a conviction or sentence of the disciplinary board.

IV

27 Faced with the difficult and uncertain language of ss. 18 and 28 of the Federal Court Act, *Martineau* launched proceedings in both the Federal Court of Appeal and the Trial Division of that court. The Federal Court of Appeal, before whom the matter first came on a s. 28 application, by a majority, dismissed the application for lack of jurisdiction [[1976] 2 F.C. 198, 31 C.C.C. (2d) 39, 12 N.R. 150]. This court, by a majority, dismissed the further appeal [[1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, 14 N.R. 285 (hereinafter referred to as *Martineau* (No. 1))]. The court held that the impugned order was not within the scope of the opening words of s. 28 of

the Federal Court Act and that the directive of the Commissioner of Penitentiaries was not "law" within the meaning of the phrase "by law" in s. 28.

28 Unsuccessful in his challenge by way of the Federal Court of Appeal, Martineau resumed the proceedings, temporarily held in abeyance, which he had commenced in the Trial Division of the Federal Court. Mahoney J. of the Trial Division, by agreement, heard an application by Martineau under Federal Court R. 474 for preliminary determination of a question of law, namely, whether or not the Federal Court, Trial Division, had jurisdiction in the circumstances. His conclusion [[1978] 1 F.C. 312 at 318-19, 37 C.C.C. (2d) 58, 22 N.R. 255]:

> I take it that in Canada, in 1975, a public body, such as the respondent, authorized by law to impose a punishment, that was more than a mere denial of privileges, had a duty to act fairly in arriving at its decision to impose the punishment. Any other conclusion would be repugnant. The circumstances disclosed in this application would appear to be appropriate to the remedy sought. I am not, of course, deciding whether the remedy should be granted but merely whether it could be granted by the Federal Court of Canada, Trial Division. In my view it could.

29 In *Magrath v. R.*, [1978] 2 F.C. 232, 38 C.C.C. (2d) 67, Collier J. of the Federal Court, Trial Division, agreed with the observations and conclusions of Mahoney J. in the *Martineau* case.

30 Shortly thereafter, however, Jackett C.J.T.D. gave judgment for a unanimous Federal Court of Appeal [[1978] 2 F.C. 637, 40 C.C.C. (2d) 325, 22 N.R. 250] allowing an appeal from the judgment of Mahoney J. in the Trial Division. The reasons of the court are brief but amplified in footnotes and in an appendix. This court is taken to have decided in *Martineau* (No. 1) that the Appeal Division of the Federal Court lacked jurisdiction because "the 'convictions' were administrative decisions that were 'not required by law to be made on a judicial or quasi-judicial basis' ". It followed, in the view of the Federal Court of Appeal, that the "convictions" could not be attacked under s. 18 of the Federal Court Act by a writ of certiorari. The court recognized that the ambit of certiorari has expanded from the time it was a writ whose sole function was to enable a superior court of law to review decisions of inferior courts of law. In the view of the court, however, the writ continues to have application only where the decision attacked is either judicial in character or is required by law to be made on a judicial or quasi-judicial basis. The conclusion of the court is expressed in these words (p. 640):

> When we read sections 18 and 28 of the *Federal Court Act*, we cannot escape the conclusion that the words 'quasi-judicial basis' were intended to include every method of reaching a decision or order that would support an application by way of *certiorari* other than a purely 'judicial ... basis'.

31 The appendix to the judgment reveals the basis for the court's reading of *Martineau* (No. 1). If "quasi-judicial" in s. 28 is regarded as delimiting the range of decisions to which

the "fairness" doctrine may apply, then, should jurisdiction be lacking under s. 28, a remedy of certiorari grounded upon the fairness doctrine cannot avail an applicant under s. 18. With great respect, in my view, this court's decisions in *Re Howarth and Nat. Parole Bd.*, [1976] 1 S.C.R. 453, 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 391, 3 N.R. 349, and *Martineau* (No. 1), and the court's recent judgment in *Nicholson v. Haldimand-Norfolk Regional Bd. of Police Commrs.*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 23 N.R. 410 (which post-dates the judgment of the Federal Court of Appeal in these proceedings), indicate a different approach. Particularly, the judgment in *Nicholson* betokens a significant development in our administrative law in its adoption of the English case authorities on the fairness doctrine.

V

32 *Howarth* brought to the fore a difference in perception of the relationship between s. 18 and s. 28 of the Federal Court Act. The minority indicated a desire to read the new s. 28 application to review and set aside as a remedy at least as broad as, if not broader than, certiorari, primarily by means of an expansive view of "decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". The majority view, however, began with the premise that [p. 470]: "s. 28 of the Federal Court Act operates as an exception to the general provision of s. 18, whereby supervisory jurisdiction over federal boards is wholly transferred from the superior courts of the provinces to the Trial Division of the Federal Court". Accordingly [p. 471], "the new remedy created by s. 28 is restricted in its application to judicial decisions or to administrative orders required by law to be made on a judicial or quasi-judicial basis." Because of their importance in the resolution of the present appeal, I must quote in extenso from the judgment of Pigeon J., speaking for a majority of the court in *Howarth* (pp. 471-72):

> It will be seen that while supervisory jurisdiction over federal boards is conferred generally upon the Trial Division without any restriction as to the nature of the decision under consideration, the new remedy created by s. 28 is restricted in its application to judicial decisions or to administrative orders required by law to be made on a judicial or quasi-judicial basis. It is only in respect of such decisions or orders that the new remedy equivalent to an appeal is made available. Thus, the clear effect of the combination of ss. 18 and 28 is that a distinction is made between two classes of orders of federal boards. Those that, for brevity, I will call judicial or quasi-judicial decisions are subject to s. 28 and the Federal Court of Appeal has wide powers of review over them. The other class of decisions comprises those of an administrative nature not required by law to be made on a judicial or quasi-judicial basis. With respect to that second class, the new remedy of s. 28, the kind of appeal to the Appeal Division, is not available, but all the other remedies, all the common law remedies, remain unchanged by the *Federal Court Act*. The only difference is that the jurisdiction is no longer exercisable by the superior courts of the provinces, but only by the Trial Division of the Federal Court. The very fact that such a distinction is made shows that the s. 28 application is not intended to be available against all administrative board decisions.

> The reason I am stressing this point is that in argument, Counsel for the appellant relied mainly on cases dealing with the duty of fairness lying upon all administrative agencies, in the context of various common law remedies. These are, in my view, completely irrelevant in the present case because a s. 28 application is an exception to s. 18 and leaves intact all the common law remedies in the cases in which it is without application. The Federal Court of Appeal did not consider, in quashing the application, whether the Parole Board order could be questioned in proceedings before the Trial Division.

33 Thus *Howarth* distinguishes between s. 18 and s. 28 review jurisdiction in the Federal Court, the new remedy under s. 28 not being exhaustive of Federal Court jurisdiction to review federal government action. The consequence, as Pigeon J. puts it, is that under the Federal Court Act "a distinction is made between two classes of orders of federal boards".

34 Further, a distinction is clearly drawn between the duty to act judicially and the duty to act fairly. Pigeon J. rejects the argument that a duty to act fairly is relevant to the question of jurisdiction under s. 28, but the relevance of such an argument in the context of s. 18 is expressly left open.

35 The duty to act fairly was alluded to by Spence J., speaking on behalf of the full court in *Minister of Manpower & Immigration v. Hardayal*, [1978] 1 S.C.R. 470 at 479, 75 D.L.R. (3d) 465, 15 N.R. 396. He said: "It is true that in exercising what, in my view, is an administrative power, the Minister is required to act fairly and for a proper motive and his failure to do so might well give rise to a right of the person affected to take proceedings under s. 18(*a*) of the *Federal Court Act*". See also *Roper v. Royal Victoria Hospital Medical Bd. Executive Committee*, [1975] 2 S.C.R. 62 at 67, 50 D.L.R. (3e) 1 N.R. 39.

36 *Martineau* (No. 1) was wholly unconcerned with the issue of "fairness". The central issue there was whether the decision of the disciplinary board was within the scope of s. 28 as being "required by law to be made on a judicial or quasi-judicial basis".

37 Pigeon J., again speaking for a majority of the court, considered the question whether the directive of the commissioner was to be regarded as "law" within the wording of s. 28 and concluded that while regulations under the Penitentiary Act were law the same could not be said of the directives [p. 129]: "It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity."

38 In the case of an inmate disciplinary board, the directive of the commissioner lacks statutory force and, by implication then, Parliament did not intend the directive to have status as a procedural code defining rules of natural justice exhaustively for the board. Accordingly, the decision in question was not one required by law to be made on a judicial or quasi-judicial basis, and the applicant had not brought himself within the precise language of s. 28. That does not, however,

determine the relevant question of a certiorari application under s. 18, where the inquiry is whether the public body may have a duty to act fairly in the broader, non-technical manner suggested in *R. v. Hull Prison Bd. of Visitors; Ex parte St. Germain*, [1979] 1 All E.R. 701, reversing [1978] 2 All E.R. 198 (C.A.).

39 The reasoning of the court in *Martineau* (No. 1) is instructive on this point. Pigeon J., while denying that the directive was a "procedural code", also rejected the suggestion that mere fairness in its "good faith" sense, as employed by the Federal Court of Appeal, fulfils the obligation of the board (p. 127):

> With respect, I find it difficult to agree with the view that Directive No. 213 merely requires that a disciplinary decision such as the impugned order be made fairly and justly.

40 Implicitly, then, the majority in *Martineau* (No. 1) accepted a measure of procedural content in a duty of fairness resting upon the board — something more than the absolute minimum of "good faith", but something less than strict application of the procedure set forth in the directive.

41 The Matsqui Institution Disciplinary Board, the respondent in this appeal, has cited the following passage from the judgment of this court in *Minister of National Revenue v. Coopers & Lybrand Ltd.*, [1979] 1 S.C.R. 495, 92 D.L.R. (3d) 1, 24 N.R. 163, in support of the contention that non-reviewability under s. 28 forecloses review by writ of certiorari under s. 18 (p. 501):

> Accordingly, administrative decisions must be divided between those which are reviewable, by certiorari or by s. 28 application or otherwise, and those which are nonreviewable. The former are conveniently labelled 'decisions or orders of an administrative nature required by law to be made on a judicial or quasi-judicial basis', the latter 'decisions or orders not required by law to be made on a judicial or quasi-judicial basis'. It is not only the decision to which attention must be directed, but also the process by which the decision is reached,

The issues to which *Coopers & Lybrand* was directed relate to the classification of decisions eligible for review under s. 28 of the Federal Court Act, the very classification process with which the court was concerned in *Howarth* and *Martineau* (No. 1). This is implicitly recognized by mention of both cases in *Coopers & Lybrand*. If anything pertinent to the present discussion is suggested by the latter judgment, it is that "administrative decision does not lend itself to rigid classification of functions". As such, it has no direct application to the new and broader territory, unhindered by exigencies of classification, that is now opened by evolution of the common law doctrine of fairness enforced by the common law remedies, including certiorari.

42 Restrictive reading of s. 28 of the Federal Court Act need not, of necessity, lead to a reduction in the ambit for judicial review of federal government action. Section 18 is available. Section 28 has caused difficulties, not only because of the language in which it is cast but, equally, because it tended to crystallize the law of judicial review at a time when significant changes were occurring

in other countries with respect to the scope and grounds for review. Sections 18 and 28 of the Federal Court Act were obviously intended to concentrate judicial review of federal tribunals in a single federal court. As I read the Act, Parliament envisaged an extended scope for review. I am therefore averse to giving the Act a reading which would defeat that intention and posit a diminished scope for relief from the actions of federal tribunals. I simply cannot accept the view that Parliament intended to remove the old common law remedies, including certiorari, from the provincial superior courts and vest them in the Trial Division of the Federal Court, only to have those remedies rendered barren through the interaction of s. 18 and s. 28 of the Act. I would apply the principle laid down by Brett L.J. in *R. v. Loc. Govt. Bd.* (1882), 10 Q.B.D. 309 at 321 (C.A.), that the jurisdiction of a court ought to be exercised widely when dealing with matters perhaps not strictly judicial but in which the rights or interests of citizens are affected.

VI

43 The dominant characteristic of recent developments in English administrative law has been expansion of judicial review — jurisdiction to supervise administrative action by public authorities. Certiorari evolved as a flexible remedy, affording access to judicial supervision in new and changing situations. In 1700 Hold C.J. could say, in *Cardiffe Bridge Case* (1700), 1 Salk. 146, 91 E.R. 135, "wherever any new jurisdiction is erected, be it by private or public Act of Parliament, they are subject to the inspections of this Court by writ of error, or by *certiorari* and *mandamus*". And in *Groenvelt v. Burwell* (1700), 1 Ld. Raym. 454 at 467-69, 91 E.R. 1202, Hold C.J. held again, in the context of the censors of the College of Physicians of London, that:

> ... it is plain, that the censors have judicial power ... where a man has power to inflict imprisonment upon another for punishment of his offence, there he hath judicial authority ... for it is a consequence of all jurisdictions, to have their proceedings returned here by certiorari, to be examined here ... Where any Court is erected by statute, a certiorari lies to it.

Nor has perception of certiorari as an adaptable remedy been in any way modified. The amplitude of the writ has been affirmed time and again. See, for example, the judgment of Lord Parker C.J. in *R. v. Criminal Injuries Comp. Bd.; Ex parte Lain*, [1967] 1 Q.B. 864, [1967] 2 All E.R. 770 at 778 (D.C.):

> The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been, and ought not to be, specifically defined. They have varied from time to time, being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word, but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty.

44 Roskill L.J. in *R. v. Liverpool Corpn.; Ex parte Liverpool Taxi Fleet Operators' Assn.*, [1972] 2 Q.B. 299, *(*sub nom. *Re Liverpool Taxi Owners' Assn.)* [1972] 2 All E.R. 589 at 596 (C.A.), expressed the thought in these words:

> The long legal history of the former prerogative writs and of their modern counterparts, the orders of prohibition, mandamus and certiorari shows that their application has always been flexible as the need for their use in differing social conditions down the centuries had changed.

45 The principles of natural justice and fairness have matured in recent years. And the writ of certiorari, in like measure, has developed apace. The speeches in *Ridge v. Baldwin*, [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.), show the evolutionary state of administrative law.

VII

46 Does certiorari lie to the Inmate Disciplinary Board? The usual starting point in a discussion of this nature is the "Electricity Commissioners" formula, found at p. 205 of *R. v. Electricity Commrs.; Ex parte London Electricity Joint Committee Co. (1920) Ltd.*, [1924] 1 K.B. 171 (C.A.), where Atkin L.J. had this to say:

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

Difficulty has arisen from the statement of Atkin L.J., in part from the fact that his words have been treated as if they had been engraved in stone and in part because it is not clear what Atkin L.J. meant. How far, if at all, did he mean to limit the use of orders for certiorari and prohibition by the phrase "and having the duty to act judicially"? What did he mean by "judicially" in the context? It will be recalled that in the *Electricity Commrs.* case itself certiorari and prohibition issued to a group of administrators who were acting far more as part of the legislative than of the judicial process.

"Rights of Subjects"

47 The term "rights of subjects" has given concern, often being treated by courts as the sine qua non of jurisdiction to permit review. There has been an unfortunate tendency to treat "rights" in the narrow sense of rights to which correlative legal duties attach. In this sense, "rights" are frequently contrasted with "privileges" in the mistaken belief that only the former can ground judicial review of the decision-maker's actions. *R. v. Criminal Injuries Comp. Bd.; Ex parte Lain*, supra, is invaluable on this branch of Atkin L.J.'s test. There, the absence of any legal right on the part of the claimants to ex gratia payments from the criminal injuries compensation board would

seem to pose an insuperable obstacle, but Ashworth J. disposed of this impediment without trouble and in broadest language (p. 784):

> For my part I doubt whether Atkin, L.J., was propounding an all-embracing definition of the circumstances in which relief by way of certiorari would lie. In my judgment the words in question read in the context of what precedes and follows them, would be of no less value if they were altered by omitting 'the rights of' so as to become 'affecting subjects'.

48 Lord Denning aptly summarized the state of the law on this aspect in *Schmidt v. Secretary of State for Home Affairs*, [1969] 2 Ch. 139, [1969] 1 All E.R. 904 (C.A.). There, the Master of the Rolls stated (p. 170):

> The speeches in *Ridge v. Baldwin* [supra] show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

49 Professor H.W.R. Wade, in his book Administrative Law, 4th ed. (1977), has captured the relevance of this requirement of the test in this passage (pp. 541-42):

> This requirement is really correlative to the idea of legal power, the exercise of which necessarily affects some person's legal rights, status or situation. The primary object of certiorari and prohibition is to make the machinery of government operate properly in the public interest, rather than to protect private rights ... The requirement of a decision 'affecting rights' is not therefore a limiting factor; it is rather an automatic consequence of the fact that power is being exercised.

50 When concerned with individual cases and aggrieved persons there is the tendency to forget that one is dealing with public law remedies which, when granted by the courts, not only set aright individual injustice but also ensure that public bodies exercising powers affecting citizens heed the jurisdiction granted them. Certiorari stems from the assumption by the courts of supervisory powers over certain tribunals in order to assure the proper functioning of the machinery of government. To give a narrow or technical interpretation to "rights" in an individual sense is to misconceive the broader purpose of judicial review of administrative action. One should, I suggest, begin with the premise that any public body exercising power over subjects may be amenable to judicial supervision, the individual interest involved being but one factor to be considered in resolving the broad policy question of the nature of review appropriate for the particular administrative body.

"Duty to Act Judicially"

51 Prior to the decision in *Ridge v. Baldwin*, supra, it was generally accepted that certiorari would be granted only when the nature of the process by which the decision was arrived at was a judicial process or a process analogous to the judicial process: *Nakkuda Ali v. M.F. de S. Jayaratne*, [1951] A.C. 66 (P.C.). This notion of a "super-added duty to act judicially", as a separate and independent pre-condition to the availability of natural justice and, inferentially, to recourse to certiorari, was unequivocally rejected by Lord Reid in *Ridge* (p. 75):

> If Lord Hewart meant that it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of natural justice, then that appears to me impossible to reconcile with the earlier authorities.

52 In the *Electricity Commrs.* case, supra, itself, Lord Reid observed, the judicial element was inferred from the nature of the power.

53 Perhaps the best expression of the significance of the decision in *Ridge v. Baldwin* is found in the reasons of Lord Widgery C.J. in *R. v. Hillington London Borough Council; Ex parte Royco Homes Ltd.*, [1974] Q.B. 720, [1974] 2 All E.R. 643 (D.C.), wherein he considered the availability of certiorari to review the grant of a planning permission by a local authority [p. 648]:

> Accordingly it may be that previous efforts to use certiorari in this field have been deterred by Atkin L.J.'s reference to it being necessary for the body affected to have the duty to act judicially. If that is so, that reason for reticence on the part of applicants was, I think, put an end to in the House of Lords in *Ridge v. Baldwin* ... in the course of his speech Lord Reid made reference to that oft-quoted dictum of Atkin L.J. and pointed out that the additional requirement of the body being under a duty to act judicially was not supported by authority. Accordingly it seems to me now that that obstacle, if obstacle it were, has been cleared away and I can see no reason for this court holding otherwise than that there is power in appropriate cases for the use of the prerogative orders to control the activity of a local planning authority.

54 A flexible attitude toward the potential application of certiorari was furthered in another recent English case, this one in the Court of Appeal, in *R. v. Barnsely Metro. Borough Council; Ex parte Hook*, [1976] 1 W.L.R. 1052, [1976] 3 All E.R. 452.

55 In a habeas corpus case, *Re H. K.*, [1967] 2 Q.B. 617, [1967] 1 All E.R. 226 (D.C.), Lord Parker was of the opinion that the immigration officers who refused to admit a boy into the United Kingdom were acting in an administrative and not in a judicial or quasi-judicial capacity; nevertheless, he held that they must act honestly and fairly, otherwise their decision could be questioned by certiorari. And in the *Liverpool Taxi Fleet Operators'* case, supra, Roskill L.J. spoke of the power of the courts to intervene in a suitable case when the function was administrative and not judicial or quasi-judicial (p. 596):

> The power of the court to intervene is not limited, as once was thought, to those cases where the function in question is judicial or quasi-judicial. The modern cases show that this court will intervene more widely than in the past. Even where the function is said to be administrative, the court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness.

56 Then there is the well-known passage in the speech of Lord Morris of Borth-y-Gest in *Furnell v. Whangarei High Schools Bd.*, [1973] A.C. 660, [1973] 1 All E.R. 400 at 412, speaking for a Privy Council majority of three: "Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions." In the same case, the penultimate paragraph from the speech of Viscount Dilhorne and Lord Reid, dissenting, reads (p. 421):

> It is not in this case necessary to decide whether the function of the sub-committee is to be described as judicial, quasi-judicial or administrative. I am inclined to think that it is at least quasi-judicial, but if it be administrative, it was the duty of the sub-committee before they condemned or criticised the appellant 'to give him a fair opportunity of commenting or contradicting what is said against him'. That they did not do.

57 Professor John Evans, writing in "The Trial Division of the Federal Court: An Addendum" (1977), 23 McGill L.J. 132 at 134-5, has noted:

> Recent English decisions have ever the availability of *certiorari* and prohibition from the requirement that the body must act 'judicially' in the sense that it is bound by the rules of natural justice. It may be concluded, therefore, that there is nothing in the judgment of Pigeon J. [in *Howarth*, supra] to prevent the Trial Division from quashing decisions of a 'purely administrative' nature or from developing procedural requirements derived from the 'duty to act fairly'.

In the view of another commentator, Professor D. P. Jones, "*Howarth v. Nat. Parole Bd.* Comment" (1975), 21 McGill L.J. 434 at 438:

> Certainly in England and in most other parts of the Commonwealth, the requirement for judicial review that the exercise of a statutory power must not only affect the rights of a subject, but also be subject to a superadded duty to act judicially, is now thoroughly discredited. In other words, the ratio of *Nakkuda Ali v. Jayaratne* [supra] in the Privy Council — and hence, one would have thought, of *Calgary Power v. Copithorne*, [1959] S.C.R. 4, 16 D.L.R. (2d) 241, in the Supreme Court of Canada — is no longer good law.

58 The authorities to which I have referred indicate that the application of a duty of fairness with procedural content does not depend upon proof of a judicial or quasi-judicial function. Even though the function is analytically administrative, courts may intervene in a suitable case.

59 In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls.

60 In my opinion, certiorari avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges or liberties of any person.

VIII

"Fairness"

61 The approach taken to the "fairness" doctrine by the court in *Nicholson v. Haldimand-Norfolk Regional Bd. of Police Commrs.*, supra, notably its differentation from traditional natural justice, permits one to dispense with classification as a precondition to the availability of certiorari. Conceptually, there is much to be said against such a differentiation between traditional natural justice and procedural fairness, but if one is forced to cast judicial review in traditional classification terms, as is the case under the Federal Court Act, there can be no doubt that procedural fairness extends well beyond the realm of the judicial and quasi-judicial, as commonly understood.

62 Once one moves from the strictures of s. 28 of the Federal Court Act, the judgment in *Nicholson* permits departure from the rigidity of classification of functions for the purposes of procedural safeguards. In finding that a duty of fairness rested upon the police commissioners in a dismissal case Laskin C.J.C., speaking for a majority of the court, employed the English fairness cases to import that duty. While the cases were there used to establish minimal protection for the constable under the Judicial Review Procedure Act, 1971 (2nd sess.), (Ont.), c. 48, the same cases have been employed in England to extend the reach of certiorari to decisions not strictly judicial or quasi-judicial. After referring to the emergence of a notion of fairness "involving something less than the procedural protection of traditional natural justice", the chief justice had this to say (pp. 423-24):

> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work

> injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ. of Tor. L.J. 281.

63 The chief justice also quoted a passage from Lord Denning M.R.'s judgment in *R. v. Race Relations Bd.; Ex parte Selvarajan*, [1975] 1 W.L.R. 1686, [1976] 1 All E.R. 12 (C.A.), in which the Master of the Rolls summed up his earlier decisions and formulated the "fundamental rule" (p. 19):

> ... that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

Of particular interest in the passage is the absence of reference to "rights". The imprecise "rights/privileges" dichotomy is utterly ignored.

IX

64 One matter remains — the so-called "disciplinary exception". There are authorities (see *R. v. Army Council; Ex parte Ravenscroft*, [1917] 2 K.B. 504 (D.C.); *Dawkins v. Lord Rokeby* (1875), L.R. 8 Q.B. 255, affirmed L.R. 7 H.L. 744 (H.L.); *Re Armstrong*, [1973] 2 O.R. 495, 11 C.C.C. (2d) 327 (C.A.)) which hold that review by way of certiorari does not go to a body such as the armed services, police or firemen with its own form of private discipline and its own rules. Relying on this analogy, it is contended that disciplinary powers are beyond judicial control and that this extends to prison discipline. I do not agree.

65 In *Fraser v. Mudge*, [1975] 1 W.L.R. 1132, [1975] 3 All E.R. 78 (C.A.), it was held that the English Prison Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2), c. 52, requiring the Home Secretary to give an inmate charged with an offence a proper opportunity of presenting his case, did not entitle the inmate to legal representation at the hearing, but Lord Denning M.R. observed that those who heard the case had the duty to act fairly. Judicial review was not precluded.

66 There is the more recent case of *R. v. Hull Prison Bd. of Visitors; Ex parte St. Germain*, supra. The central issue in that case was whether certiorari would go to quash a disciplinary decision of a board of visitors, the duties of which embraced inquiry into charges against inmates. The Divisional Court found that disciplinary procedures within the prison were judicial, but invoked the "disciplinary exception" and held that the actions of the board of visitors were not amenable to the review by way of certiorari. A unanimous Court of Appeal disagreed, however, holding that adjudication by boards of visitors in prisons were, indeed, amenable to certiorari. The court rejected the submission that prisoners have no legally enforceable rights. Megaw L.J. concluded that the observance of procedural fairness in prisons is properly a subject for review. Shaw L.J.

held that despite deprivation of his general liberty a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration. Waller L.J. accepted the proposition of Lord Reid, in *Ridge v. Baldwin*, supra, that deprivation of rights or privileges are equally important, and applied that proposition to the context of prison discipline.

67 Another case of interest is *Daemar v. Hall*, [1978] 2 N.Z.L.R. 594, a decision of the New Zealand Supreme Court, relied upon by the Court of Appeal in *Hull Prison*, supra. Daemar had been tried by a visiting justice and sentenced to four days' loss of remission. It was argued that the decision was not subject to judicial review under the Judicature Amendment Act, 1972, as certiorari would not lie to such a disciplinary decision. McMullin J. reviewed the authorities at length, including the Canadian decisions of *R. and Archer v. White*, [1956] S.C.R. 154, 114 C.C.C. 77, 1 D.L.R. (2d) 305; *Martineau* (No. 1), supra; and *R. v. Institutional Head of Beaver Creek Correctional Camp; Ex parte MacCaud*, [1969] 1 O.R. 373, *(*sub nom. *Re MacCaud)* 5 C.R.N.S. 317, [1969] 1 C.C.C. 371, 2 D.L.R. (3d) 545 (C.A.). McMullin J. exercised his discretion in favour of the prisoner, commenting that the loss of four days' remission was not a "trifle" but "tantamount to the imposition of an extra four days' imprisonment at the end of a sentence". As in *Hull Prison*, supra, this decision is based upon a finding that the visiting justice was acting in a judicial capacity and that the regulations were a procedural code, any breach of which constituted a breach of natural justice in the circumstances. Both of these conclusions are foreclosed in the case at bar by the decision in *Martineau* (No. 1). *Hull Prison* and *Daemar* are important, however, as supporting the view that there is no domestic "discipline" exception to the scope of certiorari.

68 The case of *R. and Archer v. White*, supra, must also be noted. White, a constable, was convicted by Archer, a police superintendent, of four disciplinary charges laid under s. 30 of the Royal Canadian Mounted Police Act, R.S.C. 1952, c. 241 (now R.S.C. 1970, c. R-9). He applied for certiorari. The trial judge denied the writ, 10 W.W.R. (N.S.) 305, 107 C.C.C. 230, [1953] 4 D.L.R. 220. He was reversed on appeal, 12 W.W.R. 315, 109 C.C.C. 247, [1954] 4 D.L.R. 714. The decision of the Court of Appeal for British Columbia was reversed in this court. Rand J., delivering judgment on the part of four members of the court, likened the force to the army, saying (p. 158):

> From the beginning it has been stamped with characteristics of the Army: the mode of organization, its barrack life, the uniform, address and bearing of the members, esprit de corps and discipline.

He then referred to the engagement for a term of service not exceeding five years upon which one entered on becoming a member of the force. Parenthetically, this notion of contractual commitment to rules of internal discipline, a sort of volens, is sometimes advanced in support of the argument for a disciplinary exception. Whatever may be the force of that argument in other contexts, it is wholly inapplicable in a prison environment.

69 The Federal Court of Appeal in *Martineau* (No. 1) relied upon *R. and Archer v. White* in holding that "disciplinary decisions" were not amenable to review by way of s. 28 application. There can be no doubt that all members of this court in *R. and Archer v. White* held that in the circumstances certiorari would not lie to the domestic disciplinary decision of the R.C.M.P. superintendent. As I read the case, however, Rand J. does not rule out the possibility of certiorari in a suitable case. He regarded the internal code as prima facie the exclusive means by which discipline would be enforced, but in the passage quoted hereunder he appears to have recognized three exceptions, where: (i) the powers are abused to such a degree as to put the action beyond the purview of the statute; (ii) the action is itself unauthorized; or (iii) the proceedings infringe those underlying principles of judicial process deemed annexed to legislation unless excluded by its implications. Natural justice and fairness are principles of judicial process deemed by the common law to be annexed to legislation with a view to bringing statutory provisions into conformity with the common law requirements of justice. The passage to which I refer reads as follows (p. 159):

> Parliament has specified the punishable breaches of discipline and has equipped the Force with its own courts for dealing with them and it needs no amplification to demonstrate the object of that investment. Such a code is prima facie to be looked upon as being the exclusive means by which this particular purpose is to be attained. Unless, therefore, the powers given are abused to such a degree as puts action taken beyond the purview of the statute or unless the action is itself unauthorized, that internal management is not to be interfered with by any superior court in exercise of its long established supervisory jurisdiction over inferior tribunals. The question, therefore, is whether or not in the application made before Wood J., including the materials furnished by affidavit, anything has been alleged and supported by evidence to show that the proceedings infringed or were outside the authority of either the statute or those underlying principles of judicial process to be deemed annexed to legislation unless excluded by its implications.

70 The Supreme Court of the United States in *Wolff v. McDonnell*, U.S. Neb., 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), was called upon to consider what "due process", assured by the Fourteenth Amendment of the American Constitution, required in a prison setting. The court, speaking through White J., held that where the prisoner was in peril of losing good time or being placed in solitary confinement he was entitled to written notice of the charge and a statement of fact findings and to call witnesses and present documentary evidence where it would not be unduly hazardous to institutional safety or correctional goals. However, there was no constitutional right to confront and cross-examine witnesses or to counsel.

71 It seems clear that although the courts will not readily interfere in the exercise of disciplinary powers, whether within the armed services, the police force or the penitentiary, there is no rule of law which necessarily exempts the exercise of such disciplinary powers from review by certiorari.

72 The authorities, in my view, support the following conclusions:

73 1. Certiorari is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.

74 2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad of decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum. That is what emerges from the decision of this court in *Nicholson*, supra. In these cases, an applicant may obtain certiorari to enforce a breach of the duty of procedural fairness.

75 3. Section 28 of the Federal Court Act, that statutory right of review, compels continuance of the classification process in the Federal Court of Appeal with clear outer limits imposed on the notion of "judicial or quasi-judicial". No such limitation is imported in the language of s. 18, which simply refers to certiorari and is therefore capable of expansion consistent with the movement of the common law away from rigidity in respect of the prerogative writs. The fact that a decision-maker does not have a duty to act judicially, with observance of formal procedure which that characterization entails, does not mean that there may not be a duty to act fairly which involves importing something less than the full panoply of conventional natural justice rules. In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly and a duty to act in accordance with the rules of natural justice yields an unwieldy conceptual framework. The Federal Court Act, however, compels classification for review of federal decision-makers.

76 4. An inmate disciplinary board is not a court. It is a tribunal which has to decide rights after hearing evidence. Even though the board is not obliged, in discharging what is essentially an administrative task, to conduct a judicial proceeding observing the procedural and evidential rules of a court of law, it is nonetheless subject to a duty of fairness, and a person aggrieved through breach of that duty is entitled to seek relief from the Federal Court, Trial Division, on an application for certiorari.

77 5. It should be emphasized that it is not every breach of prison rules of procedure which will bring intervention by the courts. The very nature of a prison institution requires officers to

make "on the spot" disciplinary decisions, and the power of judicial review must be exercised with restraint. Interference will not be justified in the case of trivial or merely technical incidents. The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the duty to act fairly in all the circumstancs. The rules are of some importance in determining this latter question as an indication of the views of prison authorities as to the degree of procedural protection to be extended to inmates.

78 6. A widening of the ambit of certiorari beyond that of a s. 28 application will undoubtedly, at times, present a problem in determiming whether to commence proceedings in the Court of Appeal or in the Trial Division. However, the quandary of two possible forums is not less regrettable than complete lack of access to the Federal Court.

79 7. It is wrong, in my view, to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each. In *Nicholson*, supra, the chief justice spoke of a "notion of fairness involving something less than the procedural protection of the traditional natural justice". Fairness involves compliance with only some of the principles of natural justice. Professor de Smith, in Judicial Review of Administrative Action, 3rd ed. (1973), p. 208, expressed lucidly the concept of a duty to act fairly:

> In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative.

80 The content of the principles of natural justice and fairness in application to the individual cases will vary according to the circumstances of each case, as recognized by Tucker L.J. in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 at 118 (C.A.).

81 8. In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

XI

82 I would allow the appeal, set aside the judgment of the Federal Court of Appeal and restore the judgment of Mahoney J. of the Federal Court, Trial Division. There should be no costs in this court nor in the Federal Court of Appeal.

Appeal allowed.

2003 SCC 24, 2003 CSC 24
Supreme Court of Canada

Miglin v. Miglin

2003 CarswellOnt 1374, 2003 CarswellOnt 1375, 2003 SCC 24, 2003 CSC 24, [2003] 1 S.C.R. 303, [2003] S.C.J. No. 21, 122 A.C.W.S. (3d) 101, 171 O.A.C. 201, 224 D.L.R. (4th) 193, 302 N.R. 201, 34 R.F.L. (5th) 255, 66 O.R. (3d) 736, J.E. 2003-790, REJB 2003-40012

Eric Juri Miglin, Appellant v. Linda Susan Miglin, Respondent

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: October 29, 2002
Judgment: April 17, 2003
Docket: 28670

Proceedings: reversing in part *Miglin v. Miglin* (2001), 2001 CarswellOnt 1404, 198 D.L.R. (4th) 385, 144 O.A.C. 155, *(*sub nom. *M. (L.S.) v. M. (E.J.))* 16 R.F.L. (5th) 185, 53 O.R. (3d) 641 (Ont. C.A.); reversing in part *Miglin v. Miglin* (1999), 1999 CarswellOnt 4285, 3 R.F.L. (5th) 106 (Ont. S.C.J.); additional reasons at *Miglin v. Miglin* (2000), 2000 CarswellOnt 1039 (Ont. S.C.J.)

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***Bastarache, Arbour JJ.*:**

I. Introduction

1 This appeal concerns the proper approach to determining an application for spousal support pursuant to s. 15.2(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "1985 Act"), where the spouses have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal support. Accordingly, this appeal presents the Court with an opportunity to address directly the question of the continued application of the *Pelech* trilogy (*Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.); *Richardson v. Richardson*, [1987] 1 S.C.R. 857 (S.C.C.); *Caron v. Caron*, [1987] 1 S.C.R. 892 (S.C.C.)) in light of the significant legislative and jurisprudential changes that have taken place since its facts arose and since its release.

2 In broader terms, the appeal raises the question of the proper weight to be given to any type of spousal support agreement that one of the parties subsequently wishes to have modified through an initial application in court for such support. In that sense, the matter is not restricted to spousal support agreements that contain a time-limited support arrangement or to agreements which contain a full and final release from support obligations by one or both parties.

3 The parties to this appeal, now divorced, entered into a final agreement that sought to settle all of their financial and personal affairs surrounding the breakdown of their marriage. In addition to property equalization, custody, access and support of their children, and a commercial contract between the respondent and the appellant's company, the parties agreed to release one another from any claims to spousal support. This Court must determine the proper weight to be accorded that agreement where one party subsequently makes an application for spousal support under the *Divorce Act*.

4 As we explain below, we believe that a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the *Divorce Act* as a whole should receive considerable weight. In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the Act. As we elaborate later, these general objectives include not only an equitable sharing of the consequences of the marriage breakdown under s. 15.2, but also certainty, finality and autonomy. Second, the court would ask whether, viewed from the time the application is made, the applicant has established that the agreement no longer reflects the original intention of the parties and whether the agreement is still in substantial compliance with the objectives of the Act. In contrast, the trial judge's and the Court of Appeal's approaches failed to value a determination by the parties as to what is mutually acceptable to them. We would thus allow this appeal.

5 The appellant also asks this Court to determine whether the comments and interventions of the trial judge give rise to a reasonable apprehension of bias. We will deal with these two major issues in reverse order.

II. Background

6 Linda and Eric Miglin separated in 1993 after 14 years of marriage. At the time of separation, they were 41 and 43 years old respectively and had four children aged 2 to 7 [frac 12] years.

7 Not surprisingly, the gloss with which the parties paint their marriage and their accounts of the roles and responsibilities assumed by each of them differ. Mr. Miglin claims that theirs

was a modern marriage where both spouses were also equal business partners, with Ms. Miglin advancing her career and education during the marriage. Ms. Miglin characterizes the marriage as "traditional," with Mr. Miglin managing the family's finances, making the financial decisions and giving her money when she needed it, while she was responsible for raising the children and "helping out" with the family business. Although the characterizations differ, the basic facts are not in dispute.

8 The couple met while both were employed at the Toronto Dominion Bank. Ms. Miglin was employed in an administrative capacity. Mr. Miglin was employed as a management trainee, having recently completed his Master's degree in Business Administration at Harvard University. Mr. Miglin left the bank to operate concession stores in Algonquin Park. Ms. Miglin accepted his invitation to come help with the concessions and left her employment with the bank to join him. They married a year later, in 1979. By 1983, Ms. Miglin had completed a Bachelor of Arts degree from the University of Toronto.

9 In 1984 the couple purchased the Killarney Lodge resort in northern Ontario. Mr. and Ms. Miglin were equal shareholders in the business Killarney Lodge Limited (the "Lodge"). Mr. Miglin was responsible for the financial and business aspects of the Lodge. Ms. Miglin was responsible for its day-to-day operations. Ms. Miglin characterizes this division of labour as mirroring the traditional roles each assumed in the marriage. The trial judge found that Ms. Miglin was an "effective and important component in the hotel business", and was equally responsible for its success. At the time of separation, Mr. and Ms. Miglin each received a salary of $80,500 from the net profits of the Lodge. These salaries represented roughly one half of the declared earnings of the business.

10 During the marriage and before the children reached school age, the parties lived and worked at the Lodge from May to October. They hired a babysitter to look after the children while they worked. During the off-season months of November to April, the Miglins lived in Toronto. Once some of the children reached school age, Ms. Miglin commuted back and forth between Killarney and Toronto to accommodate the children's schedules. Ms. Miglin was the children's primary caregiver.

11 The parties separated in 1993. They both retained independent legal counsel and began the difficult process of negotiating a comprehensive separation agreement. Counsel were actively involved, and it is clear from their correspondence that both counsel were well informed of the latest developments in the law. After negotiating for 15 months, the parties executed a Separation Agreement dated June 1, 1994. Attached as Schedules to the Separation Agreement are a Parenting Plan and a Consulting Agreement between Ms. Miglin and the Lodge.

12 The Separation Agreement was intended, in its own words, "to settle, by agreement, all rights, claims, demands and causes of action that each has or may have against the other including, but not

limited to claims of every nature with respect to property and support." The Separation Agreement runs to 32 pages and includes 41 numbered headings. The Separation Agreement addressed, among other things, Mr. Miglin's and Ms. Miglin's living arrangements, custody, child support, medical and dental coverage, personal property, the Lodge, another corporation owned by Mr. Miglin, debts, variation and non-compliance. The Separation Agreement is a sophisticated legal document and contains, for example, explicit provisions contingent on the outcome in the appeal to this Court respecting tax treatment of child support in *Thibaudeau v. R.*, [1995] 2 S.C.R. 627 (S.C.C.).

13 The Separation Agreement included a full and final release of any future spousal support claims. The release reads as follows:

> **10. Release of Spousal Support**
>
> a. The Husband and the Wife each agree that neither shall be obliged to make any payment or payments in the nature of support, or any similar payment, whether periodic or by way of lump sum, directly or indirectly, to or for the benefit of the other. Without restricting the generality of the foregoing, the Husband and the Wife further agree that neither of them shall maintain, commence or prosecute or cause to be maintained, commenced or prosecuted any action against the other of them for support or interim support pursuant to the Family Law Act, the Succession Law Reform Act or any comparable Provincial legislation in force from time to time, or the Divorce Act, or any successor or similar legislation whereby a spouse or former spouse is given a cause of action against his or her spouse or the spouse's estate for relief in the nature of support.
>
> b. The Wife specifically abandons any claims she has or may have against the Husband for her own support. The Wife acknowledges that the implications of not claiming support in this Agreement have been explained to her by her solicitor. At no time now or in the future, including any future divorce proceedings, or upon the Husband's death shall the Wife seek support for herself, regardless of the circumstances.
>
> c. The Husband specifically abandons any claims he has or may have against the Wife for his own support. The Husband acknowledges that the implications of not claiming support in this Agreement have been explained to him by his solicitor. At no time now or in the future, including any future divorce proceedings, or upon the Wife's death shall the Husband seek support for himself, regardless of the circumstances.
>
> d. The parties are aware that this is a final Agreement and intended to be a final break between them. No further claims will be made against either party by the other arising from the marriage or upon the dissolution thereof, including any claims under Section 15 of the Divorce Act or upon the death of one of them. Both parties are aware of the possibilities of fluctuation in their respective incomes and assets, are cognizant of the possible increases and decreases in the cost of living and are aware that radical, material, profound or catastrophic changes may

affect either of them. Each party is prepared to accept the terms of this Agreement as a full and final settlement and waive all further claims against the other, except a claim to enforce the terms of this Agreement or for dissolution of their marriage. The parties specifically agree and acknowledge that there is no causal connection between the present or any future economic need of either party and their marriage. No pattern of economic dependency has been established in their marriage.

e. The parties agree that the divorce judgment shall be silent as to spousal support.

14 The Separation Agreement appears exhaustive in its attempts to disentangle the economic affairs of Mr. Miglin and Ms. Miglin. Besides the full and final release of any spousal support, the Separation Agreement also includes a pension plan release and release of estates.

15 The Parenting Plan provided that the parents would share responsibility for the children, but that the primary residence of the four children was to be with Ms. Miglin. By the time of the trial, the eldest child was residing with Mr. Miglin.

16 When Mr. Miglin and Ms. Miglin separated, both the Lodge and the matrimonial home had net values of approximately $500,000. The Separation Agreement provided that Ms. Miglin would transfer to Mr. Miglin her one-half interest in the Lodge in exchange for the transfer to her of his one-half interest in the matrimonial home. Mr. Miglin agreed to assume sole responsibility for the mortgage on the matrimonial home. The Separation Agreement also provided that Ms. Miglin would receive child support in the amount of $1,250 per child, per month, for an annual total of approximately $60,000, taxable in her hands and tax-deductible to Mr. Miglin, subject to an annual cost of living increase.

17 The Consulting Agreement, executed between the Lodge and Ms. Miglin, provided Ms. Miglin with an annual salary of $15,000, subject to a cost of living increase. The Consulting Agreement required Ms. Miglin to perform services detailed in the contract, including maintenance of the mailing list, preparation of an annual newsletter, advertising and promotion, and attendance at trade shows. The contract was for a term of five years with an option to renew on the consent of both parties.

18 The parties' Divorce Judgment was granted effective January 23, 1997. It was silent with respect to spousal support, child support, and child custody and access arrangements.

19 After entering into the Separation Agreement, the parties were able to maintain an amicable relationship and an *ad hoc* parenting arrangement developed. Consequently, the parties did not adhere rigidly to the access arrangements set out in the Parenting Plan. The parties' relationship deteriorated in 1997, however, when Ms. Miglin underwent a religious conversion and sold the matrimonial home in Toronto to move to Thornhill, Ontario. Ms. Miglin eventually sought and received an order preventing Mr. Miglin from attending at the children's school. This order was

later rescinded, but attests to the degree of animosity that arose between the parties. It is in the midst of this turmoil that in June 1998 Ms. Miglin brought an application for sole custody, child support and spousal support.

III. Relevant Statutory Provisions

20

Divorce Act, R.S.C. 1970, c. D-8, s. 11

11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(*a*) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the wife,

. . . . .

(*b*) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the husband,

. . . . .

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), as amended

9. (2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

. . . . .

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(*a*) the length of time the spouses cohabited;

(*b*) the functions performed by each spouse during cohabitation; and

(*c*) any order, agreement or arrangement relating to support of either spouse.

. . . . .

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(*a*) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(*b*) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(*c*) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(*d*) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(*a*) a support order or any provision thereof on application by either or both former spouses;

. . . . .

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

. . . . .

(7) A variation order varying a spousal support order should

(*a*) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(*b*) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(*c*) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(*d*) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

IV. Judicial History

A. Ontario Superior Court of Justice - (1999) 3 R.F.L. (5th) 106 (Ont. S.C.J.)

21 Tobias J. held that under an application for corollary relief under s. 15 of the 1985 Act, the court is only required to determine whether the Separation Agreement is consistent with the social policies and objectives set out in s. 15(7) (now s. 15.2(6)). He rejected the argument that the court is required to determine a threshold issue relating to a change of circumstances. Tobias J. found that the Separation Agreement treated Ms. Miglin unfairly and commented that he considered the Consulting Agreement to be "thinly veiled spousal support" orchestrated to provide a tax advantage for Mr. Miglin. Based on his finding that Mr. Miglin had an annual income of $200,000, Tobias J. awarded Ms. Miglin spousal support in the amount of $4,400 per month for a term of five years. He ordered Mr. Miglin to pay monthly child support in the amount of $3,000, based on the *Federal Child Support Guidelines*, SOR/97-175, ss. 15-20, amount applicable for his income, for the remaining three children residing primarily with Ms. Miglin.

B. Ontario Court of Appeal (2001) 53 O.R. (3d) 641 (Ont. C.A.)

22 Abella J.A., for the court, held that in light of the new language of the 1985 Act (as compared to the *Divorce Act*, R.S.C. 1970, c. D-8 (the "1968 Act")) and the revised approach to spousal support developed by this Court, the *Pelech* trilogy no longer applied. She adopted a two-stage inquiry for the variation of a subsisting support agreement in an application for corollary relief under s. 15.2. The first, threshold stage is to determine whether there has been a material change in circumstances. This change need not be causally connected to the marriage. Once the material change threshold is met, the second stage requires the court to determine the amount of spousal support justified (under the statutory principles set out in s. 15 of the 1985 Act and subsequent Supreme Court jurisprudence).

23 Applying her analysis to the facts of this case, she held that the material change threshold was met through a combination of two factors: Ms. Miglin's child-care responsibilities had increased as compared to what was initially anticipated and the Consulting Agreement was terminated. Abella J.A. agreed with Tobias J. that the Consulting Agreement was "thinly disguised" spousal support.

Abella J.A. upheld the trial judge's quantum of spousal support but removed the five-year term. The amount of child support was adjusted based on a concession by Ms. Miglin that Mr. Miglin's income was $186,130 annually. This resulted in a reduction in the monthly amount of child support for the three children from $3,000 to $2,767.

24 Abella J.A. rejected Mr. Miglin's argument that the trial judge's comments and interventions had raised a reasonable apprehension of bias.

V. Analysis

A. Reasonable Apprehension of Bias

25 Mr. Miglin urged this Court to order a new trial on the basis that the interventions by the trial judge throughout the proceedings, by reason of their frequency, timing, content and tone, gave the trial an unmistakable appearance of unfairness.

26 The appropriate test for reasonable apprehension of bias is well established. The test, as cited by Abella J.A., is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), at para. 111, *per* Cory J.; *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at pp. 394-95, *per* de Grandpré J. A finding of real or perceived bias requires more than the allegation. The onus rests with the person who is alleging its existence (*S.* (*R.D.*), *supra*, at para. 114). As stated by Abella J.A., the assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. We see no reason to interfere with the Court of Appeal's assessment of the record, nor with its conclusion that although the trial judge's comments were intemperate and his interventions at times impatient, they do not rise to the level necessary to establish a reasonable apprehension of bias.

27 We wish to stress, however, how critical it is for trial judges to maintain at all times an appearance of impartiality and fairness when presiding over acrimonious matrimonial disputes. Trying as the conduct of the parties may be, trial judges must be alive to the emotionally charged nature of the proceedings. Parties to litigation of this kind may feel particularly vulnerable and sensitive. Trial judges should measure the wisdom of their interventions accordingly.

B. Spousal Support

28 As mentioned earlier in these reasons, this appeal is concerned with the continued application of the *Pelech* trilogy. The three cases making up this trilogy were decided immediately after the promulgation of the 1985 Act, but dealt with situations governed by the 1968 Act. Those cases establish a change-based test under which a court is permitted to override a final agreement on

spousal support only where there has been a significant change in circumstances since the making of the agreement. The test establishes a threshold that is defined as a radical and unforeseen change that is causally connected to the marriage. It does not deal with the fairness of the agreement or its attention to the objectives of the *Divorce Act*. It is designed to promote certainty and to facilitate a clean break in the relationship of the parties, focussing on individual autonomy and respect for contracts. Since the release of the trilogy, the law of spousal support has evolved. A compensatory approach was adopted in *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.). A more nuanced approach was developed in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.). Self-sufficiency, autonomy and finality remain relevant factors in our case law, but many question whether the emphasis put on them by the trilogy remains. The question posed is whether agreements concluded with the intent that they be final can, under the 1985 Act, be overridden on grounds other than those defined in the trilogy.

1. Does the Pelech Trilogy Still Apply?

29 The issues in the present appeal resemble those facing this Court in the *Pelech* trilogy. Despite significant changes in the intervening years, the basic question remains: What role should a pre-existing agreement play in determining an application for spousal support? Writing for the majority of this Court in *Pelech*, Wilson J. described the issue the following way, at p. 382:

> While it is generally accepted that the existence of an antecedent settlement agreement made by the parties is an important fact, there is a wide range of views as to how this affects the legal principles governing the exercise of the discretion conferred in s. 11 [of the 1968 Act].

30 Except for the statutory reference, these words could easily have been written by us today. The statutory and jurisprudential context, however, is of utmost importance. As counsel for both parties recognized, the resolution of this appeal rests primarily on an exercise in statutory interpretation. The revision of the *Divorce Act* in 1985 and changing judicial and societal understandings of the function of spousal support make it appropriate for this Court to revisit Parliament's intention regarding agreements relating to spousal support.

31 The facts and reasoning of the three cases constituting the trilogy have attracted substantial scholarly and judicial commentary. We do not propose to review those decisions in detail again here. Suffice it to say that the *Pelech* trilogy has come to stand for the proposition that a court will not interfere with a pre-existing agreement that attempts fully and finally to settle the matter of spousal support as between the parties unless the applicant can establish that there has been a radical and unforeseen change in circumstances that is causally connected to the marriage. The trilogy represents an approach to spousal support that has been described as a "clean break," emphasising finality and the severing of ties between former spouses. As Wilson J. put it in *Pelech*, at p. 851:

> [I]t seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other.

32 With the coming into force of the 1985 Act and the release of the trilogy the following year, confusion ensued as to whether the trilogy had any continued application. The confusion may stem from two main factors. On the one hand, the 1968 Act, while providing less direction on the issue of support, could be interpreted as not inconsistent with the new, more detailed statute. Indeed, Professor M. Bailey has suggested that the trilogy was more consistent with the new Act because the latter explicitly provides that agreements are to be a factor in determining support and because the support objectives outlined in s. 15.2(4) reflect the trilogy's emphasis on self-sufficiency and the necessity of linking need to the marriage or its breakdown. ("Case Comment: *Pelech, Caron*, and *Richardson* " (1989-90), 3 *C.J.W.L.* 615, at p. 624).

33 On the other hand, some members of the judiciary and several scholars recognized the potential difficulties in applying the *Pelech* trilogy in the new statutory context. As Misener L.J.S.C. stated in *Corkum v. Corkum* (1988), 14 R.F.L. (3d) 275 (Ont. H.C.), at p. 286:

> I am obliged to say that I have the greatest difficulty in my own mind reconciling the direction that Parliament has given the courts in s. 15(5) [now s. 15.2(4)] and (7) [now s. 15.2(6)], in exercising its discretion to order spousal maintenance and to fix the amount and duration of it, with the application of the principle set forth in *Richardson*. Section 15(5) specifically directs the court to consider the provisions of a separation agreement as only *one* of three factors included in the phrase "other circumstances". How then can the agreement be made the only factor to be considered in all but the most exceptional circumstances? Section 15(7) directs the court to fix the amount of and the duration of support with a view to accomplishing certain specified objectives. The almost automatic adoption of the terms of a separation agreement will in many cases -- and indeed in this case -- at least tend to defeat one or more of these objectives. One would think that any order that would tend to have such a result would not be permissible in the proper exercise of the court's discretion. [Emphasis added.]

34 In addition to generating some confusion, the trilogy received no small degree of criticism, from both legal scholars and family law practitioners. The main thrust of the criticism levied at the trilogy was summarized by McLachlin J. (as she then was) in a speech delivered to the National Family Law Program over a decade ago. McLachlin J. suggested that the "joint venture model" of marriage, which viewed married persons as autonomous individuals entering into equal partnerships who should and do take responsibility for themselves, informed the economic self-sufficiency or "clean break" theory of spousal support endorsed by this Court in *Pelech*.

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Although McLachlin J. fully endorsed the model of equality on which the trilogy was based, she cautioned that that model did not necessarily conform to everyone's reality. This disjuncture, in her view, explained much of the criticism to which the trilogy has been subjected (The Honourable Madame Justice B. McLachlin, "Spousal Support: Is it Fair to Apply New-Style Rules to Old-Style Marriages?" (1990), 9 *Can. J. Fam. L.* 131).

35 Since the trilogy, decisions from this Court have recognized a shift in the normative standards informing spousal support orders. In *Moge*, *supra*, at p. 849 L'Heureux-Dubé J. held for the majority that the underlying theme of the 1985 Act is the "fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown". In making an order for support, she noted that the court must have regard to *all four* of the objectives of spousal support, none of which is paramount. Self-sufficiency is only one of those objectives and an attenuated one at that (to be promoted "insofar as practicable" (p. 852)). L'Heureux-Dubé J. concluded that Parliament appears to have adopted a compensatory model of support, one which attempts to ensure the equitable sharing of the economic consequences of marriage and its breakdown.

36 Regarding the trilogy specifically, L'Heureux-Dubé J. held that it had no application to the circumstances of that case, where there had been no final agreement between the parties. In her view, the trilogy did not address issues of entitlement to support in the absence of an agreement. Nevertheless, her reasoning with respect to the "compensatory model" of support only served to fuel debate as to whether the *Pelech* trilogy still governed at all. See e.g. A. Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 749, at pp. 781-82.

37 This Court's decision in *B. (G.) c. G. (L.)*, [1995] 3 S.C.R. 370 (S.C.C.), further illustrated the questions relating to the trilogy's continued relevance. Sopinka J., writing for a four-member majority, held that the facts did not require the Court to address directly the continued validity of the trilogy. *G.* (*L.*) involved an application for variation to a consent support order, under s. 17 of the *Divorce Act*, arising out of a pre-existing agreement between the parties. The parties had agreed to an amount of spousal support and to certain conditions for reducing or eliminating entitlement. Sopinka J. held that the trial judge applied the correct test of material change, enunciated by this Court in *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.). He further held that there was no basis to interfere with the trial judge's findings of fact and, accordingly, that the threshold of material change had not been met. He noted, finally, that the Court of Appeal had erred in applying a presumption of self-sufficiency to the recipient wife and, accordingly, in granting the husband's application for a reduction in the quantum of his support obligation.

38 In contrast, L'Heureux-Dubé J., writing for a three-member minority, addressed the trilogy directly. She concluded that it is no longer good law. In language cited and relied on extensively by Abella J.A. in the present appeal, L'Heureux-Dubé J. explained that the new 1985 Act adopted

"as its underlying philosophy a partnership in marriage and, at the time of a divorce, an equitable division of its economic consequences between the spouses" (*G.* (*L.*) at para. 41). She drew on this Court's approach to spousal support under the 1985 Act, as laid out in *Moge*, *supra*. She noted in particular that the presence of a separation agreement is only one factor, albeit an important one, that a court must consider in making an initial order for support. In her view, the *Divorce Act* accords this factor no greater weight than any other, making the trilogy -- and its emphasis on self-sufficiency to the exclusion of other objectives -- incompatible with the new Act.

39 Whereas the 1968 Act refers only to the "conduct of the parties and the condition, means, and other circumstances of each of them" (s. 11(1)), the 1985 Act abandons the reference to the conduct of the parties and makes explicit both the objectives of spousal support and the factors to be considered in making an order. That these objectives can and do often conflict and compete suggests an intention on the part of Parliament to vest in trial judges a significant discretion to assess the weight to be given each objective against the very particular backdrop of the parties' circumstances. Moreover, we agree that the importance given to self-sufficiency and a "clean break" in the jurisprudence relying on the trilogy is not only incompatible with the new Act, but too often fails to accord with the realities faced by many divorcing couples. Indeed, in *Bracklow*, *supra*, this Court recognized how these different realities also mirror competing normative standards justifying entitlement to spousal support. McLachlin J. (as she then was) noted for the unanimous Court as follows, at para. 32:

> Both the mutual obligation model and the independent, clean-break model [of spousal support] represent important realities and address significant policy concerns and social values. The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute.

40 In light of these developments in the understanding of spousal support, the question "Does the trilogy apply or not?" is perhaps too mechanical, and the answer does not turn solely on the existence of a new Act. Parliament's recognition of competing objectives of spousal support renders the trilogy's privileging of "clean break" principles inappropriate, but this is not to suggest that the policy concerns that drove the trilogy are wholly irrelevant to the new legislative context. On the contrary, the objectives of autonomy and finality, as well as the recognition that the parties may go on to undertake new family obligations, continue to inform the current *Divorce Act* and remain significant today. What has changed is the singular emphasis on self-sufficiency as a policy goal to the virtual exclusion of other objectives that may or may not be equally pressing according to the specific circumstances of the parties. Such an emphasis on self-sufficiency is inconsistent with both the compensatory model of support developed in *Moge*, and the non-compensatory model of support developed in *Bracklow*. It is also inconsistent with the interpretive point made in both cases that no single objective in s. 15.2(6) is paramount: *Bracklow*, at para. 35; *Moge*, at p. 852. Nevertheless, promoting self-sufficiency remains an explicit legislative objective.

41 In addition to these competing policy goals, we also note that the current statutory language does not support direct incorporation of the trilogy test. In *Pelech*, Wilson J. held that an application for variation of spousal support required the applicant to demonstrate a radical and unforeseen change of circumstances causally related to the marriage, pursuant to s. 11(2). In *Richardson*, *supra*, she further held at p. 867 that the same test applied to initial applications for support where a pre-existing agreement that dealt finally with support was present:

> In my view, the only difference under the two subsections is that in a s. 11(1) application the change being considered will have occurred between the signing of the agreement and the application for the decree *nisi* whereas in the s. 11(2) application the change will have occurred between the granting of the decree *nisi* and the application for variation.

42 The current statutory context, however, is quite different in that Parliament has explicitly directed the court to consider a change in circumstances only where the application is for variation to an existing spousal support order. Section 17(4.1) of the 1985 Act provides as follows:

> **17**. (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

43 Section 15.2 provides no such similar direction. Rather, the court is explicitly directed to take into account certain non-exhaustive factors, and instructed that a support order should advance certain specified objectives. On a plain reading of the statute, then, there is simply no basis for importing a change threshold, radical, material or otherwise, into the provision. Indeed, on an initial application for support, the very concept of "change of circumstances" has no relevance, except to the limited extent that there might have been a pre-existing order or agreement that needs to be considered.

44 How, then, should trial judges exercise the discretion vested in them by virtue of the Act where a party who makes an initial application for support has previously entered into an agreement that purports to have settled all matters between the spouses? How should trial judges assess the appropriate weight to be given such an agreement where s. 15.2 of the 1985 Act appears to accord it no greater priority than other factors?

45 It is helpful initially to identify several inappropriate approaches. In our view, the answer to these questions does not lie in adopting a near-impermeable standard such that a court will endorse any agreement, regardless of the inequities it reveals. Neither, however, does the solution lie in unduly interfering with agreements freely entered into and on which the parties reasonably expected to rely. It is also not helpful to read between the lines in s. 15.2 so as to identify a single

implicit overriding legislative objective overshadowing the factors specifically set out. The fact that judicial and societal understandings of spousal support have changed since the release of *Pelech* and the adoption of admittedly competing factors in s. 15.2(6) does not lead to an unfettered discretion on the part of trial judges to substitute their own view of what is required for what the parties considered mutually acceptable. In this respect, we agree in principle with Wilson J.'s comments in *Pelech*, *supra*, at p. 853:

> Where parties, instead of resorting to litigation, have acted in a mature and responsible fashion to settle their financial affairs in a final way and their settlement is not vulnerable to attack on any other basis, it should not, in my view, be undermined by courts concluding with the benefit of hindsight that they should have done it differently.

46 Nevertheless, the language and purpose of the 1985 Act militate in favour of a contextual assessment of all the circumstances. This includes the content of the agreement, in order to determine the proper weight it should be accorded in a s. 15.2 application. In exercising their discretion, trial judges must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown with the parties' freedom to arrange their affairs as they see fit. Accordingly, a court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the *Divorce Act*. This is particularly so when the pre-existing spousal support agreement is part of a comprehensive settlement of all issues related to the termination of the marriage. Since the issues, as well as their settlement, are likely interrelated, the support part of the agreement would at times be difficult to modify without putting into question the entire arrangement.

47 Having determined that the narrow test enunciated in the *Pelech* trilogy for interfering with a pre-existing agreement is not appropriate in the current statutory context, we now consider the approaches taken by the courts below in this appeal.

2. Did the Trial Judge Err in Applying a "Fairness" Test?

48 The trial judge was correct in finding that the presence of a duly executed pre-existing agreement between the parties did not oust the jurisdiction of the court to make an order for spousal support. He was also correct in proceeding under s. 15.2 (then s. 15) of the Act and not incorporating the "material change" requirement of s. 17 into Ms. Miglin's application for an initial order. Finally, he was correct in finding that the trilogy's threshold test of a radical change of circumstances, recently articulated and applied in *Santosuosso v. Santosuosso* (1997), 32 O.R. (3d) 143 (Ont. Div. Ct.), was not appropriately viewed as governing s. 15 of the 1985 Act. Tobias J. found, at para. 24, that under s. 15 of the Act "the court is provided with authority to scrutinize a separation agreement without any requirement to find radical unforeseen changes".

49 With the threshold requirement removed, Tobias J. went on to consider the scope of the court's discretion to scrutinize the pre-existing agreement. He reasoned as follows at para. 28:

> Section 15(5)(c) [now s. 15.2(4)(c)] provides the court with the authority to scrutinize the separation agreement and to decide whether its provisions conform to the policies enunciated in s. 15(7) [now s. 15.2(6)]. If the separation agreement fails to provide for either spouse in a fashion consistent with these objectives, it is the obligation of this court to undertake a review under s. 15(5) [now s. 15.2(4)] of the conditions, means, needs, and other circumstances of each spouse, and any child of the marriage including the length of time the spouses cohabited, the functions performed by the spouses during cohabitation, and, as well, any order, agreement, or arrangement relating to the support of the spouse or child.

50 Applying the above test, Tobias J. found, at para. 27, that the Separation Agreement suffered from "a fundamental inequality of matrimonial asset distribution" because it provides for the transfer of the one-half interest of the applicant in the hotel corporation for the sum of $250,000.00 and proposes to replace her annual salary of $80,200.00 with the consultation contract which provided $15,000.00 per annum... The separation agreement provides that the Respondent convey to the applicant his one-half interest of $250,000.00 in the matrimonial home, a non-producing income asset, for the one-half-interest of the applicant in the hotel corporation having the same value.

Accordingly, Tobias J. disregarded the spousal support waiver and, following his application of the spousal support objectives to the facts of this case, set spousal support at $4,400 per month for five years.

51 It is settled that Parliament has vested in courts the discretion to review and reject the terms of a pre-existing agreement: *Pelech*, *supra*, at p. 827. Nevertheless, this discretion should not be exercised lightly. A purported inequality in asset distribution is not necessarily a sufficient basis to disregard the parties' declared intention to be bound by the terms of the agreement they reached. In fact, here there was no such inequality, as properly admitted by counsel for the respondent during the hearing of this appeal. Further, we do not accept that the weight to be afforded a pre-existing agreement should be determined solely by the extent to which that agreement is consistent with the specific objectives of spousal support orders listed in s. 15.2(6) of the Act. Such an interpretation is not consistent with the language and objectives of the *Divorce Act* more generally.

52 The objectives listed in s. 15.2(6) are designed to guide trial judges in determining the quantum, if any, and duration of a spousal support award made in an order of the court. Such an order is made either in the absence of an agreement between the parties or in substitution for some unacceptable terms in a proposed agreement submitted to the court for approval. In our view, these objectives are not intended to dictate by themselves the precise terms of an enforceable negotiated agreement dealing with spousal support, distribution of assets and child support. In the first place, the language of s. 15.2(6) is suggestive only:

> **15.2**(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> . . . . .
>
> [Emphasis added.]

Compare this provision with the mandatory language adopted in s. 15.2(4), which expressly directs the court to take certain factors into account in exercising its discretion to make an award:

> **15.2**(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> . . . . .
>
> [Emphasis added]

Nothing in these provisions indicates a duty on the court to subject a comprehensive agreement to scrutiny based solely on the objectives in s. 15.2(6) or to assume that any agreement by the parties will be enforceable only when its provisions substantially mirror what a trial judge, unfamiliar with the parties' motivations and subjective understanding of their relationship, would have awarded on the basis of these criteria alone.

53 The objectives in s. 15.2(6) do not accommodate within them the compelling objectives of finality, certainty and autonomy that Parliament has also seen fit to endorse in the *Divorce Act*. It should not be overlooked that s. 9(2) of the Act imposes a positive duty on counsel to advise clients of alternatives to litigation:

> **9**. (2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

54 Section 9(2) of the 1985 Act clearly indicates Parliament's intention to promote negotiated settlement of all matters corollary to a divorce. This, coupled with the suggestive language of s. 15.2(6) and the mandatory language of s. 15.2(4), suggests that more must be shown than mere deviation from what a trial judge would have awarded in an order before it is appropriate for the court to disregard the parties' pre-existing agreement. Without some degree of certainty that the agreement will be respected by the court, parties have little incentive to negotiate a settlement and then to comply with the terms of their undertakings. The policy goal underlying s. 9(2) would then be entirely defeated.

55 Furthermore, exclusive focus on the s. 15.2(6) objectives leaves no room for the parties to apply their own values and pursue their own objectives in reaching a settlement. The objectives in s. 15.2(6) may not sufficiently account for the many ways in which couples structure their marital relationship and face its dissolution. To impose on all separating or divorcing persons an obligation to adhere strictly and exclusively to the statutory spousal support objectives denies them the autonomy to organize their lives as they see fit and to pursue their own sense of what is mutually acceptable in their individual circumstances. Accordingly, the spousal support objectives should not operate so as to preclude parties from bringing their own concerns, desires and objectives to the table in negotiating what they view as a mutually acceptable agreement, an agreement they consider to comply substantially with the objectives of the Act. In that way, the policy goals of autonomy and certainty will be rendered consistent with Parliament's recognition of "the diverse dynamics of the many unique marital relationships" (*Bracklow*, *supra*, at para. 35).

56 This is not to suggest that courts should prioritize the policy goal of autonomy to the exclusion of all other concerns. Nor are we suggesting that courts should condone agreements that manifestly prejudice one party. The trial judge would endorse a seemingly unlimited discretion to disregard pre-existing agreements and impose his own view of what, in light of the spousal support objectives, constitutes equitable sharing of the consequences of the marriage breakdown. In contrast, we are of the view that what constitutes equitable sharing in this sense cannot be informed solely by the list of objectives set out in s. 15.2(6) of the Act. Unlike child support, for which relatively clear normative standards have been set, spousal support rests on no similar social consensus. See M. Shaffer and C. Rogerson, "Contracting Spousal Support: Thinking Through *Miglin*", Paper originally presented to the National Family Law Program, in Kelowna, B.C., July 14-18, 2002, at p. 9. We note too that Parliament's adoption of broad, and at times competing, objectives for spousal support contrasts with its promulgation of uniform Child Support Guidelines. The discretion granted to trial judges respecting spousal support also contrasts with the detailed default provision for equalization of matrimonial property set out in s. 5 of the *Family Law Act*, R.S.O. 1990, c. F.3, and the obligatory regime of the family patrimony in arts. 414 *et seq.* of the *Civil Code of Québec*, S.Q. 1991, c. 64. Therefore, what is "fair" will depend not only on the objective circumstances of the parties, but also on how those parties conceive of themselves, their marriage and its dissolution, as well as their expectations and aspirations for the future.

57 We are of the view that, rather than trying to measure whether the terms of a comprehensive agreement advance the objectives of support set out in s. 15.2(6), trial judges must consider the agreement more broadly in light of all the objectives of the *Divorce Act*. These objectives of the Act as a whole, as compared with the objectives set out in s. 15.2(6), include the compelling policy goals of certainty, autonomy and finality. These legislative objectives require the trial judge to consider the extent to which the agreement represents a final settlement of the issues, negotiated under unimpeachable conditions, to which both parties agreed and on which each of them intended to rely. It is only then that the judge will consider whether the agreement must nevertheless be

set aside in full or in part because it is not in substantial compliance with the broader objectives of the Act.

58 Accordingly, we cannot accept the trial judge's approach to assessing the appropriate weight to be given the pre-existing agreement.

3. Did the Court of Appeal Err in Applying a "Material Change" Test?

59 Abella J.A. began by agreeing with the trial judge that the application was properly brought under s. 15 of the *Divorce Act*, as an initial application for corollary relief. Regarding the applicability of the *Pelech* trilogy to the present statute, Abella J.A. held that she would not conclude that this Court had based its decision on a different statute from the one on which it expressly stated it was relying. Following a review of the jurisprudence and scholarly literature since the trilogy, she reasoned at para. 60:

> In my view, based on the new language in the 1985 *Divorce Act*, and the revised approach to support developed by the Supreme Court of Canada in accordance with those statutory changes, it is difficult to justify the continued application of the trilogy which emanated from a completely different statutory scheme. The language in s. 15 of the 1985 *Divorce Act* is so dramatic a departure from the linguistic and conceptual minimalism of s. 11 of the former *Divorce Act* that statutory interpretations emanating from the old legislation, such as the trilogy, cannot, it seems to me, continue to apply.

Abella J.A commented further at para. 65, that in the *Divorce Act*,

> Agreements are not, notably, given any primacy, nor is there any explicit statutory direction for how the existence of an agreement is to be factored into an assessment of whether or how much support should be awarded.

60 We agree with Abella J.A. that the inclusion of "any order, agreement or arrangement" in s. 15.2(4)(*c*) suggests an intention on the part of Parliament to provide parties with a certain degree of confidence that these prior determinations, whether in the form of an order pursuant to a provincial statute, a formalized separation agreement, or some other arrangement between the parties, will not be easily disturbed. We further agree with Abella J.A. that there is no reason for subjecting a pre-existing agreement to a different or higher threshold than that for an agreement incorporated into an order. As she notes, where the parties properly consider a court order approving their agreement for support to be presumptively binding, it is difficult conceptually to see why a separation agreement that the parties view as no less binding should be subjected to a different threshold. A different threshold might provide an inappropriate incentive militating either for or against judicial approval of agreements.

61 We disagree, however, with Abella J.A.'s importation of the "material change" test developed for s. 17 of the Act (see *Willick*, *supra*) into s. 15.2 in respect of pre-existing agreements. As we noted earlier, the statutory language simply does not support this. Whereas s. 17 of the Act directs the court to satisfy itself that a change has occurred, s. 15.2 respecting initial support applications does not. Rather, s. 15.2(4) requires the court to consider the length of cohabitation, the roles of the parties during the marriage, and any orders, agreements or arrangements. This explicit direction cannot be avoided, cast, as it is, in mandatory language.

62 As we shall explain below, consistency between treatment of consensual agreements incorporated into orders and those that are not is achieved another way. It is achieved when judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescision, rather than a mere variation of the order.

63 As we shall discuss more fully, however, changes to the parties' circumstances after completion of a separation agreement are obviously not wholly irrelevant considerations in assessing the weight to be given to a pre-existing agreement at the time of the application. In our view, the court should focus not on change as a threshold matter, leading to the total setting aside of an agreement, but rather on the totality of the circumstances, of which a change in the parties' circumstances will likely be an element. Put another way, it is not the existence of change *per se* that matters but whether, at the time of the application, all the circumstances render continued reliance on the pre-existing agreement unacceptable.

4. The Proper Approach to Applications Under Section 15.2

64 An initial application for spousal support inconsistent with a pre-existing agreement requires an investigation into all the circumstances surrounding that agreement, first, at the time of its formation, and second, at the time of the application. In our view, this two-stage analysis provides the court with a principled way of balancing the competing objectives underlying the *Divorce Act* and of locating the potentially problematic aspects of spousal support arrangements in their appropriate temporal context. Before doing so, however, it is necessary to discuss some of the interpretive difficulties affecting spousal support.

65 As a starting point, we endorse the reasoning of this Court in *Moge*, *supra*, where L'Heureux-Dubé J. held that the spousal support objectives of the *Divorce Act* are designed to achieve an equitable sharing of the economic consequences of marriage and marriage breakdown. By explicitly directing the court to consider the objectives listed in s. 15.2(6), the 1985 Act departs significantly from the exclusive "means and needs" approach of the former statute. We note, however, that there is a potential tension between recognizing any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown and promoting, even if only to the extent practicable, the economic self-sufficiency of each spouse (ss. 15.2(6)(*a*), and

(*d*)). The way to reconcile these competing objectives is to recognize that the meaning of the term "equitable sharing" is not fixed in the Act and will, rather, vary according to the facts of a particular marriage. Parliament, aware of the many ways in which parties structure a marriage and particularly its economic aspects, drafted legislation broad enough that one cannot say that the spousal support provisions have a narrow fixed content. Contrasted with the former Act, then, these objectives expressly direct the court to consider different criteria on which to base entitlement to spousal support, while retaining the objective of fostering the parties' ability to get on with their lives.

66 The role that these objectives was intended to play, however, must be understood in the proper statutory context. Whether by way of an initial application or an application to vary, the criteria listed in s. 15.2(6) and s. 17(7) pertain to spousal support orders imposed by the court. Nowhere in the *Divorce Act* is it expressed that parties *must* adhere strictly, or at all, to these objectives in reaching a mutually acceptable agreement. Rather, the listed objectives relate only to orders for spousal support, that is, to circumstances where the parties have been unable to reach an agreement. Moreover, the positive obligation that the Act places on counsel to advise their clients of alternatives to litigation, noted above, indicates Parliament's clear conception of the new divorce regime as one that places a high premium on private settlement. Parliament's preference appears to be that parties settle their dispute, without asking a court to apply s. 15.2(6) to make an order. This is not to suggest that the objectives are irrelevant in the context of a negotiated agreement. The parties, or at least their counsel, will be conscious of the likely outcome of litigation in the event that negotiation fails. Consideration of the statutory entitlements will undoubtedly influence negotiations. But the mutually acceptable agreement negotiated by the parties will not necessarily mirror the spousal support that a judge would have awarded. Holding that any agreement that deviates from the objectives listed in s. 15.2(6) be given little or no weight would seriously undermine the significant policy goal of negotiated settlement. It would also undermine the parties' autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns. Such a position would leave little room to recognize the terms that the parties determined were mutually acceptable to them and in substantial compliance with the objectives of the *Divorce Act*.

67 Having said this, we are of the view that there is nevertheless a significant public interest in ensuring that the goal of negotiated settlements not be pursued, through judicial approbation of agreements, with such a vengeance that individual autonomy becomes a straightjacket. Therefore, assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties' interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular.

68 Each of the parties in this appeal has suggested a model for the exercise of judicial discretion in the context of a s. 15.2 application. The appellant submits that the proper test for determining the weight due a pre-existing agreement mirrors that adopted by several provincial legislatures in

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statutes dealing with spousal support. In Ontario, for example, the *Family Law Act* confers on the court a discretion to set aside a domestic contract in certain circumstances. Concerning the court's exercise of its supervisory discretion, s. 33(4) provides as follows:

> **33**. (4) The court may set aside a provision for support or a waiver of the right to support in a domestic contract or paternity agreement and may determine and order support in an application under subsection (1) although the contract or agreement contains an express provision excluding the application of this section,
>
> > (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances [in French: *situation inadmissible*]; [Emphasis added.]

69 Counsel for the appellant urges this Court to adopt a similar test of "unconscionable circumstances". She suggests that these provisions are directed to relieve unconscionable circumstances at the time of the support application, rather than to offer relief from an agreement that was unconscionable at the time of signing. In the appellant's view, the latter situation can be remedied in accordance with the general law of contract.

70 The appellant's counsel further submits that the "unconscionable circumstances" test gives sufficient weight to the binding nature of domestic contracts while being flexible enough to redress gross inequities. Moreover, she argues that it avoids the difficulties that arise where both the sufficiency and the foreseeability of "change" form part of the test. Finally, she submits that, because it already appears in several provincial regimes, such a test has the added benefit of offering a degree of uniformity to an important area of law.

71 In contrast, counsel for the respondent proposes a more searching standard of review. He proposes the following test, at para. 123 of his factum:

> On an originating application for spousal support, where spousal support has been released or a time limited support arrangement has ended, examining a prior agreement as a whole, and having regard to the factors and objectives of a spousal support order listed in section 15.2 of the *Divorce Act*, a court should award reasonable spousal support to a claimant spouse where:
>
> > (a) the spousal support provisions of the previous agreement did not reasonably reflect the factors and objectives of section 15.2 of the *Act* at the time the agreement was executed or, in other words, where the spousal support provisions in the previous agreement were not within the generous ambit within which reasonable disagreement is possible; or
> >
> > (b) the provisions of the agreement have resulted in unfair circumstances such that the agreement does not meet the factors and objectives of the *Divorce Act* as anticipated.

72 We note, in passing, that neither of the proposals put forth by the parties resembles the tests adopted in the courts below. Indeed, counsel for both parties have provided this Court with able submissions on the unworkability of both the trial judge's loosely crafted "fairness" test and the Court of Appeal's "material change" test. We also note that the differences between the proposals put forth by the parties are subtle. Each reflects an attempt to balance the competing objectives at work in the *Divorce Act*. The difference lies in how that balance is ultimately struck.

73 In our view, there is merit to each of these positions. Nevertheless, we believe that the approach that will provide both negotiating spouses and, failing agreement, courts with a principled and consistent framework is not that proposed by either party. The test should ultimately recognize the particular ways in which separation agreements generally and spousal support arrangements specifically are vulnerable to a risk of inequitable sharing at the time of negotiation and in the future. At the same time, the test must not undermine the parties' right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing. Our approach, for example, takes greater account of the parties' subjective sense of equitable sharing than the objective "unconscionable circumstances" standard proposed by counsel for the appellant.

74 Negotiations in the family law context of separation or divorce are conducted in a unique environment. Both academics and practitioners have acknowledged that this is a time of intense personal and emotional turmoil, in which one or both of the parties may be particularly vulnerable. Unlike emotionally neutral economic actors negotiating in the commercial context, divorcing couples inevitably bring to the table a host of emotions and concerns that do not obviously accord with the making of rational economic decisions. As Payne and Payne note,

> In the typical divorce scenario, spouses negotiate a settlement, often with the aid of lawyers, at a time when they are still experiencing the emotional trauma of marriage breakdown. Spouses who have not come to terms with the death of their marriage and who feel guilty, depressed or angry in consequence of the marriage breakdown are ill-equipped to form decisions of a permanent and legally binding nature. (J.D. Payne and M.A. Payne, *Dealing with Family Law: A Canadian Guide* (1993), at p. 78. See also *Leopold v. Leopold* (2000), 12 R.F.L. (5th) 118 (Ont. S.C.))

75 Add to this mix the intimate nature of the marital relationship that makes it difficult to overcome potential power imbalances and modes of influence. As Wilson J. notes in *Leopold*, at para. 128:

> [F]or parties negotiating a separation agreement, one party may have power and dominance financially, or may possess power through influence over the children. Our courts have also recognized the need to curtail one spouse's power over the other. The reality ... is that often both contracting parties are vulnerable emotionally, with their judgment and ability to plan

> diminished, without the other spouse preying upon or influencing the other. The complex marital relationship is full of potential power imbalance. In a sense, vulnerability is implicit in the difficult emotional process of separation.

76 We also note that, depending on the circumstances of the parties, a wide array of interrelated elements may make up a global separation agreement. Such a separation agreement may comprise division or equalization of marital property, provision for custody and support of any children, as well as provisions for spousal support, be it in the form of lump sum, periodic payment, time-limited payment or a waiver and release. These matters, with the exception of the property division, are primarily prospective in nature, although compensatory spousal support is retrospective. As Shaffer and Rogerson point out, *supra*, at p.13:

> At the point separation agreements are being negotiated it is difficult to know what post-divorce life will be like and how it will unfold....
>
> [The] economic advantages and disadvantages are often difficult to predict in advance; rather the full impact of the marriage and its breakdown is something that only becomes apparent over time. In our view one of the main problems with contracting spousal support is that spouses routinely under-estimate the time it will take a formerly dependent spouse to overcome the economic disadvantages of the marriage and become self-sufficient. But forseeability problems can also affect payors who may experience unexpected decreases in their income.

77 In our view, Parliament's recognition of the potential complications in the process of contracting spousal support is reflected in the *Divorce Act* itself. We see this in the direction to the court to consider an agreement as only one factor among others, rather than to treat it as binding, subject merely to remedies in contract law. Accordingly, contract law principles are not only better suited to the commercial context, but it is implicit in s. 15 of the 1985 Act that they were not intended to govern the applicability of private contractual arrangements for spousal support.

78 Therefore, in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act. In doing so, however, the court should treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in s. 15.2 but also, as noted above, certainty, finality and autonomy.

79 With these broad concerns in mind, we now turn to the specifics of the two-stage approach to the exercise of the court's discretion.

(a) Stage One

80 In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should first look to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it.

(i) The Circumstances of Execution

81 It is difficult to provide a definitive list of factors to consider in assessing the circumstances of negotiation and execution of an agreement. We simply state that the court should be alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities, taking into account all of the circumstances, including those set out in s. 15.2(4)(*a*) and (*b*) and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance.

82 We pause here to note three important points. First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor should it presume that the apparently stronger party took advantage of any vulnerability on the part of the other. Rather, there must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. If separating or divorcing parties were generally incapable of making agreements it would be fair to enforce, it would be difficult to see why Parliament included "agreement or arrangement" in s. 15.2(4)(*c*). Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.

83 Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should

not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

(ii) The Substance of the Agreement

84 Where the court is satisfied that the conditions under which the agreement was negotiated are satisfactory, it must then turn its attention to the substance of the agreement. The court must determine the extent to which the agreement takes into account the factors and objectives listed in the Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown. Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.

85 When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the *Divorce Act*. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.

86 Two comments are necessary here. First, assessment of an agreement's substantial compliance with the entire Act will necessarily permit a broader gamut of arrangements than would be the case if testing agreements narrowly against the support order objectives in s. 15.2(6). Second, a determination that an agreement fails to comply substantially with the Act does not necessarily mean that the entire agreement must be set aside and ignored. Provided that demonstrated vulnerability and exploitation did not vitiate negotiation, even a negotiated agreement that it would be wrong to enforce in its totality may nevertheless indicate the parties' understanding of their marriage and, at least in a general sense, their intentions for the future. Consideration of such an agreement would continue to be mandatory under s. 15.2(4). For example, if it appeared inappropriate to enforce a time limit in a support agreement, the quantum of support agreed upon might still be appropriate, and the agreement might then simply be extended, indefinitely or for a different fixed term.

(b) Stage Two

87 Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find themselves

down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

88 The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen," and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

89 We stress that a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities under an agreement might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention. That said, we repeat that a judge is not bound by the strict *Pelech* standard to intervene only once a change is shown to be "radical". Likewise, it is unnecessary for the party seeking court-ordered support to demonstrate that the circumstances rendering enforcement of the agreement inappropriate are causally connected to the marriage or its breakdown. The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

90 The court's focus should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act, not on whether a change occurred *per se*. That is to say, we do not consider "change" of any particular nature to be a

threshold requirement which, once established, entitles the court to jettison the agreement entirely. Rather, the court should be persuaded that both the intervention and the degree of intervention are warranted. That is, at this stage, even if unbending enforcement of the agreement is inappropriate, that agreement may still indicate to a trial judge the parties' understanding of their relationship and their intentions. Even an agreement that is not determinative as a result of the parties' circumstances at the time of the application warrants compulsory consideration under s. 15.2(4).

91 Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight. As we noted above, it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17. In our view, the Act does not create such inconsistency. We do not agree with the Ontario Court of Appeal when it suggests at para. 71, that once a material change has been found, a court has "a wide discretion" to determine what amount of support, if any, should be ordered, based solely on the factors set out in s. 17(7). As La Forest J. said in his dissent in *Richardson*, *supra*, at p. 881, an order made under the Act has already been judicially determined to be fit and just. The objectives of finality and certainty noted above caution against too broad a discretion in varying an order that the parties have been relying on in arranging their affairs. Consideration of the overall objectives of the Act is consistent with the non-exhaustive direction in s. 17(7) that a variation order "should" consider the four objectives listed there. More generally, a contextual approach to interpretation, reading the entire Act, would indicate that the court would apply those objectives in light of the entire statute. Where the order at issue incorporated the mutually acceptable agreement of the parties, that order reflected the parties' understanding of what constituted an equitable sharing of the economic consequences of the marriage. In our view, whether acting under s. 15.2 or under s. 17, the Court should take that into consideration.

C. Application to the Facts of this Case

92 In the circumstances of this appeal, we are of the view that the global Separation Agreement should be accorded significant and determinative weight. Looking to the Separation Agreement at the time of its formation, we find nothing to indicate that circumstances surrounding the negotiation and execution of the agreement were fraught with vulnerabilities. On the contrary, the record reveals that these parties underwent extensive negotiation over a substantial time period and engaged the services of several professionals, including experienced and expert counsel. Negotiation of the Separation Agreement lasted some 15 months. Ms. Miglin, in addition to legal advice, received detailed financial advice, both in terms of tax planning and income projections, throughout the negotiation process.

93 At the trial, Ms. Miglin suggested that she was not content with the Separation Agreement and felt pressured by her husband to agree to the spousal support release. As she phrased it, it was a confusing and emotional time for her. We do not doubt that marital separation is almost inevitably a time of emotional upheaval and confusion. Regardless, in this case there is ample evidence to conclude that any vulnerability experienced by Ms. Miglin was more than adequately compensated by the independent and competent legal counsel representing her interests over a prolonged period, not to mention the services provided to her by other professionals. It is unnecessary, therefore, for us to determine whether Ms. Miglin's evidence relating to her personal feelings would have been sufficient to demonstrate a vulnerability in this case and, if so, whether that vulnerability was exploited. The extent of Ms. Miglin's professional assistance obviously comes at the upper end of the range, and we would not wish to suggest that hers was the minimum required to assure fair negotiation.

94 Turning to the substance of the Separation Agreement, we also find nothing to demonstrate a significant departure from the overall objectives of the *Divorce Act*. At the time of separation both the Lodge and the matrimonial home had net values of approximately $500,000. The Separation Agreement provided for Ms. Miglin to transfer to Mr. Miglin her one-half interest in the Lodge in exchange for the transfer to her of his one-half interest in the matrimonial home. Mr. Miglin agreed to assume sole responsibility for the mortgage on the house. We cannot agree with the trial judge's characterization of this arrangement as "not an equal split." He made this assessment on the basis that the business was income-producing and the house was not. Valuation of an asset necessarily takes into account its characteristics, including its potential income, capital appreciation and risks. In the same way that a single asset should not be counted twice (*Boston v. Boston*, [2001] 2 S.C.R. 413, 2001 SCC 43 (S.C.C.), the factors that went into an asset's valuation should not be considered a second time. Presumably, viewed subjectively, in light of Mr. Miglin's and Ms. Miglin's respective abilities, interests and needs, the business was of greater interest to him and the matrimonial home more attractive to her. That is why they divided the assets as they did. There was no basis for the trial judge to conclude that one asset was worth more than another of identical value. In our view, the division in the Separation Agreement reflects the parties' needs and wishes and fairly distributed the assets acquired and created by them over the course of their marriage.

95 The Separation Agreement also provided that Ms. Miglin would receive child support in the amount of $1,250 per month, per child, for an annual total of approximately $60,000, taxable in her hands and tax-deductible to Mr. Miglin. The child support arrangement was subject to both an annual cost of living increase and the caveat that it would be revisited, if necessary, once reasons for judgment were released from this Court in *Thibaudeau*, *supra*, or Parliament enacted legislation that altered the child support tax scheme. The record reveals that the quantum of child support was arrived at in full contemplation of Ms. Miglin's spousal support release. We also note that correspondence between counsel suggests that it was Ms. Miglin's preference to release Mr. Miglin from spousal support on condition that her economic needs were addressed through child support.

96 The Consulting Agreement, executed between the Lodge and Ms. Miglin, was for a term of five years, with an option to renew on the consent of both parties. Both the trial judge and the Court of Appeal found this arrangement to be "thinly veiled spousal support." If it was, there should be no pejorative sense to the term. If the commercial contract is construed as a form of spousal support, it simply means that the agreement contains a time-limited spousal support agreement with a renewal option, rather than a total waiver of spousal support. Either way, neither is intrinsically unfair nor contrary to the objectives of the Act. There is nothing inherently sinister about a release or a waiver any more than there is about a time-limited arrangement. Any support clause has to be assessed in the full context of the broader agreement, the overall circumstances of the parties, and the degree of compliance with the objectives of the Act. In our view, the Consulting Agreement reflects the parties' intentions to provide Ms. Miglin with a source of employment income for a limited time. That the parties chose such a method to provide the income to Ms. Miglin does not detract from the commercial nature of the contract. Moreover, the vehicle chosen is appropriate to the manner in which the parties structured their economic lives during the marriage.

97 It is true that Ms. Miglin stopped receiving her salary of $80,500 from the Lodge. The obvious reason, though, is that she had also stopped working more or less full-time for the Lodge. During the marriage she had hired babysitters to permit her to work at the Lodge. After the separation she could hire babysitters so she could work for a new employer. Or, as in fact she chose, she was free not to seek other employment and to support herself and her children, during the five years of the Consulting Agreement, on the combined income of roughly $75,000 consisting of $60,000 in child support and $15,000 from the Consulting Agreement. Her own financial analyst's tables indicated her choice not to work. Recall too that, since Mr. Miglin had assumed sole responsibility for the mortgage on the matrimonial home, Ms. Miglin's expenses included no rent or mortgage payments.

98 It is in the context of these arrangements that the final release and waiver of spousal support must be assessed. Overall, the Separation Agreement provided for a certain level of revenue to the wife, in the form of ongoing child support and the consulting fees for a five-year period, with a possibility of renewal. In this way, the Agreement sought to redress any disadvantages arising from the marriage and its breakup in part through the vehicle of the business which was, as it had been throughout the marriage, the parties' major source of income. At the same time, the Separation Agreement sought to facilitate the disentanglement of the parties' economic lives and promote their self-sufficiency. The Separation Agreement advances the 1985 Act's goals of finality and autonomy. During the marriage, Ms. Miglin continued her education (obtaining her B.A.), earned a salary and obtained work experience; a case was therefore not made out for compensatory support. It is unnecessary, therefore, to determine whether the Separation Agreement would still have complied substantially with the objectives of the Act on facts closer, say, to those in *Moge*.

99 Accordingly, we find the Separation Agreement at the time of its formation to have been in substantial compliance with the *Divorce Act*.

100 The Court of Appeal found that, at the time of the support application, the non-renewal of the Consulting Agreement and changes in the child-care arrangements constituted a material change sufficient to justify overriding the spousal support release. As we noted earlier, we do not accept the Court of Appeal's "material change" test as the appropriate basis for dispensing with an otherwise enforceable agreement. Still, with respect to the findings, we believe them to be in error.

101 With respect to the Consulting Agreement, we note that Ms. Miglin brought her application for corollary relief in June of 1998 -- prior to the expiry of the five-year term of the contract. Moreover, the parties agree that Ms. Miglin performed the terms of her contract for a period but performed no work for the Lodge, contrary to the Consulting Agreement, for the last two years of the contract. She did, however, continue to receive payment under that contract until its expiry in December 1998. Needless to say, Mr. Miglin opted not to renew the Consulting Agreement at the end of its term. We fail to see how, at the time of application, the ongoing receipt of payment for services not being performed can constitute a change of any kind.

102 Regarding the purported changes to the child-care arrangements, the *ad hoc* parenting arrangements that developed during the period of amicable relations between the parties no doubt reflected the changing needs of the growing children. These changes are an ordinary fact of life. We note too that by the time of the trial, the eldest child was residing primarily with Mr. Miglin.

103 Moreover, even if we accept that the expiry of the Consulting Agreement can be construed as occurring at the time of Ms. Miglin's application, we do not consider its non-renewal to be sufficient to render continued reliance on the original agreement inappropriate. First, the contract stipulated that renewal required the consent of both parties. Second, the income projections and tax planning advice provided by Ms. Miglin's accountant at the time of negotiation carried that assumption and thus made her fully aware that she would be without that income in five years. Third, there is no evidence of any damaging long-term impact of the marriage on Ms. Miglin's employability or that at the time of negotiation she underestimated how long it would take to become self-sufficient. Ms. Miglin is an educated woman with employable skills who worked in the business throughout the marriage. Although she is no doubt responsible for the day-to-day care of the three children residing with her, she has previously demonstrated her willingness to engage child-care services. The parties dispute whether Ms. Miglin attempted to pursue any employment. What is clear from the correspondence between counsel during negotiation of the agreement, however, is that Ms. Miglin had no intention of working.

104 The only real changes we see are the variation of the child support award in accordance with the Guidelines and the fact that the eldest child is now residing primarily with Mr. Miglin. The quantum of child support established in the Agreement provided Ms. Miglin with a minimum amount of income in contemplation of her not working. Her lawyer, in a letter to Mr. Miglin's counsel, states: "She is clearly not going to be working. Taking care of the children is a full time job

at this time. It does not change the nature of the spousal support release anyway...." Furthermore, the correspondence makes it clear that Ms. Miglin contemplated a reduction in income when the Consulting Agreement ended and was advised by her accountant to plan ahead for this drop in income. In our view, the change to the obligations regarding child care did not take Ms. Miglin's current position outside the reasonable range of circumstances that the parties contemplated in making the Separation Agreement.

105 At the Court of Appeal, counsel for Ms. Miglin suggested that her financial position deteriorated after the breakdown of the marriage. The record demonstrates (and she concedes), however, that her net worth in fact increased by at least 20 percent. At the time of her support application, a financial statement dated June 2, 1998, filed as part of the record, valued her net worth at $750,000 with essentially no debt. The statement shows that she held $246,000 in RRSPs, $83,000 in cash, and an unencumbered five-bedroom home valued at $395,000. The only debt listed on the statement was an unsubstantial debt for a credit card. By the time of trial, one year later, she valued her home at $400,000. There was no evidence that the terms of the agreement resulted in conditions under which Ms. Miglin could not assure her family's livelihood and had to deplete her assets, thus bringing her outside the range of circumstances in which she pictured herself at the time of executing the Separation Agreement.

106 The respondent's evidence and argument regarding her circumstances at the time of her support application fail to demonstrate that the agreement fairly negotiated and substantially compliant with the objectives of the 1985 Act at its formation should not continue to govern the parties' post-divorce obligations towards each other.

VI. Disposition and Costs

107 For the reasons discussed, we would reverse both the decision of the trial judge and that of the Court of Appeal with respect to the application for spousal support. In these circumstances, both courts erred in giving the parties' agreement insufficient weight. On this issue, therefore, the appeal is allowed. With respect to the reasonable apprehension of bias, we would affirm the decision of the Court of Appeal. Given the result, we do not find a cost award to be appropriate in this Court. The parties shall bear their own costs.

***LeBel J.*:**

I. Introduction

108 This appeal concerns an application for corollary relief under s. 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "1985 Act") in the face of a spousal support agreement entered into by the parties at the time of their separation, but not incorporated into their divorce order. The Court must first determine whether the *Pelech* trilogy (*Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.); *Richardson v. Richardson*, [1987] 1 S.C.R. 857 (S.C.C.); and *Caron v. Caron*, [1987]

1 S.C.R. 892 (S.C.C.)) continues to govern the threshold for judicial intervention in the spousal support provisions of a final separation agreement. If not, what threshold should apply in light of the 1985 Act and the current jurisprudence?

109 I have had the benefit of reading the majority's reasons but, with respect, I do not agree with them in the result or in principle. Given the nature of the disagreement, I find it necessary to provide my own overview of the background in this case and the decisions in the courts below.

110 Because I conclude that the trilogy no longer applies and because the 1985 Act itself clearly sets out the objectives of spousal support, I find that Parliament intended to permit courts to order corollary relief under s. 15.2 where the parties' agreement does not reasonably realize the spousal support objectives indicated in the Act. Because the Miglins' agreement does not reflect these objectives, and in fact explicitly disavows them, I would dismiss the appeal and allow Ms. Miglin to receive the relief to which she is entitled under s. 15.2.

111 This case also requires the Court to determine whether the comments and interventions of the trial judge give rise to a reasonable apprehension of bias. I concur with the majority's findings on this issue.

II. Background

112 Eric and Linda Miglin were married on February 17, 1979. They had four children: Samantha, born October 4, 1985; Alexandra, born October 31, 1988; Charlotte, born December 31, 1989; and Jonathan, born March 18, 1991. They separated after 14 years of marriage in 1993.

113 When the parties met in 1976, both were employed by the Toronto Dominion Bank. Mr. Miglin, then a newly minted Harvard M.B.A., was a management trainee. Ms. Miglin worked in an administrative role. Mr. Miglin left his position at the Bank to operate concession stores in Algonquin Provincial Park with his brother. In 1978, Mr. Miglin invited Ms. Miglin to work for his new business and she agreed, quitting her job at the Bank to work for him.

114 After marrying in 1979, the parties purchased a hotel business in Algonquin Park, Killarney Lodge Ltd. (the "Lodge") for $1,015,000 in 1984. They became equal shareholders in the corporation which owned the Lodge. The Lodge business served as the family's primary source of income throughout the course of the marriage. As the trial judge outlined, by the date of the parties' separation in 1993, the parties' combined efforts had "pumped up" the business substantially; at the time of trial, the Lodge had yearly gross earnings of about $1.5 million.

115 The parties' representations of their respective roles in the business diverge, but it is clear that Mr. Miglin was in charge of the overall management of the business, while Ms. Miglin was responsible for its administrative and housekeeping aspects. The trial judge found that Ms. Miglin and her husband had contributed equally to the success of their business. In addition, Ms. Miglin

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had earlier contributed significantly to the development of the outfitting business, Alquon Ventures Inc. ("Alquon"), co-owned by Mr. Miglin and his brother. At the time of separation, Ms. Miglin was earning a salary from the Lodge representing roughly half of the net profits of the business, approximately $80,500 per annum.

116 Ms. Miglin was the primary caregiver of the four children throughout the marriage. While the children were very young, both parties lived and worked at the Lodge from May until October, hiring a babysitter to assist with childcare. At the end of the season, usually in November, Mr. Miglin would take a vacation alone. During the off-season, the parties resided in Toronto. Once the eldest child started school, the family would spend the summer months together at the Lodge but, when school started in September, Ms. Miglin would return to Toronto with the children. The family followed a similar pattern in the spring, with Mr. Miglin returning to Algonquin Park some months before Ms. Miglin and the children joined him there for the summer season.

117 In 1993, the parties separated. After protracted negotiations during which both parties were represented by independent legal counsel, they entered into three agreements: a Separation Agreement signed by Mr. Miglin on June 15, 1994 and by Ms. Miglin on June 17, 1994; a Parenting Plan signed by Mr. Miglin on June 15, 1994 and by Ms. Miglin on June 17, 1994; and a Consulting Agreement "made as of February 28, 1994" that was signed, but not dated, by both parties (with Mr. Miglin signing "per Killarney Lodge Limited").

118 The Separation Agreement provided for a division of the parties' property. At the time of the separation, the parties had three main assets: the jointly owned Lodge; the matrimonial home in Toronto; and the husband's one-half interest in Alquon. Ms. Miglin transferred her one-half interest in the Lodge, which had been valued at the time of separation at $250,000, in exchange for Mr. Miglin's one-half interest in their matrimonial home, also valued at $250,000 although, as the trial judge noted, a non-income producing asset. Mr. Miglin assumed sole responsibility for the mortgage on the matrimonial home. The Separation Agreement also provided that Ms. Miglin release any claim to Alquon, to which no value was assigned under the Agreement.

119 The Separation Agreement provided for child support in the amount of $1,250 per month per child (totalling $5,000), so long as the children's principal residence continued to be with Ms. Miglin. The child support payments were subject to an annual cost of living increase, which is standard for child support.

120 While providing for child support, the Separation Agreement contained the following spousal support release:

> (a) The Husband and the Wife each agree that neither shall be obliged to make any payment or payments in the nature of support, or any similar payment, whether periodic or by way of lump sum, directly or indirectly, to or for the benefit of the other. Without restricting the generality of the foregoing, the Husband and the Wife further agree that neither of them shall

maintain, commence or prosecute or cause to be maintained, commenced or prosecuted any action against the other of them for support or interim support pursuant to the Family Law Act, the Succession Law Reform Act or any comparable Provincial legislation in force from time to time, or the Divorce Act, or any successor or similar legislation whereby a spouse or former spouse is given a cause of action against his or her spouse or the spouse's estate for relief in the nature of support.

(b) The Wife specifically abandons any claims she has or may have against the Husband for her own support. The Wife acknowledges that the implications of not claiming support in this Agreement have been explained to her by her solicitor. At no time now or in the future, including any future divorce proceedings, or upon the Husband's death shall the Wife seek support for herself, regardless of the circumstances.

(c) The Husband specifically abandons any claims he has or may have against the Wife for his own support. The Husband acknowledges that the implications of not claiming support in this Agreement have been explained to him by his solicitor. At no time now or in the future, including any future divorce proceedings, or upon the Wife's death shall the Husband seek support for himself, regardless of the circumstances.

(d) The parties are aware that this is a final Agreement and intended to be a final break between them. No further claims will be made against either party by the other arising from the marriage or upon the dissolution thereof, including any claims under Section 15 of the Divorce Act or upon the death of one of them. Both parties are aware of the possibilities of fluctuation in their respective incomes and assets, are cognizant of the possible increases and decreases in the cost of living and are aware that radical, material, profound or catastrophic changes may affect either of them. Each party is prepared to accept the terms of this Agreement as a full and final settlement and waive all further claims against the other, except a claim to enforce the terms of this Agreement or for dissolution of their marriage. The parties specifically agree and acknowledge that there is no causal connection between the present or any future economic need of either party and their marriage. No pattern of economic dependency has been established in their marriage.

121 Although Ms. Miglin received no spousal support under the Separation Agreement, the concurrent Consulting Agreement provided her with $15,000 in annual income from the Lodge ostensibly for services such as updating and revising mailing lists, writing newsletters, confirming reservations, helping with advertising and promotion, and advancing the Lodge's image at trade shows. The Consulting Agreement provided for five years of consulting fees for Ms. Miglin for the period from 1994 to 1998, with the possibility of renewal. The consulting payments were subject to an annual cost of living increase, which is unusual for this type of payment. Ms. Miglin performed some work for the Lodge in the first two years after the Consulting Agreement was signed, but this had stopped apparently without objection by the third year of the five-year Agreement. Ms. Miglin nonetheless continued to receive the agreed upon amounts until Mr. Miglin failed to renew

710 the Consulting Agreement in December of 1998, a decision that coincided with a deterioration in the parties' post-separation relationship.

122 The Parenting Plan, which was incorporated into the Separation Agreement, set out the parties' parenting responsibilities. The parties were to share responsibility for raising the children, but the children's principal residence was to be with Ms. Miglin. The Plan contemplated that Ms. Miglin would essentially be the children's sole caregiver during the four "shoulder months" of the year when the children were in school in Toronto while Mr. Miglin was at the Lodge. During the remainder of the year, Ms. Miglin was the children's primary caregiver, though Mr. Miglin had extensive access to the children. The trial judge noted that, over time, the parties deviated from the Parenting Plan, making their own *ad hoc* arrangements for the welfare of the four children. Under these *ad hoc* arrangements, Ms. Miglin remained the children's primary caregiver.

123 The trial judge found that Mr. Miglin and Ms. Miglin appeared to be able to arrange their affairs and the affairs of their children in a reasonable fashion under their three agreements until about 1997. The Miglins' divorce was finalized on January 23, 1997. The divorce order made no provision for corollary relief either in the form of child support or spousal support payments.

124 Several months after the divorce, Ms. Miglin sold the matrimonial home in downtown Toronto. She used the proceeds to repay debts she had incurred post-separation, and she purchased a new home in Thornhill for herself and the children. Her personal reasons for relocating included her growing interest in, and study of, Orthodox Judaism; she converted to Judaism in the spring of 1999.

125 Although Mr. Miglin had shared a cooperative post-separation relationship with Ms. Miglin, he changed his behaviour as a result of Ms. Miglin's relocation to Thornhill and her conversion to Judaism, both of which, as the Court of Appeal noted, he objected to. The trial judge described this change in Mr. Miglin, whom he characterized as a "strong-willed, intelligent and manipulative individual", as a dramatic one ((1999), 3 R.F.L. (5th) 106 (Ont. S.C.J.), at para. 10). He observed at paras. 14 and 16-18:

> ...he became aggressive, dominating, and often acted in an outlandish fashion towards her and her children. After the Fall closing of the hotel at the end of the 1997 season, the Respondent appears to have made up his mind to go to school with his children. Almost every day saw him seated behind one of them in their public school classroom, listening with them to their lessons, and, no doubt, reviewing and discussing the significance of what they were receiving from their teachers. He became involved in the parent/teacher association. It appears to me that his focus on his children became obsessive. Ultimately, he was ordered by a Superior Court judge not to go to school with them. That order was subsequently rescinded.
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> . . . . .

> When the Petitioner decided to move from the matrimonial home in Toronto and strike out on her own in Thornhill, the respondent became noticeably upset. His attitude towards his wife, her need for support and her custody of the children changed abruptly. The Petitioner's move made it clear he was no longer in control. As a result of that rapid change of spirit, the Respondent caused the hotel not to extend the consulting agreement. Shortly after the Petitioner's move to Thornhill, the husband began a campaign to involve himself in all aspects of the children's lives, particularly their schooling. His obsessive involvement with his children was oppressive to them. They were disturbed by his continued presence in school. The Respondent attempted to pre-empt the applicant's time with the children. He demanded, whenever possible, full time involvement with the children to the exclusion of their mother. In my opinion, he was unreasonable in his demands. He intensified the tension between himself and the petitioner to the point where the applicant became almost unable to meet her obligations to her young family and to her private life.
>
> As a result of the increasing pressure applied by the Respondent, the children became harder and harder to manage, and in the end, the eldest child, left her mother to live with her father in Toronto....
>
> The Petitioner claims that the circumstances surrounding her life and the lives of her children were altered dramatically with the change of attitude of the Respondent after her move to Thornhill.... His escalated interference in the day to day lives of the children caused them great stress. He confronted his former wife on every occasion; he was determined to make her life unhappy.

126 In June 1998, Ms. Miglin brought proceedings pursuant to s. 15.2 of the 1985 Act for sole custody, spousal support, and child support in accordance with the *Federal Child Support Guidelines*, 1997, SOR/97-175. In December 1998, Mr. Miglin terminated all payments under the Consulting Agreement and refused to renew it.

127 At the time of the trial, Mr. Miglin was 50 years old. He held an M.B.A. from Harvard University. He owned a home in downtown Toronto. He was the sole owner of the Lodge and co-owner of the successful Alquon outfitting business, each of which the trial judge found was generating an annual gross income of approximately $1.5 million. His annual income was determined at trial to be approximately $200,000.

128 At the time of the trial, Ms. Miglin was 47 years old. She held a Bachelor of Arts in English Literature from the University of Toronto, which she had earned during the early years of the marriage. She owned a home in Thornhill and had investments in RRSPs, made in part with monies borrowed from friends and received from the sale of the matrimonial home. She continued to assume a majority of the childcare responsibilities in the post-separation period, as she had during the marriage, and at the time of the trial she was a full-time mother and homemaker. She was receiving support for her children in the amount of $67, 200 per annum. Ms. Miglin had not

worked outside of the family business since 1978 and she had not worked outside of the home, with the exception of the consulting work for the Lodge, since the parties separated in 1993. With the cessation of the payment of monies under the Consulting Agreement, she had no independent source of income beyond a minimal amount of investment income. After the separation, it appears that Ms. Miglin did not actively seek employment, as she felt that most of her time was taken up dealing with childcare and with the problems arising from the breakdown of the marriage.

129 The trial judge awarded Ms. Miglin $4,400 per month in spousal support for a period of five years and $3,000 in monthly support for the children, all but the eldest of whose principal residence would continue to be with her. The Court of Appeal dismissed Mr. Miglin's appeal, but granted Ms. Miglin's cross-appeal, eliminating the five-year term from the award of spousal support. Child support was reduced by agreement of the parties, based upon a more accurate determination of Mr. Miglin's income as $186,130 per annum. Mr. Miglin now appeals from the decision of the Court of Appeal with regard to Ms. Miglin's entitlement to spousal support, arguing that she waived her right to any support by signing the Separation Agreement.

III. Judicial History

A. Ontario Superior Court of Justice (1999) 3 R.F.L. (5th) 106 (Ont. S.C.J.)

130 On the issue of custody and access, Tobias J. noted that, at the completion of trial, the parties had agreed to joint custody of the children. Tobias J. held that, while both parents were to have generous access to all four children, the principal residence of the three younger children would be with Ms. Miglin, while the eldest child would live with Mr. Miglin. He rejected as "patently not in the best interests of the children" (para. 11) a parenting plan that Mr. Miglin proposed under which the children would live with him in Toronto every other week and, during those periods, be driven daily by him to their school in Thornhill.

131 Tobias J. also expressed concern over what he found to be Mr. Miglin's aggressive and dominating attitude towards Ms. Miglin and the children after Ms. Miglin moved the family to Thornhill. He found that Mr. Miglin's obsessive involvement with all aspects of the children's lives, and particularly their schooling, during this period was oppressive to them. His order included restrictions on Mr. Miglin's attendance at the children's school, as Mr. Miglin had adopted the habit of sitting in on his children's classes.

132 On the issue of spousal support, Tobias J. did not accept that Ms. Miglin had actually waived her entitlement to support. He pointed to the Consulting Agreement, describing the payments under the Agreement as "thinly disguised spousal support": "[c]learly, this type of consulting agreement was a convenient vehicle [for Mr. Miglin] to provide spousal support to his wife without paying it out of his own pocket. These payments as expenses of the hotel likely improved the incidence of taxation of the Respondent and his corporation" (para. 27).

133 Tobias J. held that the alleged threshold test of "a radical unforeseen change in circumstances" that is causally connected to the marriage did not apply to applications for corollary relief under s. 15 of the 1985 Act, such as that of Ms. Miglin. Rather, in determining whether the provisions of an informed separation agreement bind the parties at the time of the application, the court's role under s. 15 is to scrutinize the separation agreement to decide whether it provides support to the dependent spouse in a fashion consistent with the social policies and objectives set out in s. 15(7) (now s. 15.2(6)). Where an agreement contains an element of unfairness to one of the spouses which is inconsistent with the objectives of s. 15(7), the court need not enforce it, and can enter a support order that diverges from the agreement in order to ensure that the objectives in s. 15(7) are met.

134 Tobias J. found such unfairness on the facts of the case (at para. 27):

> In my opinion, the separation agreement, of which the parenting plan and the consulting agreement form a part, treats the applicant unfairly because it provides for the transfer of the one-half interest of the applicant in the hotel corporation for the sum of $250,000.00 and proposes to replace her annual salary of $80,200.00 with the consultation contract which provided $15,000.00 per annum plus a cost of living index. In my opinion, the payments under the consulting contract are thinly disguised spousal support payments, which amount to less than twenty-five percent of the annual salary earned by the Applicant as an owner of a one-half interest in the hotel corporation before separation. The separation agreement provides that the Respondent convey to the applicant his one-half interest of $250,000.00 in the matrimonial home, a non-producing income asset, for the one-half interest of the applicant in the hotel corporation having the same value, $250,000.00. It is interesting to note that within approximately three years following the evaluation of $500,000.00 obtained by the parties after separation, the hotel corporation was producing an annual gross profit of close to $1,000,000.00. The total purchase price paid by the parties for the hotel operation in 1981 was that same amount, $1,000,000.00. In my opinion, the provisions of the separation agreement suffer from a fundamental inequality of matrimonial asset distribution.

135 In Tobias J.'s view, in these circumstances the releases and waiver contained in the Separation Agreement were not a bar to a claim for relief under s. 15. Given that the provisions of the Separation and Consulting Agreements failed to conform to the objectives enunciated in s. 15(7), the court was obliged to undertake a review under s. 15(5) (now s. 15.2(4)) of the conditions, means, needs and other circumstances of each spouse, including the length of time the spouses cohabitated and the functions performed by the spouses during the cohabitation. The court was required to assess these factors in light of the economic consequences for both parties of the marriage and its breakdown in order to determine whether support was warranted and, if so, in what amount.

136 Applying s. 15 to the matter at bar, Tobias J. determined that Mr. Miglin, according to his last income tax return, had an annual income of $172,370. In addition, Mr. Miglin received $30,000 per annum from his common-law spouse for her share of the rent of the couple's home in Toronto, for a total annual income of approximately $200,000. Although describing Mr. Miglin's evidence that he did not receive substantial income from the Alquon outfitting business as "equivocal and evasive" (para. 31), Tobias J. was ultimately unable to quantify the amount of Mr. Miglin's income from this source. While he ventured the opinion that Mr. Miglin's annual income from this business exceeded $100,000, he concluded that there was insufficient evidence upon which to make a conclusive finding on this point.

137 Tobias J. held that, once the payments due under the Consulting Agreement ended, Ms. Miglin had no income and that she continued to have no income at the time of the trial. He noted that Mr. Miglin was fully aware at the time of negotiating the Separation Agreement that Ms. Miglin would be involved in the full-time care of the parties' four children and that, as a result, there was little possibility that she could become economically self-sufficient until the children matured. Notwithstanding the language in the Separation Agreement, it was beyond doubt that a pattern of economic dependency had been established in the marriage and that it continued to affect Ms. Miglin.

138 As indicated above, Tobias J. found that Ms. Miglin was entitled to spousal support of $4,400 per month for a period of five years. Based upon Mr. Miglin's annual income, and the *Federal Child Support Guidelines*, he awarded Ms. Miglin child support of $3,000 per month.

B. Ontario Court of Appeal (2001) 53 O.R. (3d) 641 (Ont. C.A.)

139 Abella J.A. declined to interfere with the trial judge's conclusion, which she found to be reasonably supported on the evidence, that Mr. Miglin's proposal that the children spend every other week with him was patently not in the children's best interests. She approved the agreed-upon joint custody plan, and upheld the trial judge's order with regard to the children's principal residences. Abella J.A. also lifted the trial judge's order restricting Mr. Miglin's attendance at the children's school. She found that, since it was no longer Mr. Miglin's practice to sit in on his children's classes, which had caused the children significant discomfort, the order was no longer necessary.

140 As indicated above, Abella J.A. varied the quantum of child support to $2,767 per month in accordance with the parties' concession that there had been an error in the calculation of Mr. Miglin's income at trial.

141 On the issue of spousal support, Abella J.A. agreed with Tobias J.'s characterization of the Consulting Agreement as "thinly disguised spousal support". She noted that, since the payments under the Consulting Agreement were found by the trial judge to be support payments, the parties

must have anticipated the possibility that such support would still be required beyond the initial five years, since they negotiated a flexible renewal clause of indeterminate duration.

142 On the question of Ms. Miglin's entitlement to support, Abella J.A. rejected Mr. Miglin's argument that the release of spousal support in the Separation Agreement triggered the application of the *Pelech* trilogy. Abella J.A. held that the *Pelech* trilogy's threshold for the variation of final agreements, decided under the provisions of the *Divorce Act*, R.S.C. 1970, c. D-8 (the "1968 Act"), did not have any application under the substantially amended support provisions in the 1985 Act (at para. 60):

> In my view, based on the new language in the 1985 *Divorce Act*, and the revised approach to support developed by the Supreme Court of Canada in accordance with those statutory changes, it is difficult to justify the continued application of the trilogy which emanated from a completely different statutory scheme. The language in s. 15 of the 1985 *Divorce Act* is so dramatic a departure from the linguistic and conceptual minimalism of s. 11 of the former *Divorce Act* that statutory interpretations emanating from the old legislation, such as the trilogy, cannot, it seems to me, continue to apply.

143 Abella J.A. stressed as the major difference between the 1968 Act and the 1985 Act the fact that, while the former Act did not set out support objectives, the latter Act established a "comprehensive scheme" for support. Given this key difference, Abella J.A. held that it was crucial to examine the 1985 scheme, rather than resorting to the trilogy, for guidance on how agreements are now to be treated.

144 Abella J.A. noted that, in contrast to s. 11 of the 1968 Act, which made no explicit reference to separation agreements, s. 15.2(4) of the 1985 Act provides that agreements are one of several factors for courts to consider in awarding support. Abella J.A. recognized that s. 15.2(4), which is animated by the objectives for ordering spousal support outlined in s. 15.2(6), does not give an agreement primacy, nor does the 1985 Act provide explicit direction as to how a court is to factor an agreement into the assessment of whether or how much support should be awarded.

145 Though noting the absence of any legislative requirement to defer to separation agreements in the 1985 Act, Abella J.A. justified according some measure of deference to parties' arrangements on the basis that court orders and agreements are referred to together in s. 15.2(4)(*c*). In Abella J.A.'s view, both court orders and private agreements represent a kind of economic certainty around which parties have arranged their affairs and with which courts should not lightly interfere. For support on this point, she cited s. 17(4.1) of the 1985 Act which stipulates that a court order for spousal support may only be varied if there has been a change in circumstances, defined by this Court in *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), at p. 688, as a material change which, if known at the time, would likely have resulted in different terms.

146 Abella J.A. reasoned that if a court order could be varied by meeting a threshold of material change, it was difficult to conceive of why a separation agreement should be subjected to a different or higher threshold before a court could review what amount of support, if any, was justified. While court orders could be "presumed to be in reasonable compliance with the objectives of the Act by virtue of their having received judicial screening or scrutiny", parties' own agreements could be "deemed to be in reasonable compliance only with the negotiated wishes of the parties" (para. 73). Abella J.A. thus held that there was no basis in the current Act for imposing a threshold as stringent as the one pronounced in the trilogy for overriding separation agreements.

147 Abella J.A. stressed that it had been open to Parliament when it amended the *Divorce Act* in 1985 to limit the vulnerability of agreements to judicial review and variation by requiring deference to their terms. In the absence of any such statutory direction, the court should look for guidance to the overall scheme of the support provisions in the 1985 Act, which establish economic equity as the overriding objective. In this regard, Abella J.A. expanded her analysis of s. 15.2 to include a review of the recent jurisprudence of this Court, including *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.), and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.). In her view, this jurisprudence reinforced the conclusion she had reached on a plain reading of s. 15.2 of the 1985 Act: "there has been so significant a change in the legislative directions for awarding spousal support in the 1985 *Divorce Act*, that judicial interpretations founded on the old language cannot survive, let alone prevail" (para. 76).

148 Abella J.A. emphasized that the stringent threshold for variation under the trilogy was rooted not only in a belief in reinforcing the rights of parties to arrange their affairs with finality, but also in the "clean break" theory of spousal support, and the concept of the state as the ultimate provider. She found these principles to be inconsistent with the philosophies of spousal support that this Court has outlined in its recent jurisprudence. As L'Heureux-Dubé J. stressed in *Moge*, in applications for corollary relief, courts must be attentive to all four of the objectives in s. 15.2. Within this legislative framework, self-sufficiency, the primary support objective prevailing at the time of the trilogy, can no longer be prioritized at the expense of equally important goals.

149 In addition to discussing *Moge* and *Bracklow*, Abella J.A. referenced in some detail the minority judgment of L'Heureux-Dubé J. in *B. (G.) c. G. (L.)*, [1995] 3 S.C.R. 370 (S.C.C.). Abella J.A. agreed in principle with L'Heureux-Dubé J.'s finding that, while parties should continue to be encouraged to resolve their disputes by agreement under the 1985 Act, the question of whether their autonomous decision-making capacity will be insulated from judicial scrutiny and thus whether their agreement will be final depends on the degree to which the terms of the agreement take into account the Act's objectives, even where the agreement was consensual and the parties were fully informed.

150 Abella J.A. concluded that the threshold for variation of a spousal support agreement in an application for corollary relief under s. 15.2 is whether there has been a material change in the parties' circumstances since the agreement was made. In other words, she imported the test from s. 17 into s. 15.2 so as to ensure that an agreement would be accorded some deference, but would not preclude attention to the other considerations enumerated in s. 15.2. She held that where the material change threshold is met, the court should determine what amount of spousal support, if any, is justified having regard to the statutory principles set out in s. 15.2 of the 1985 Act and refined in the leading cases from this Court.

151 On the facts, Abella J.A. held that two factors combined to represent a material change in circumstances. First, the extent of Ms. Miglin's childcare responsibilities was greater than had been anticipated in the Parenting Agreement. This had a negative impact on her range of employment options and thus affected her ongoing need for support. Second, the support Ms. Miglin had received through the vehicle of the Consulting Agreement had been terminated by Mr. Miglin despite her ongoing need. Having concluded that these factors represented a material change which, if known at the time, would likely have resulted in an agreement for ongoing spousal support, Abella J.A. turned to the question of whether, and to what extent, support should be ordered.

152 Abella J.A. held that the Consulting Agreement, which the trial judge had found to be the true agreement for spousal support, fell short of meeting the 1985 Act's objectives in s. 15.2(6) (at para. 100):

> ...it took insufficient account, both in quantum and duration, of how fundamentally Ms. Miglin's role during the 15-year marriage had created a financial dependency on Mr. Miglin and impaired her capacity to become economically self-sufficient. Only Ms. Miglin experienced economic disadvantage or hardship arising from the marriage and its dissolution, yet the long-term financial consequences of her childcare responsibilities were not equitably acknowledged in the economic arrangements made by the parties.

153 Abella J.A. upheld the quantum of support awarded by the trial judge, concluding that it was not unreasonable in the circumstances. Abella J.A. removed, however, the trial judge's imposition of a five-year time limit on support, as she held that it was not easy to anticipate when and to what extent the disadvantageous impact of Ms. Miglin's childcare responsibilities on her earning capacities would be attenuated. The five-year limitation was thus "unhelpfully speculative" (para. 102).

154 In this fashion, Abella J.A., like the trial judge, used her authority under s. 15.2 to award corollary relief to Ms. Miglin in light of the deficiencies identified in the Separation Agreement and the Consulting Agreement.

155 In addition, Abella J.A. concluded that the trial judge's interventions did not raise a reasonable apprehension of bias.

IV. Analysis

A. Issues

156 The initial question to be addressed in this case is identical to that which confronted this Court in the *Pelech* trilogy: "Should the parties be held to the terms of their contract or should the court intervene to remedy the inequities now alleged by one of the parties to be flowing from the bargain previously entered into freely and on full knowledge and with the advice of counsel?" (p. 806) If the Court does intervene, should the threshold for this intervention continue to be that established in the trilogy, or is a different approach required under the 1985 Act and in light of the current jurisprudence?

(1) The Trilogy's Key Precepts

157 The trilogy stands for the proposition that in order to vary the terms of a valid separation agreement whereby the parties have purported to settle finally the issue of spousal support, an applicant must show a radical change in circumstances that is causally connected to the marriage. This strict threshold test for judicial intervention was intended to foster finality in the affairs of former spouses. It reflected what Wilson J. termed the "overriding policy consideration" of encouraging people "to take responsibility for their own lives and their own decisions" (p. 850).

158 It is important to stress, as Professor M. Shaffer and D. Melamed do, that the trilogy's privileging of finality was rooted in both practical and theoretical concerns: "Separation Agreements Post-*Moge, Willick* and *B. (G.) c. G. (L.)* : A New Trilogy?" (1999), 16 *Can. J. Fam. L.* 51). Practically speaking (at p. 53):

> Wilson J. clearly saw separation agreements as a desirable way of settling the spouses' affairs. In her view, separation agreements allowed parties to take responsibility for their lives by deciding how they -- rather than the courts -- would settle their affairs; they also provided parties with the freedom to sever the financial ties between them and to get on with their lives. To encourage people to enter into settlement agreements, Wilson J. held that the law should take the parties at their word. Adopting a deferential approach to agreements would, in Wilson J.'s opinion, create an incentive for people to settle rather than to go to court since they would have the certainty of knowing that their desires as expressed in the agreement would be respected.

More theoretically, Wilson J.'s insistence on finality reflected her stance on both "individual autonomy and gender equality" (at p. 53):

> In Wilson J.'s view, holding parties to their agreements manifested respect for people's ability to make important personal decisions; in contrast, overriding agreements too lightly based simply on the court's notion of fairness was "paternalistic." In a similar vein, Wilson J. opined that permitting the court to override settlements on the basis of systemic gender inequality would "ultimately reinforce the very bias" that the court would be seeking to counteract.

159 The trilogy's emphasis on the promotion of individual responsibility and finality in the affairs of former spouses both reflected and promoted what is customarily labelled the "clean break" model of support, which had been strongly advocated in Lamer J.'s dissent in *Messier v. Delage*, [1983] 2 S.C.R. 401 (S.C.C.). This model, premised on an understanding of marriage as an equal partnership between autonomous individuals, views the primary goal of a support order as facilitating the economic self-sufficiency of the dependent former spouse as quickly as possible after the divorce. This allows the parties "to make new lives for themselves" without carrying forward any "ongoing contingent liability" for each other's misfortunes after the marriage (*Pelech*, at p. 851). The clean break theory of spousal support is of necessity buttressed by another theoretical assumption, that of the state as the ultimate provider, as Abella J.A. noted. (at para. 77)

160 The trilogy's approach to spousal support has generated extensive literature, much of which, as Abella J.A. observed, is critical of its "restrictive impact on the ability to redress the disadvantageous economic consequences of a separation" (para. 54). Academics have critiqued both the practical results of the trilogy's strict threshold -- the enforcement of agreements that are unfair to one party, typically the wife -- and the theoretical assumptions on which this threshold is premised. Wilson J.'s insistence on the "sanctity of spousal contracts" and her "supposed promotion of equal autonomy" did not stand uncontested even in their origins, with La Forest J. challenging Wilson J.'s approach in dissent in *Richardson*, *supra* (see J.W. Durnford and S.J. Toope, "Spousal Support in Family Law and Alimony in the Law of Taxation" (1994), 42 *Can. Tax J.* 1. As Durnford and Toope outline at p. 18:

> ...La Forest J. questioned the model of rational choice implicit in the majority reasons in *Pelech* and *Richardson*. He noted that divorce is one of the most stressful occasions in any person's life and that many people do "very unwise things, things that are anything but mature and sensible, even when they consult legal counsel." Agreements should not be treated as sacrosanct in this emotionally fraught context. [Footnotes omitted.] (See also *G. (L.) v. G. (B.), supra*, at para. 35 (*per* L'Heureux-Dubé J.))

161 Academic criticism went further still, with some commentators suggesting that the trilogy's insistence on the formal equality and autonomy of spouses may efface substantive gender inequalities and fail to recognize the complex patterns of economic dependence that may develop during a marriage (see, for example, M.J. Bailey, "Case Comment: *Pelech, Caron*, and *Richardson* " (1989-1990), 3 *C.J.W.L.* 615; N. Bala, "Domestic Contracts in Ontario and

the Supreme Court Trilogy: 'A Deal is a Deal'" (1988), 13 *Queen's L.J.* 1; The Honourable Madame Justice B. McLachlin, "Spousal Support: Is It Fair to Apply New-Style Rules to Old-Style Marriages?" (1990), 9 *Can. J. Fam. L.* 131).

162 The criticism of the support theories and objectives underpinning the trilogy points to the same conclusion that I find flows inevitably from two developments in the law subsequent to this Court's decisions in *Pelech* and its companion cases, namely that the high threshold for judicial scrutiny articulated in the trilogy is no longer good law. These developments, each of which I will discuss in some detail, are: (1) the 1985 amendments to the *Divorce Act* and (2) the more contextual approach to spousal support that characterizes this Court's recent jurisprudence. In light of these developments, it is no longer appropriate to require an applicant to demonstrate a radical change in circumstances that is causally connected to the marriage before a court may intervene in a "final" support agreement. Instead, a more flexible and contextual approach must be applied, as well as a broader view of causation in the context of the untangling of marital relationships.

(2) The Parties' Agreements

163 Prior to exploring why the trilogy no longer applies given the revised statute and the contemporary jurisprudence, a preliminary question must be addressed: Ms. Miglin's argument that, given the particular facts at issue, it is possible for this Court to decide this appeal without determining whether the trilogy is still good law. Ms. Miglin applied for corollary relief pursuant to s. 15.2 of the 1985 Act before the expiry of the Consulting Agreement, which the courts below described as "thinly disguised spousal support". As a result, Ms. Miglin submits this is really a case "about the jurisdiction of the Court to award spousal support in the face of an existing spousal support agreement, not about an award of spousal support in the face of a full and final release". Ms. Miglin stresses that the Consulting Agreement, while time-limited, contained a renewal clause and in her view is thus properly construed not as a final agreement but rather as an agreement anticipating a review, variation or continuation of support. In Ms. Miglin's submission, then, the facts do not engage the trilogy, which was intended to apply only to "final agreement[s] entered into [by] the parties in order to settle the economic consequences of their divorce" (*Moge*, *supra*, at p. 839; see also *Pelech*, *supra*, at p. 849).

164 Even if Ms. Miglin is correct in her characterization of the Consulting Agreement, this argument adopts an unjustifiably narrow view of the parties' agreements. As I will outline in more detail below, the determination of an application for corollary relief under s. 15.2 in the face of an antecedent agreement between the parties requires an evaluation of the entirety of the parties' negotiated arrangement. In this case, the financial "package" that the parties negotiated consisted of both the Separation Agreement and the Consulting Agreement. The framework Separation Agreement contains a waiver of spousal support. At the same time, the Consulting Agreement referenced therein and attached as Schedule E thereto, whether or not it is properly understood as "thinly veiled spousal support", provides evidence of the parties' awareness and acknowledgment

that Ms. Miglin would require a post-separation income. As Abella J.A. noted, the fact that it contained an open-ended renewal clause suggests that the parties understood that her need might continue past a five-year period.

165 The peculiar nature of the parties' agreements militates against adopting Ms. Miglin's approach of considering only the Consulting Agreement, to the exclusion of the Separation Agreement, as a way of avoiding the question of the trilogy's continued applicability. This Court must be attentive to the entirety of the parties' negotiated settlement, including the apparent inconsistences therein, namely, the coexistence of a support waiver based on a declaration of future self-sufficiency with a *de facto* support provision based on an acknowledgement of future need. With this backdrop in mind, I must now turn to the issue of whether the trilogy's threshold test for judicial intervention in final support agreements remains good law.

(3) The State of the Law: the Courts Below

166 The courts below each addressed the question of whether the trilogy applies on the facts of this case. Although he did not specifically reference the trilogy, the trial judge held that the threshold test of a radical change causally connected to the marriage did not apply under s. 15 of the 1985 Act. Instead, in his estimation, s. 15 requires the court to determine whether the separation agreement provides support to the dependent spouse in a fashion consistent with the social policies and objectives set out in s. 15(7) (now s. 15.2(6)). In reaching this conclusion, the trial judge declined to follow *Santosuosso v. Santosuosso* (1997), 32 O.R. (3d) 143 (Ont. Div. Ct.), a case that I will review in more detail below.

167 The Court of Appeal took a broader approach, characterizing the main issue in this case as "whether the threshold established in the *Pelech* trilogy survives [the] amendments and continues to apply under the new 1985 *Divorce Act*" (para. 2). After a comprehensive review of the 1985 Act and this Court's jurisprudence on spousal support, Abella J.A. answered this question in the negative, holding that the appropriate threshold test under s. 15.2 is whether there has been a material change in the parties' circumstances since the time the Agreement was made.

168 The differences between the approaches of the trial judge and the Court of Appeal reflect a much broader confusion among lower courts generally as to whether the trilogy's "radical change" and "causal connection" threshold test for judicial intervention in final spousal support agreements continues to be a valid one and, if not, what threshold test now applies. This confusion underscores the importance of approaching the question of the trilogy's continued viability directly and definitively. This is a step which to date this Court has not taken, despite reconceptualizing the nature and purpose of spousal support based on the 1985 Act in cases such as *Moge* and *Bracklow* (the exception is the minority judgment of L'Heureux-Dubé J. in *B. (G.) c. G. (L.)*, *supra*, which I will discuss in more detail later in these reasons). This area of the law cannot remain in this state of

turmoil. Guidance is needed if trial courts are to be able to evaluate, and family law practitioners are to be able to draft, support agreements with any degree of coherence and consistency.

169 Shaffer and Melamed, in their article "Separation Agreements Post-*Moge, Willick* and *B. (G.) c. G. (L.)* : A New Trilogy?", *supra*, provide an overview of the range of judicial views on the treatment of final settlement agreements, followed by a detailed appendix outlining the holdings in 75 cases across the common-law provinces. The Alberta Court of Queen's Bench in *Wilkinson v. Wilkinson* (1998), 43 R.F.L. (4th) 258 (Alta. Q.B.), at pp. 270-71, groups the various approaches to the trilogy that Shaffer and Melamed identify into four main categories (see also J.D. Payne and M.A. Payne, *Canadian Family Law* (2001), at pp. 215-16):

> 1 cases in which courts strictly apply the *Pelech* standard, requiring a radical change causally connected to the marriage before intervening in settlement agreements;
>
> 2 cases in which courts purport to apply the *Pelech* standard, but in fact apply a standard that is less stringent;
>
> 3 cases in which courts explicitly reject the trilogy standard in favour of some other variation standard, for instance applying a lower threshold such as material or substantial change or endorsing the minority opinion in *B. (G.) c. G. (L.)*, *supra*, and determining whether to intervene in an agreement by having regard to the extent to which it meets the objectives in s. 15.2 of the *Divorce Act*; and
>
> 4 cases in which courts have shown an increased willingness to adopt a broad definition of change, defining for instance as a "change" the parties' failed expectations where the dependent spouse does not achieve the predicted economic self-sufficiency.

The consequence of this wide variation in approaches is that similarly situated individuals seeking corollary relief pursuant to s. 15.2 in the face of antecedent agreements are subjected to vastly different treatment by courts.

170 To the extent that Shaffer and Melamed are able to identify a trend in this area of the law, they note that "the trilogy has been abandoned in an astonishing number of cases", although this has not been uniform across the country, (p. 61). I would add to this my sense that, even where courts do apply the trilogy they are increasingly unlikely to do so unselfconsciously, particularly when they reach the conclusion that the trilogy's strict threshold test is not met on the facts. In *Wilkinson*, for instance, even though the court treated the case as an application for a variation of a time-limited support order under s. 17(10) (a provision that, in contrast to s. 15.2, *does* codify a change-based causal connection threshold test) and emphasized contract law principles, it applied *Pelech* only after providing a thorough review of the conflicting judicial approaches to the question of the continued validity of the trilogy.

171 A similar trend was observed in Quebec by academic comment. It appears that, soon after the trilogy, Quebec courts began to adopt a broader and more flexible view of the diversity of the models of marriage, of the grounds for support and of causation issues. At the same time, Quebec courts seem to have felt constrained in the development of new and more flexible approaches to the application of the 1985 Act by lingering doubts about the status of the trilogy and its precedential value particularly since *Moge*, *supra*, especially when they had to review separation agreements (see, for example, D. Goubau, "La situation depuis la trilogie *Pelech*", in *Droit de la famille québécois* (loose-leaf), vol. 2, at pp. 6019-25; D. Goubau, "Une nouvelle ère pour la pension alimentaire entre ex-conjoints au Canada" (1993), 72 *Can. Bar Rev.* 279; *Droit de la famille - 1404*, [1991] R.J.Q. 1561 (Que. C.A.); *A. (G.) c. R. (J. P.)*, [1992] R.J.Q. 931 (Que. C.A.); *Droit de la famille - 1688*, [1992] R.J.Q. 2797 (Que. C.A.); *Droit de la famille -- 2249*, [1995] R.J.Q. 2066 (Que. C.A.); *M. (R.) c. S. (L.)*, [1996] R.J.Q. 34 (Que. C.A.); *B. (R.) c. J. (C.)*, [1996] R.D.F. 735 (Que. C.A.); and *V. (D.) c. A.F. (J.)*, [2002] R.J.Q. 1309 (Que. C.A.)).

172 It is interesting to note in this regard that Mr. Miglin himself, perhaps in recognition of these trends, has essentially abandoned the argument that he appears to have advanced in the courts below -- that the Separation Agreement indeed triggered the application of the trilogy and that he was insulated from a claim for spousal support because there was no radical and unforeseen change in circumstances causally connected to the marriage. In his pleadings before this Court, he stated that "in view of the legitimate controversy the trilogy invoked, its application is no longer tenable", although he was careful to observe that it nonetheless remained open to this Court to affirm the trilogy.

173 In my view, the lower court cases of particular interest in this context are those in which the court either purports to apply the trilogy but in fact applies a standard that is less stringent, or applies the trilogy standard only reluctantly. These types of cases, and the commentary that they have generated, provide an indication of what makes courts wary of applying the trilogy and thus what is truly at stake in the debate over whether the trilogy should be rejected or reaffirmed.

174 Two cases are instructive here by way of example. First is the much discussed decision of the Ontario Divisional Court in *Santosuosso*, *supra*. In *Santosuosso*, the parties had entered into a Separation Agreement after a 23-year traditional marriage, in which spousal support was to terminate after two years. The Agreement contained a full waiver and release of all further support even in the face of a catastrophic change in circumstances. After the time-limited support terminated under the Agreement, the wife applied for spousal support pursuant to s. 15 of the Act. She argued that, at the time the Agreement was negotiated, the parties had expected that she would become economically self-sufficient, but that these expectations were not realized. At the time she applied for corollary relief, she had not successfully completed upgrading courses or secured full-time employment. She was working 60 hours a week at low-paying jobs, earning $1,700 monthly. The Divisional Court found that Ms. Santosuosso had suffered a radical, unforeseen change in

724 circumstances that was related to a pattern of economic dependency created in the marriage, concluding, at p. 156, that:

> It was not within the contemplation or expectation or reasonable anticipation of *both parties* to the agreement that the applicant would be working almost 60 hours a week at low-level wages to earn $1,700 a month in 1996. Further, an underpinning of the agreement was that the wife would achieve what can be fairly characterized as a modest and realistic goal for financial independence having regard to her circumstances. [Emphasis in original.]

175 Critics of the decision have suggested that the court in *Santosuosso*, although paying lip service to the trilogy, applied a considerably less stringent threshold for variation: see, for example, S.M. Grant, "The End of Finality" (1997) 27 R.F.L. (4th) 252. According to Shaffer and Melamed, *supra*, at p. 66:

> It is hard to buy the court's conclusion that Mrs. Santosuosso's circumstances were truly a radical and unforeseen change as contemplated by the trilogy. One might argue that a more plausible interpretation of what was going on in the case was a refusal of the court to defer to the contract *not* because it fell within the exception carved out by the trilogy, but because it did not accord with the court's sense of fairness. As a result, some commentators have decried the decision in *Santosuosso* as heralding the end to the finality of separation agreements. [Emphasis in original.] (See also N. Bala and K. Chapman, "Separation Agreements & Contract Law: From the Trilogy to *Miglin*", in *Child & Spousal Support Revisited* (2002), tab 1, at pp. 1-26 and 1-27).)

176 The tension identified here between finality and fairness also surfaces, albeit in a different manner, in *Leopold v. Leopold* (2000), 51 O.R. (3d) 275 (Ont. S.C.J.). In *Leopold*, the Ontario Superior Court of Justice refused to vary a time-limited support agreement containing a full and final release where the husband sought renewed support. The parties had been married for seven years and had two surviving children. At the time of the marriage, the husband was earning $20,000 per year and had a small net worth of $1,400, while the wife was the beneficiary of a significant family trust. At separation, the wife's various interests were valued in excess of $4 million. The husband's employability was circumscribed throughout the marriage by health problems which continued after separation. When the parties separated, they entered into agreements whereby the husband received an equalization payment of $205,000 and spousal support in the amount of $1,700 per month for 42 months. After the time-limited support had expired, the husband applied for spousal support under s. 15.2 of the 1985 Act. He cited two factors that in his view should trigger renewed support: the fact that his business plans had not been successful and that the parties' eldest child, who had behavioural and health problems, had begun to live with him. Wilson J. applied *Pelech* and denied support, finding that these events did not constitute a radical, unforeseen change in circumstances causally connected to the marriage.

177 Although she applied *Pelech*, Wilson J. also sought to strike a balance between the "important competing objectives of certainty and fairness" (*Leopold*, *supra*, at para. 98). To this end, she devoted considerable effort in her reasons to outlining a less restrictive definition of common-law unconscionability that would fit the unique dynamics of family law, although she ultimately concluded that the agreement in question did not meet even this more relaxed standard. From Wilson J.'s perspective, an unconscionable agreement in the family law context is an agreement that is outside of the range of what is objectively fair at the time it is entered into. As she outlined at paras. 141 and 143-44:

> ...in the family law context, the parameters of a strict test of unconscionability begin to blur. I conclude that the traditional dual test defining what is unconscionable requiring both inequality and improvidence rooted in the common law ignores the special nature of marital relationships. A rigid application of the inequality requirement ignores the reality that these are not commercial contracts negotiated for commercial gain in emotionally neutral circumstances.
>
> . . . . .
>
> I agree with the suggestion of McLeod in his annotation to *B.* (*G.*), *supra*, at p. 216 that a court should only intervene if the terms of the settlement are outside the generous ambit within which reasonable disagreement is possible.
>
> I conclude, therefore, that an unconscionable agreement is one that is clearly outside the range of what is objectively fair when it was made, taking into account the facts and circumstances of the parties. If it is clearly outside the range within which rational people may disagree, then inevitably the statutory objectives of the 1985 *Divorce Act* will not have been met. [Emphasis added].

178 Although she rejected the routine imposition of "judicial concepts of fairness" in the face of existing agreements, Wilson J. suggested that this revised and more flexible notion of unconscionability should serve as a caveat to the trilogy's strict threshold test (paras. 142 and 146(4)). In her view, this is appropriate in part because, in the trilogy itself, the threshold test for judicial intervention in a final agreement was subject to the reservation that the agreement not be "unconscionable in the substantive law sense" (see *Richardson*, *supra*, at p. 872).

179 The role that Wilson J. crafts for unconscionability in *Leopold* in fact represents a significant shift from the role accorded to the stricter common law doctrine by Wilson J. in the trilogy. As J.G. McLeod comments in the annotation to *Leopold* at pp. 124-25:

> Wilson J. wanted to reduce the threshold to override the support provisions of a final support agreement but had a difficult time implementing such a test on the current state of the law. Her description of many wives' circumstances at the time of marriage breakdown and during negotiations accurately reflects the problems facing a lawyer representing a dependent client.

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> She was probably correct when she stated that traditional rules of law were inadequate to ensure that fair support bargains are reached. If courts cannot control the validity rules to ensure that only fair bargains are upheld, they may be able to accomplish the same end by expanding the range of cases where a court can override the support provisions of a valid agreement.
>
> When Wilson J. raised the concept of unconscionability as a limiting factor on upholding settlement agreements in the trilogy, she was referring to a flaw in the formation of a contract, not to a test to override a domestic contract. In *Leopold*, Wilson J. seems to treat "unconscionability" as a potential threshold test to override a valid support agreement. [Emphasis added].

180 I will further explore the doctrine of unconscionability, as well as the relative merits of Wilson J.'s approach, later in these reasons. I find *Leopold* of interest at this stage of the analysis because it provides a clear example of the trend noted in *Wilkinson*, *supra*, at para. 49: "[il]n essence, the courts are looking for ways to circumvent the strict standard imposed by *Pelech* in order to ensure a fair result". The impetus to do so -- to tip the balance away from finality and towards fairness where these goals appear incompatible on the facts of a given case -- is in keeping with the significant shift that has taken place in both the statutory framework and the family law jurisprudence of this Court since the trilogy was decided more than 15 years ago.

181 It is also in keeping with a broader and more realistic understanding of the operation of contractual relationships that has emerged in both academic literature and case law in recent years, discrediting earlier, more abstract or formalistic notions of contract law (see Bala and Chapman, *supra*, at pp. 1-13 to 1-20). A legal scholar, Professor J.-G. Belley, for instance, has concluded from his extensive fieldwork that parties use commercial contracts primarily as a framework for ongoing cooperation, rather than as a conflict resolution tool for allocating gains and losses in the event of a litigated dispute between the parties (see *Le contrat entre droit, économie et société: Étude sociojuridique des achats d'Alcan au Saguenay-Lac-Saint-Jean* (1998)). As Belley outlines, over the long term, commercial contracts are voluntarily adjusted by the parties, because the parties prioritize preserving their contractual relationship (see also L.M. Friedman, *American Law in the 20th Century* (2002), at p. 385). They thus work towards mutual accommodation, rather than resorting to judicial intervention to resolve conflicts when they arise. The emphasis is placed on adapting and maintaining the relationship, rather than on one party or the other triumphing in a court battle. The contract structures and facilitates continuous cooperation between the parties. In other words, in practice parties prefer to keep their commercial contracts flexible and adaptable, rather than seeking rigid enforcement through judicial institutions.

182 It is thus important to recognize that, while separation agreements are indeed unique as I will discuss in more detail below, even in commercial law settings contracts are not designed to be, nor are they understood as, unalterable. We must resist the temptation to reify or mythologize

the "sanctity" or "finality of contract", particularly in the field of family law, which primarily concerns the management of human relationships at some of their most sensitive points. That Parliament has resisted this temptation in the family law context is evident in the fact that, in the 1985 Act, separation agreements are recognized as but one of the factors to be taken into account in applications for corollary relief under s. 15.2. It is to a discussion of this statutory framework, as well as the contemporary spousal support jurisprudence of this Court, that I now turn.

(4) The Current Statutory and Jurisprudential Context

183 Both the 1985 Act itself and this Court's recent family law jurisprudence dictate that a case-by-case evaluation of fairness and compatibility with the statutory objectives -- not an axiomatic insistence on finality -- must guide courts in applications for corollary relief under s. 15.2, even in the face of an existing separation agreement.

(i) The Statute

184 As McLachlin J. (as she then was) stated in *Moge*, spousal support is, "first and last, a [matter] of statutory interpretation.... [I]n the end the judge must return to what Parliament has said on the subject" (p. 877). What Parliament had to say in the *Divorce Act* in 1968, under which the trilogy was decided, differs markedly from what it had to say in the 1985 Act.

185 Under the 1968 statutory framework, the "means and needs" test was the exclusive criterion for support. The 1968 Act provided that:

> **11**. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
>
> (*a*) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
>
> (i) the wife,
>
> (ii) the children of the marriage, or
>
> (iii) the wife and the children of the marriage;
>
> (*b*) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
>
> (i) the husband,
>
> (ii) the children of the marriage, or
>
> (iii) the husband and the children of the marriage; and

(*c*) an order providing for the custody, care and upbringing of the children of the marriage.

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

186 The 1968 Act was silent on the question of support objectives. However, as L'Heureux-Dubé J. outlined in *B. (G.) c. G. (L.)*, *supra*, "[w]hat was not spelled out in the 1968 Act was quickly made up by the courts", which adopted the clean break theory of support, assuming that the "economic self-sufficiency of either spouse could and should be achieved as soon as possible after the divorce" (para. 22). As I noted above, the trilogy, in establishing a strict threshold test for judicial intervention in separation agreements, both reflected and promoted this approach.

187 In 1985, Parliament replaced what Abella J.A. termed the "linguistic and conceptual minimalism" of s. 11 of the former *Divorce Act* with a "comprehensive scheme for support" (paras. 60-61). For ease of reference, I reproduce the relevant spousal support provisions of the 1985 Act here:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

. . . . .

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(*a*) the length of time the spouses cohabited;

(*b*) the functions performed by each spouse during cohabitation; and

(*c*) any order, agreement or arrangement relating to support of either spouse.

. . . . .

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(*a*) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(*b*) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(*c*) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(*d*) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

188 While I express no opinion on whether the trilogy's stringent threshold test was truly organic to the 1968 Act, a plain reading of the 1985 Act reveals that neither the trilogy's strict threshold, nor the values upon which it is grounded, have survived. The creation of a fundamentally different statutory environment is evidenced by two aspects of the 1985 Act that were entirely absent from the earlier Act and that are inconsistent with the trilogy: (1) the articulation in s. 15.2(6) of four specific spousal support objectives and (2) the inclusion of separation agreements in s. 15.2(4) as one of the factors relevant to the exercise of judicial discretion in an application for corollary relief.

189 These provisions require courts to engage in a more nuanced analysis than that required under the 1968 Act when considering a question of support and the basis for it. The starting point for this analysis, whether or not an agreement is in issue, is the objectives for spousal support articulated in s. 15.2(6): recognizing the economic advantages or disadvantages arising from the marriage or its breakdown; apportioning the financial consequences of childcare; relieving economic hardship arising from the breakdown of the marriage; and promoting, in so far as practicable, the economic self-sufficiency of the spouses within a reasonable period of time. The structure of s. 15.2(6) dictates, as this Court has repeatedly emphasized, that "[n]o single objective is paramount; all must be borne in mind" (*Moge*, *supra*, at p. 852; *Bracklow*, *supra*, at para. 35). The statute does not support the position that a final agreement relieves the court of the obligation to apply all four of the objectives of spousal support in an application for corollary relief under s. 15.2. The effect of the trilogy's strict threshold for judicial intervention is the "almost automatic" adoption of the terms of an agreement. This prevents the court from being attentive to, and in many cases defeats, one or more of Parliament's specified objectives (see the comments of Misener L.J.S.C. in *Corkum v. Corkum* (1988), 14 R.F.L. (3d) 275 (Ont. H.C.), at p. 286). The trilogy's requirement of a radical and unforeseen change in circumstances that is causally connected to the marriage is thus fundamentally incompatible with the requirements of s. 15.2(6) of the governing statute.

190 More broadly, s. 15.2(6) significantly qualifies the role of one of the key philosophies underlying the trilogy's strict threshold: that parties should be required to achieve self-sufficiency quickly and permanently in order to facilitate a clean break. While self-sufficiency is referenced in s. 15.2(6), it is only one of four objectives. The very language of the 1985 Act precludes courts from

granting self-sufficiency the pre-eminence it is accorded in the trilogy. This is particularly so given that self-sufficiency is the only qualified objective in s. 15.2(6) ("in so far as practicable"), which means that continuing need is an ongoing concern and not one that in the opinion of Parliament ends at the time of the separation or is always to be determined at that time. The court, in other words, must be closely attuned to what may be ongoing difficulties flowing from the breakup of the marriage relationship. Moreover, under s. 15.2, even where economic self-sufficiency has been attained, this will not necessarily dispose of a support application (see *Moge*, *supra*, at p. 852). In determining the right to, and the quantum and duration of spousal support, the court must also have regard, for instance, to the objectives of recognizing the economic advantages or disadvantages arising from the marriage or its breakdown and apportioning the financial burden of childcare.

191 The fact that the 1985 Act mandates a flexible and contextual approach to spousal support is underscored by the Act's treatment of support agreements themselves. The 1985 Act, in contrast to the 1968 Act, makes specific reference to agreements, including them in s. 15.2(4) among the factors a court must consider in determining whether to order spousal support. In this sense, as McLachlin J. (as she then was) noted in *Bracklow*, *supra*, in the 1985 Act "contractual support obligations, while not new, were given new emphasis" (para. 18). The extent of this emphasis, however, is limited by the structure of s. 15.2(4) itself. While agreements are enumerated as one factor to be taken into account in spousal support applications, they are not to be accorded primacy. Given this statutory framework, it is inappropriate to continue to apply the trilogy's radical change and causal connection test, the effect of which is to render the agreement *the* decisive factor in all but the most exceptional circumstances.

192 In *Richardson*, *supra*, La Forest J. argued against allowing separation agreements the kind of compelling weight the majority in effect accorded them by limiting judges' discretion to vary agreements to those cases where radical or catastrophic changes have occurred since the agreement was made. He stated, at pp. 883-84:

> Even if I thought that the adoption of such a judicial policy would have the desired effect, I do not think we are given the power to do this at the expense of those whom Parliament sought to protect by giving jurisdiction to a judge to order what he or she thinks is "fit and just" having regard to the factors spelled out in the legislation. Parliament's policy, as Chouinard J. noted, is one of "intentional flexibility" aimed at meeting the variegated situations a trial judge must face in divorce matters. I am confident that trial judges are in a better situation to respond to this policy than appeal court judges; trial judges hear the matter first hand. Parliament obviously took this view in vesting the discretion in them. Theirs is the task of making the decision, weighing the factors prescribed by the Act. Courts of appeal undoubtedly have a role within the limits previously described, in seeing that trial judges properly exercise their discretion by adequately weighing the factors they are required to consider, but the search for precision must be confined within the intentionally flexible policy adopted by Parliament. There is no flexibility in a judicially created policy that requires a judge to exercise his or her

> discretion to do what is fit and just in accordance with the provisions of a separation agreement unless radical changes have occurred since the agreement was made. Under such a policy, the judge's discretion simply becomes no more than one to vary a separation agreement when subsequent radical circumstances have occurred. This, in my view, amounts to rewriting the Act. This we have no right to do. [Emphasis added].

193 La Forest J. did not carry the day with this view in *Richardson*, but his words have enhanced meaning under the 1985 statutory framework. While the 1968 Act was silent on the matter, the 1985 Act specifically entrenches a flexible approach to agreements by defining them as but one factor to consider on an application for support. A plain reading of the statute does not support the view than an agreement can either be unduly privileged over the other factors enumerated in s. 15.2(4), or considered independently from the court's broader analysis of the support objectives codified in s. 15.2(6). There is thus a fundamental disconnect between the current statutory framework and the trilogy's approach in treating an agreement as a "virtually binding force unless radical changes have since occurred" (*Richardson*, p. 884).

194 As I will discuss in more detail later in these reasons, what flows naturally from the language of the 1985 Act is an approach that requires the court to evaluate the parties' agreement at the time of the application for corollary relief to see if it meets the objectives for spousal support enumerated in s. 15.2(6). The degree to which the agreement realizes these objectives in light of all of the parties' circumstances at the time of the application will be the determining factor in according it finality.

(ii) The Case Law

195 The conclusion I have reached based on a plain reading of the 1985 Act -- that neither the trilogy's strict threshold test for judicial intervention in a support agreement nor the underlying values on which it is based have survived -- is fully supported by the recent jurisprudence of this Court. The contemporary framework cases on spousal support, *Moge* and *Bracklow*, do not directly address the continued validity of the trilogy's threshold test for judicial intervention in the spousal support provisions of a final agreement. However, both espouse a contextual approach to spousal support that is fundamentally inconsistent with the emphasis on absolute autonomy, formal equality, and deemed self-sufficiency that grounded the trilogy's privileging of finality, even at the expense of fairness. This contextual approach reflects the varied models of marriage and is sensitive to the difficulties inherent in unbundling a marital relationship. It is also grounded in a broader notion of causation which seeks to fully address the consequences of the marriage as time and circumstances unfold in respect of the need for support.

196 At the heart of L'Heureux-Dubé J.'s analysis of the rationales for spousal support in *Moge* is the statutory imperative that I outlined above: in determining the entitlement to and the quantum of support, the Court's starting point must be *all* four of the objectives outlined in s.

732 15.2(6) of the 1985 Act. Citing Payne on Divorce, (2nd ed. 1988), at p. 101, L'Heureux-Dubé J. noted that the diversity of these objectives reflects Parliament's recognition that the "*economic variables of marriage breakdown and divorce do not lend themselves to the application of any single objective*" (*Moge*, *supra*, at p. 851). More particularly, she noted that there is no statutory basis for granting pre-eminence to the objective of self-sufficiency. Instead, taken together, the 1985 Act's spousal support objectives demand a broader approach. These objectives, each of which is predicated on the philosophy of marriage as a socio-economic partnership, "can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown" (*Moge*, at p. 866).

197 In *Moge*, L'Heureux-Dubé J. stressed not only statutory language (i.e., the diversity of support objectives) but also social policy in concluding that Parliament in the 1985 Act intended to move away from deemed self-sufficiency and towards what has come to be known as the compensatory model of spousal support. In relation to the social context in which support orders are made, she stated, at pp. 853 and 857:

> In Canada, the feminization of poverty is an entrenched social phenomenon....
>
> It would be perverse in the extreme to assume that Parliament's intention in enacting the Act was to financially penalize women in this country. And, while it would undeniably be simplistic to identify the deemed self-sufficiency model of spousal support as the sole cause of the female decline into poverty, based on the review of the jurisprudence and statistical data set out in these reasons, it is clear that the model has disenfranchised many women in the court room and countless others who may simply have decided not to request support in anticipation of their remote chances of success. The theory, therefore, at a minimum, is contributing to the problem.

198 The "ethos of deemed self-sufficiency", which allows for the creation of a clean break between spouses whether or not the conditions of self-sufficiency for the dependent spouse have *in fact* been met, fails to recognize the lived reality of many women both during a marriage and after its breakdown (*Moge*, at p. 853; see also Bailey, *supra*, at p. 633). As L'Heureux-Dubé J. explained, the disadvantages flowing from marriage and its breakdown tend to fall disproportionately on women because of the roles that they frequently assume during the relationship (particularly, but not exclusively, in longer term marriages or marriages involving children). Disadvantages such as time out of the work force or foregoing educational and training opportunities may irreparably and permanently affect women's prospects for self-sufficiency and render short-term, "sink or swim" support inadequate.

199 L'Heureux-Dubé J.'s emphasis on social context in *Moge* contrasts sharply with Wilson J.'s reluctance in the trilogy to acknowledge systemic gender inequality in establishing the threshold for judicial intervention in spousal support agreements. L'Heureux-Dubé J.'s approach, though not formulated specifically in relation to spousal support agreements, is more in keeping with La Forest

J.'s dissent in *Richardson*, in which he insisted that it was "not paternalism, but realism" (p. 877) to recognize continuing disparities along gender lines in spouses' bargaining power and ability to become economically self-sufficient following marriage breakdown. L'Heureux-Dubé J. noted in *Moge*, that while "there will be the occasional marriage where both spouses ... either mak[e] no economic sacrifices for the other or, more likely, mak[e] them equally", such cases "would appear to be rare". In these "utopian scenario[s]", the former spouses may be able to make a clean break and proceed with their respective lives, but in a majority of cases the marriage will have involved economic sacrifices by one spouse, typically the wife, and corresponding economic benefits to the other (p. 864-65). The logic of compensatory support requires that these respective roles be reflected in the spousal support arrangement (at p. 864):

> The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative.

200 The fundamental incompatibility between the trilogy and *Moge* lies, in large part, in this shift away from an insistence on formal equality towards a recognition of the substantive equality of the spouses in the marriage and at the time of the separation. Having regard to Parliament's goal of equitably apportioning the economic consequences of the marriage and its breakdown requires courts, in awarding spousal support, to address in a realistic and practical manner the consequences of the parties' relationship and its breakup.

201 *Moge* 's movement away from the "clean break" model is also reflected in L'Heureux-Dubé J.'s recognition that the objectives of support enumerated in the 1985 Act encompass non-compensatory, as well as compensatory, considerations (p. 865). This idea emerges as the central theme of *Bracklow*. In *Bracklow*, McLachlin J. reasoned that, even in the absence of a contractual or compensatory foundation, spouses may have support obligations where their former partners have need and they have the capacity to pay. In reaching this conclusion, McLachlin J. found that the direction in s. 15.2(4) that the judge consider the "condition, means, needs and other circumstances of each spouse" invites "an inquiry that goes beyond compensation to the actual situation of the parties at the time of the application" (para. 40). Similarly, two of the objectives in s. 15.2(6) -- relieving economic hardship arising from the breakdown of the marriage and promoting economic self-sufficiency to the extent practicable -- are sufficiently broad to encompass non-compensatory support (paras. 41-42).

202 At the root of *Bracklow* is the recognition that marriage may create a complex web of interdependencies that are not always appropriately addressed by the clean break model of

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marriage and support, which stresses the parties' independence. An alternate model, which in McLachlin J.'s view is reflected in ss. 15.2(4) and (6) of the statute, is that of "mutual obligation", which takes a somewhat broader view of the expectations and obligations that flow from marriage. As this Court recently stated in *Walsh v. Bona*, 2002 SCC 83 (S.C.C.): "people who marry can be said to freely accept mutual rights and obligations" (*per* Bastarache J., at para. 55). The mutual obligation model conceptualizes marriage as an "economic partnership ... built upon a premise (albeit rebuttable) of mutual support" and recognizes that it is artificial to assume "that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life" (*Bracklow*, at paras. 32 and 31). As McLachlin J. stated, "it is ... important to recognize that sometimes the goals of actual independence are impeded by patterns of marital dependence, that too often self-sufficiency at the time of marriage termination is an impossible aspiration" (para. 32). Where this is the case, and where compensatory support is not indicated, a party with the ability to pay may have an obligation based in the marriage relationship itself to continue to meet or contribute to the needs of a former spouse after the break. Realizing the goal of dealing equitably with the economic consequences of marriage breakdown in certain circumstances may require no less.

203 McLachlin J.'s contextual approach to the marital relationship in *Bracklow* stands in vivid contrast to Wilson J.'s more narrow approach in the trilogy. By way of example, McLachlin J.'s conclusion that in certain circumstances a potentially lifelong support obligation -- there are, as she says, "no magical cut-off dates" (para. 57) -- may arise out of the marriage relationship conflicts with Wilson J.'s view in *Pelech* that "to burden the respondent with [Mrs. Pelech's] care fifteen years after their marriage has ended for no other reason than that they were once husband and wife seems to me to create a fiction of marital responsibility at the expense of individual responsibility" (*Pelech*, *supra*, at p. 852). Similar discord flows from McLachlin J.'s finding that the former spouse, rather than the state, is in many circumstances the appropriate ultimate provider of non-compensatory support where a needy partner cannot attain post-marital self-sufficiency. By contrast, Wilson J. held that where a former spouse seeking corollary relief in the face of an existing agreement cannot establish that he or she has "suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage ... the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state" (*Pelech*, at p. 851-52). For McLachlin J., the approach is broad and contextual: "the desirability of freedom to move on to new relationships is merely one of several objectives that might guide the judge" (*Bracklow*, *supra*, at para. 57). For Wilson J., the clean break is paramount: "[The parties] made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other" (*Pelech*, at p. 851).

204 *Bracklow*, like *Moge*, thus emphasizes a more holistic and fact-based approach to spousal support, in keeping with the diversity of factors and objectives in the 1985 Act. The recognition in

Moge and *Bracklow* that the relationship of marriage often creates complicated and gender-based interdependencies that cannot adequately be addressed by stressing formal equality or deemed self-sufficiency is incompatible with the mantra of individualism that underscores the trilogy: individual choice, individual responsibility, and individual autonomy. *Moge* and *Bracklow* provide compelling support for the proposition that it is inappropriate to defer to a support agreement based on unrealistic assumptions about the absolute autonomy or deemed self-sufficiency of the parties. The paradigm shift evident in this Court's jurisprudence on the rationales for spousal support bolsters the conclusion that I reached above based on a plain reading of the statute: the trilogy's radical change and causal connection threshold test for judicial intervention in "final" agreements can no longer stand.

205 To be consistent with the developments in this Court's jurisprudence, the threshold test that replaces it must be one that insists on the substantive equality of the parties during the marriage and at the time of separation, by ensuring that the agreement equitably apportions the economic consequences of the marriage and its breakdown. Before turning to a discussion of the contours of such a test, I think it appropriate to make some prefatory comments about the nature of separation and support agreements themselves.

B. The Unique Nature of Separation and Spousal Support Agreements

206 Separation and support agreements aim to disentangle complex relationships and interdependencies. As Bala and Chapman, *supra*, comment, separation agreements are "uniquely significant" contracts that have a "profound and personal effect" on the individuals who enter into them (p. 1-2). Nevertheless, some commentators suggest that contract law principles would provide an adequate means of redressing any injustices that may arise between parties to such agreements (see M. Menear, "*Miglin v. Miglin* -- Judicial Assault on Individual Liberty" (2002), 20 *Can. Fam. L.Q.* 119). I disagree.

207 As I outlined above, in *Moge* and *Bracklow*, this Court emphasized the importance of a contextual approach to spousal support, which not only respects the diversity of marital relationships, but also recognizes the social and socio-economic realities that shape parties' roles within these relationships and upon marital breakdown. The private contractual model is blind to these realities and is therefore fundamentally incompatible both with the contextual approach to spousal support propounded by this Court and with the language of the 1985 Act.

208 Under the private contractual model, contracts may only be set aside if they are unconscionable in that they shock the conscience of the court. For a contract to be deemed unconscionable, there must be both a substantial inequality of bargaining power between the parties that is exploited by the stronger party who preys upon the weaker and substantial unfairness or improvidence in the terms of the agreement (see Bala and Chapman, *supra*, at pp. 1-7 and 1-8; *Mundinger v. Mundinger* (1968), 3 D.L.R. (3d) 338 (Ont. C.A.), aff'd (1970), 14 D.L.R. (3d) 256

(note) (S.C.C.)). The stringency of the test for unconscionability reflects the strong presumption that individuals act rationally, autonomously and in their own best interests when they form private agreements. Non-enforcement of the parties' bargain is only justified where the transaction is so distorted by unequal bargaining power that this presumption is displaced. It is inherently problematic to apply this strict standard, which is more appropriate to arm's-length commercial transactions, in the polar opposite negotiating context of family separation and divorce.

209 The effect of the private contractual model generally, and the doctrine of unconscionability more specifically, is to preclude any recognition of the unique context in which separation agreements are made and the special circumstances that they are intended to govern. Separation agreements are often negotiated in situations that are emotionally charged. Their negotiation may be further complicated by what are typically gender-based inequities in bargaining positions between the parties. In addition, separation agreements are inherently prospective in nature and, as family law experts stress, the parties may have difficulty accurately forecasting how the economic consequences of their marriage and its breakdown will play out over time. See M. Shaffer and C. Rogerson, "Contracting Spousal Support: Thinking Through *Miglin*", paper originally presented to the National Family Law Program (Kelowna, B.C., July 14-18, 2002), at pp. 13-15; Bala and Chapman, *supra*, at pp. 1-32 to 1-35.

210 In cases of marriage breakdown, it is not appropriate to require that circumstances rise to the level of unconscionability before parties' agreements will be reopened. Settlement agreements are formed in an environment where the assumptions underpinning the enforceability of freely chosen bargains do not apply to the same extent as in the commercial context. This was Wilson J.'s concern in *Leopold*, where she stressed that settlement agreements are negotiated in a unique emotional climate, involving much more subtle bargaining inequalities than are at play in a commercial context (see also J.G. McLeod, "Annotation" *B. (G). v. G. (L.)*" (1995) 15 R.F.L. (4th) 216, at p. 219). I share Wilson J.'s concerns in this respect, although I disagree with her conclusion, and that of the majority in this case, that the solution to this problem lies, in part, in revising the common law doctrine of unconscionability itself.

211 In my view, one does not need to entertain a heavy-handed or paternalistic view of the propriety of judicial intervention to "save people from themselves" in order to express scepticism about the background negotiating conditions for separation agreements and about whether, in light of these conditions, waivers of support can always be taken at face value. As La Forest J. observed in dissent in *Richardson*, *supra*, in the stressful circumstances of divorce "many people ... do very unwise things, things that are anything but mature and sensible, even when they consult legal counsel" (p. 883). J.D. Payne and M.A. Payne echo the conclusion that optimal bargaining is unlikely to take place in the negotiation of settlement agreements in *Dealing with Family Law: A Canadian Guide* (1993), at p. 78:

> In the typical divorce scenario, spouses negotiate a settlement, often with the aid of lawyers, at a time when they are still experiencing the emotional trauma of marriage breakdown. Spouses who have not come to terms with the death of their marriage and who feel guilty, depressed or angry in consequence of the marriage breakdown are ill-equipped to form decisions of a permanent and legally binding nature.

One possible effect of this emotionally charged negotiating environment is that spouses may seek to end things quickly and finally and may fail to assess the long-term impact of the breakup. The rush to be free of the relationship may significantly impede the process of weighing and balancing the economic advantages and disadvantages flowing from the marriage and its breakdown and ensuring that these advantages and disadvantages are accurately reflected in the support agreement.

212 In addition to the inherent emotional stress of separation and divorce, inequalities in bargaining power rooted in the nature of the parties' marital relationship may also have a negative impact on the negotiation of settlement agreements, as Shaffer and Rogerson suggest at p. 14. Subtle pressures may be at work even where the parties have negotiated over a long period of time, and even where there is proof they both received independent legal advice. Well-established patterns governing a couple's interaction may continue to manifest themselves during the negotiating process. For instance, a spouse who depended on and deferred to his or her partner throughout the marriage may continue to do so at the bargaining table. Alternatively, a legacy of abuse may continue to colour the parties' interactions as they work out the details of a support agreement. See Shaffer and Rogerson, *supra*, at p. 14; McLeod, *B. (G). v. G. (L.)*", *supra*, at pp. 218-19; G. Stotland and M.R. Siminovitch, "Renunciation to Spousal Support -- The Great Escape" (1996), 14 *Can. Fam. L.Q.* 159, at p. 166; M. Neave, "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994), 44 *U.T.L.J.* 97, at pp. 125-26.

213 In some situations, it may ultimately be such power dynamics that determine the content of an agreement, rather than an objective assessment of how best to equitably distribute the economic consequences of the marriage and its breakdown. C. Martin notes that there is some evidence to suggest that support claimants receive less through negotiation than might be ordered by the courts. Martin sees this evidence as reflective of the fact that support claimants are systematically disadvantaged in the negotiating process (see "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998), 56 *U.T. Fac. L. Rev.* 135, at pp. 139 and 156). I find the comments of Shaffer and Rogerson at p. 15, pertinent in this respect:

> ...the continuing prevalence of waivers and time-limits in spousal support agreements, even in paradigmatic spousal support cases involving marriages of significant duration with children, suggests that there may be something in the structure of bargaining around spousal support which allows the obligation to be whittled down. It also suggests that there are serious

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concerns about how free and fully informed some of the contractual choices about bringing finality to the spousal support obligation really are, thus undermining arguments in favour of contractual freedom and autonomy. [Emphasis added.]

214 Comments such as these underscore the importance of recognizing the degree to which social and economic factors may constrain individuals' choices at the bargaining table (see Neave, *supra*, at p. 122). The inequalities in bargaining power at play in the settlement process are not gender neutral. As this Court stressed in *Moge* at p. 850, in many (if not most) marriages, the wife remains the economically disadvantaged partner. Though marriage relationships are, in general, becoming more egalitarian, there continues to be a disjunction between the principle of equality and the lived economic and personal reality of many married women, and the law needs to be able to recognize and to accommodate the situations where this disjunction exists.

215 We should also recognize that it is typically women who come to the bargaining table as the financially dependent spouse, and hence the more vulnerable party in the negotiating process. Where this is the case, their freedom to negotiate may be significantly constrained by pressure to reach a timely settlement in light of financial need and other stresses, such as the inability to marshal other sources of support during the negotiations, and the fear of losing custody of, or access to, the children. See Bailey, *supra*, at p. 616; Neave, *supra*, at p. 117 and 125-26; Stotland and Siminovitch, *supra*, at pp. 165-66 and 168; Martin, *supra*, at pp. 146-48.

216 The unconscionability test is blind to these and other subtle ways in which the economic disparities between the parties and the parties' respective familial roles, both of which continue to be gender-based, may play into the negotiating process and significantly influence its outcome. The test that governs judicial intervention in spousal support agreements must be one that is responsive to these realities.

217 The new test must also be sensitive to the unique nature of the agreements the parties are negotiating. Unconscionability, as a retrospective doctrine which is concerned solely with the moment of contract formation, is inadequate to do so, even in the revised form suggested by Wilson J. in *Leopold* (see Bala and Chapman, *supra*, at pp. 1-9 and 1-35; Shaffer and Rogerson, *supra*, at p. 29). Separation agreements may "require individuals to make predictions about every aspect of their future lives" and, as Bala and Chapman note, such prospective assessments are "inherently speculative" (p. 1-3); see also Shaffer and Rogerson, *supra*, at pp. 13-14. Their accuracy may be undermined by the emotional overlay that characterizes marital breakdown and by the gendered disparities in bargaining power that I described above. Even where this is not the case, it may nonetheless be difficult for the parties to assess how the economic consequences of the marriage and its breakdown will unfold over time. Shaffer and Rogerson suggest, for instance, that parties "routinely under-estimate the time it will take a formerly dependent spouse to overcome the economic disadvantages of the marriage and become self-sufficient" (p. 13). The law should be able to take into account the fact that, for a myriad of reasons, parties at the time of separation

may not have the clear-sighted ability to project their circumstances into the future, and may thus negotiate agreements that will not in fact equitably distribute the economic consequences of the marriage and its breakdown as they play out over time.

218 Given these realities, the private contractual model -- and similarly any model based on the assumptions that underlie it -- has limited value in the spousal support context. Even where an agreement is not strictly speaking unconscionable, it may nonetheless be inappropriate for the court to uphold it. While it is important to respect the will of the parties, courts cannot assume that the parties' spousal support agreements necessarily provide a clear and transparent guide to their intentions, which, as in any area of the law, are often difficult to ascertain. In the family law context, the parties' "freedom" to contract may be significantly constrained by social and economic factors, and may be decidedly unequal. An agreement may be a product of many implicit, as well as explicit, compromises. It may reflect fundamentally flawed assumptions about how the consequences of the marriage and its breakdown will affect the parties' post-divorce lives. In light of these factors, I question the desirability of a policy of excessive deference that puts the courts in the position of enforcing support agreements because they are presumed to represent the objective expression of the parties' free will. While representation by competent counsel is advisable, even necessary, in this context and while professional advisors should certainly seek a proper settlement and most do, the presence of counsel will not always be sufficient to redress these problems.

C. Did the Court of Appeal Err in Applying a Change-Based Test?

219 If the trilogy test is no longer good law, and contract principles are insufficient to deal with the inequities that may flow from family law dynamics, the question then becomes what threshold test should govern the exercise of judicial discretion under s. 15.2 of the 1985 Act to modify the support provisions of a separation agreement or to enter a new support order in the face of an existing agreement. Abella J.A., in her reading of what she termed the *Divorce Act*'s "linguistic tea leaves", held that the threshold for varying a subsisting support agreement in an application for corollary relief under s. 15.2 is whether there has been a material change in the parties' circumstances since the agreement was made. Only where this threshold is met, is the agreement itself evaluated with reference to the objectives in s. 15.2(6) of the 1985 Act.

220 I agree with the majority that Abella J.A. was in error in establishing a change-based threshold under s. 15.2. I think it important to emphasize, however, that my reasons for so holding go beyond the inconsistency between a change-based threshold and the language of s. 15.2(4) itself. The imposition of a change-based threshold gives rise to broader difficulties in attempting to meet the objectives in s. 15.2(6) in a way that is appropriately attentive to the unique aspects of spousal support agreements.

221 Abella J.A. begins her analysis with the recognition that, based on the language in the 1985 Act and this Court's contemporary, more contextual approach to spousal support, the trilogy's

strict threshold test for judicial intervention in support agreements no longer applies. While I agree with her characterization of the support provisions of the 1985 Act as a whole, as well as her analysis of the recent trends in this Court's jurisprudence, I find inherently problematic Abella J.A.'s more narrowly focussed statutory analysis of both s. 15.2(4)(*c*) and the relationship between ss. 15 and 17 of the 1985 Act. In Abella J.A.'s view, the fact that orders and agreements are referred to together in s. 15.2(4)(*c*), while not determinative, may be interpreted as a signal of Parliament's intent that they be similarly treated. She thus reasoned that the standard for overriding the terms of a support *agreement* in an originating application under s. 15.2 should parallel the standard for varying a support *order* under s. 17(4) and adopted the change-based threshold test codified in s. 17 as the relevant threshold under s. 15.

222 In her attempt to root a change-based threshold under s. 15 in the provisions of the 1985 Act itself, Abella J.A. read into s. 15.2 something that is simply not there. The change threshold that she endorsed, and indeed any change-based threshold, accords a degree of finality to agreements that is inconsistent with the structure of s. 15.2(4) of the 1985 Act itself, which conceives of agreements as but one of the relevant factors for the court to consider in an application for corollary relief. The court's review of the relevant factors enumerated in s. 15.2(4) in relation to the objectives in s. 15.2(6) is not statutorily constrained by any explicit threshold test, as it is in s. 17. These aspects of s. 15.2 lend no support to the conclusion that Abella J.A. reached.

223 Even if the language and structure of s. 15.2 did not preclude the imposition of the material change-based threshold that Abella J.A. espoused, I would nonetheless reject any importation of this change-based test into s. 15.2. While the threshold proposed by Abella J.A. provides a level of assurance that the parties' arrangement will be upheld -- in so far as an agreement can *never* be overridden where the required degree of change has not occurred -- this degree of certainty comes at the expense of fairness, which may be considered only at the second stage of the analysis (see Shaffer and Rogerson, *supra*, at pp. 18 and 24).

224 Under Abella J.A.'s test, if no material change has occurred, even *patently unfair agreements* cannot be reviewed or varied by the courts. As Bala and Chapman, *supra*, note at p. 1-37, the inevitable result of requiring an applicant to satisfy a material change threshold for judicial review is that, in some cases, those who should be entitled to a review will be denied access to the courts (see also *Champagne v. Champagne*, [2001] O.J. No. 2660 (Ont. S.C.J.)). This outcome is inconsistent with the objectives of spousal support codified in s. 15.2 of the 1985 Act, as well as with broader notions of equity, equality and justice.

225 The likely result of a change-based threshold, as Ms. Miglin submitted, is that courts will manipulate the meaning of "change" to "deal with what are, essentially, fairness concerns". I agree with Shaffer and Rogerson that such manipulation is far less desirable than having courts directly and explicitly confront what constitutes a fair agreement at the initial stage of the analysis (pp. 22, 24 and 33). The risk that courts will be forced to manipulate what constitutes "change"

will remain a problem under the majority's framework, which in effect requires a very substantial change before a court may intervene at the time of the s. 15.2 application if the agreement in question was not vitiated by a "fundamental flaw in the negotiation process" and appeared to have been be in "substantial compliance" with the Act *at the time it was executed*. As I outlined above, family law experts stress that parties may not be able to adequately foresee all of the economic consequences of a marriage or its breakdown at the time they negotiate an agreement; over time, it may become clear that what seemed fair (or at least substantially compliant) at the outset, was not in fact so, even where there is no evidence of a material change in the circumstances of the parties. Though the majority uses the language of foreseeability, they interpret narrowly the range of circumstances that fall outside of the foreseeable. The result in some instances may be to prevent courts from redressing unfairness flowing from the parties' inability to accurately predict the long-term consequences of their marriage and its breakdown at the time they entered into their separation agreement.

226 I thus agree with Ms. Miglin's submission that a change-based threshold "imposes an artificial and unwarranted burden on a support claimant who is faced with an unfair agreement", and would add that this is so whether the change requirement serves as an initial threshold for judicial intervention (Court of Appeal) or plays a very significant role in whether the court intervenes in an agreement that *appeared* to have been in substantial compliance with the objectives of the 1985 Act at the time it was signed (majority). A change-based threshold must thus be rejected in favour of a fairness-based threshold in applications for corollary relief under s. 15.2. It is to a consideration of what fairness entails in this context that I now turn.

D. The Proper Approach to Applications Under Section 15.2

227 The appropriate threshold for overriding a support agreement in an application for corollary relief under s. 15.2 is whether the agreement is objectively fair at the time of the application. This test is based on the language of the statute, which gives the court a broad jurisdiction and a duty to ensure that matrimonial agreements prove to be consistent with the objectives of the law. It is also grounded in sound policy reasons which reflect the context in which these agreements are made and the complexities of the breakup of the marriage as they evolve in the parties' lives over time. It is in effect the approach endorsed by Shaffer and Rogerson, after a comprehensive review of the available alternatives, in their article "Contracting Spousal Support: Thinking Through *Miglin*", *supra*.

228 This threshold allows the reviewing court to intervene regardless of whether the unfairness at the time of the application stems from the unfairness of the initial agreement, the parties' failure at the time the agreement was negotiated to accurately predict how the economic consequences of the marriage or its breakdown would play out over time, or changes in the parties' circumstances (Shaffer and Rogerson, at p. 25). It places the emphasis on whether the support agreement has *in fact* brought about an equitable distribution of the economic consequences of the marriage and its

742 breakdown, the ultimate goal of spousal support embodied in the statute and affirmed by this Court. In contrast, the majority's two-part test creates an artificial distinction between an assessment of the agreement at the time it was signed and an assessment of the agreement at the time of the application. Where an agreement is not voidable for reasons relating to the circumstances of execution and is found to be in substantial compliance with the Act at the first stage, it will be subject to a very stringent test for variation at the second stage. As I noted above, this approach is inadequate to deal with the problems that family law experts identify flowing from the inherently prospective nature of spousal support agreements. Its effect is to penalize parties who do not accurately predict the future by subjecting agreements that may have appeared fair at the outset, but that result in unfair circumstances, to a stricter standard for judicial intervention. In addition, the majority's approach fails to accord appropriate weight to a consideration of whether the agreement is in fact meeting the objectives in s. 15.2(6) at the time of the application. In my view, a single standard is preferable. Courts should not be in the business of enforcing unfair agreements irrespective of whether the unfairness is inherent in the provisions of the initial agreement or manifests itself only as the economic consequences of the marriage and its breakdown play out in the parties' lives over time.

229 In my estimation, the content of fairness in this context is dictated by the 1985 Act itself. Parliament has spoken clearly on this issue by establishing legislative norms for spousal support in s. 15.2. A fair agreement is one that reasonably realizes the objectives codified in s. 15.2(6), the overarching purpose of which is the equitable distribution of the economic consequences of the marriage and its breakdown. I agree with the approach that L'Heureux-Dubé J. took to separation agreements in her minority decision in *B. (G.) c. G. (L.)*, *supra*, which involved an application for variation to a consent support order arising out of an antecedent agreement between the parties, pursuant to s. 17 of the 1985 Act. The principle that L'Heureux-Dubé J. established in there is equally applicable to applications for corollary relief under s. 15.2: the more a spousal support agreement takes into account the objectives codified in s. 15.2(6), the more likely it will be to influence the outcome of the application (para. 56). However, I would add to L'Heureux-Dubé J.'s analysis the caveat that there may well be cases, though they are likely to be in the minority, where the spousal support agreement at the time of formation does attempt to take into account the objectives of s. 15.2(6), but it nonetheless results in circumstances that are inconsistent with those objectives. In these situations, as well as in cases where the agreement's unfairness stems from the parties' failure to address adequately the objectives in s. 15.2(6) at the point of settlement, it is appropriate and, indeed, necessary for the court to override the spousal support provisions.

230 An approach that evaluates the extent to which an agreement realizes the Act's objectives for spousal support, and bases its degree of deference to the agreement on the agreement's degree of compliance, is mandated by the structure of s. 15.2 as a whole, which requires that the factors in s. 15.2(4), including any agreement, be assessed in light of the objectives in s. 15.2(6). Because this approach places the emphasis on an objective evaluation of the content of the agreement and the circumstances of the parties at the time of the application, it is also appropriately responsive

to the unique nature of family law agreements, which for the reasons I outlined above may not always provide a transparent guide to the parties' intentions. And, finally, this approach reflects what Parliament has determined to be the driving consideration in support awards: achieving an *equitable* disentangling of the parties' economic relationship upon marital breakdown. It is inappropriate to allow parties, by way of private agreements, to subvert this statutory policy (see McLeod, "Annotation: *B. (G). v. G. (L.)*", *supra*, at p. 218), and to require courts to sanction this subversion by mandating deference to unfair agreements.

231 The process of determining whether an agreement is fair will of necessity be fact and context specific. The issue is whether, in light of all of the parties' circumstances at the time of the application, the agreement adequately meets the spousal support objectives in s. 15.2(6). This will require trial judges to make case-by-case determinations based on the whole picture of the parties' relationship, including their respective functions during the marriage, their allocation of capital and income upon the breakup, their childcare responsibilities, their employment prospects, and a range of other factors. Because parties may attempt to achieve economic equity in a variety of ways (i.e., through property division and spousal support), the *entirety* of the parties' financial arrangement upon marital dissolution and not merely the spousal support provisions in their agreement must be considered. This is precisely the kind of comprehensive inquiry called for under s. 15.2. The inquiry must consider all aspects of the parties' relationship, addressing pure need as well as compensation.

232 Any attempt to apply the objectives in s. 15.2(6) in a particular case will involve judgment calls, accommodation, and interpretation. The parties' own attempts to achieve the objectives codified in s. 15.2(6) in the context of their unique situation should not lightly be disregarded. Whether, however, an agreement reasonably satisfies the objectives of spousal support does not depend entirely on the subjective expectations of the parties. Rather, it involves an objective assessment of both the content of the agreement and the circumstances of the parties at the time of the application. To be given substantial weight, the parties' agreement, objectively assessed, must indicate a genuine attempt to achieve the objectives in s. 15.2(6), and must fall within the parameters of "the generous ambit within which reasonable disagreement is possible" in terms of actually achieving them. See Shaffer and Rogerson, *supra*, at p. 29; McLeod, "Annotation: *B. (G). v. G. (L.)*", *supra*, at p. 220.

233 I agree with L'Heureux-Dubé J.'s suggestion in *B. (G.) c. G. (L.)*, that "[i]n drafting future agreements, counsel would be well advised to articulate the bases on which both spousal and child support covenants have been negotiated" and to mention more particularly "the various factors and objectives they took into account in their agreement to share the economic consequences of the marriage and its breakdown" (paras. 56-57). Reviewing courts are not required, however, to take the parties' characterizations of their situation at face value. A disclaimer such as that at para. 10(d) of the Miglins' Separation Agreement -- "[t]he parties specifically agree and acknowledge that there is no causal connection between the present or any future economic need of either party

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and their marriage" -- will not satisfy L'Heureux-Dubé J.'s admonition in letter or in spirit. Nor will statements such as that in para. 10(d) of the Miglins' Separation Agreement -- "[n]o pattern of economic dependency has been established in their marriage" -- where, as here, such statements are quite clearly belied by the facts. The parties do not alter the reality of their situation by simply proclaiming economic equality in their Agreement. In order for a court to lend substantial weight to an agreement, in addition to taking account of the parties' evident desire for finality, the agreement must do more than simply speak the language of equality. As emphasized in *Moge*, at p. 864, in a passage that bears repeating in this context:

> The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative. [Emphasis added.]

For an agreement to merit deference in an application for corollary relief under s. 15.2, it must recognize the parties' lived reality and must genuinely attempt in light of this reality to equitably apportion the economic consequences flowing from the marriage and its breakdown.

234 Even where an agreement represents a genuine attempt to address the objectives in s. 15.2(6), if, by the time of the application, it falls outside of the parameters of the generous ambit within which reasonable disagreement is possible in terms of actually achieving them, the court must intervene. In other words, it is not enough that an agreement is intended to effect an equitable sharing of the economic consequences of the marriage and its breakdown; it must in fact reasonably accomplish this end. If the parties' circumstances evolve in ways they do not anticipate when they enter into the agreement, even an agreement that envisioned meeting the objectives in s. 15.2(6) at the time it was negotiated may no longer serve those objectives at the time of the application. Fairness requires that in such cases the court override the agreement's spousal support provisions in favour of an order that does in fact realize the objectives of the 1985 Act.

235 The role of the reviewing court is not, however, to engage in tinkering with or "fine-tun[ing]" agreements (see McLeod, "Annotation: *B. (G). v. G. (L.)*", *supra*, at p. 220). It is important to stress that, in order to be respected as an authoritative guide to the parties' actual intentions and expectations and to be endorsed by a court faced with a s. 15.2 application, an agreement need not correspond perfectly in its terms or in its results with the objectives of the 1985 Act. Provided that at the time of the application the arrangement falls within the generous ambit within which reasonable disagreement is possible in terms of realizing the objectives in s. 15.2(6), it will be enforced. This approach does not deny individuals the autonomy to organize their lives as they see fit or prevent them from bringing their own concerns, desires and objectives to the negotiating

table as the majority suggests. Instead, it accords parties a considerable degree of flexibility in negotiating arrangements that reflect their particular priorities. At the same time, it recognizes that under the legislative framework there are, as broader principles of fairness dictate there should be, certain non-negotiables. Where, for instance, an agreement, either on its face or in its result, fails to address the dependent spouse's proven need arising from the breakdown of the marriage, it is appropriate for the court to intervene on the ground that the agreement is inconsistent with the objectives in s. 15(6), even if the agreement achieves some of the parties' other goals in reaching a settlement.

236 An approach that requires that agreements realize the objective of equitably distributing the economic consequences of the marriage and its breakdown is not only compelled by the 1985 Act, it is also consistent with society's notions of what is fair and just in the circumstances of marital dissolution. Though made in a different context, this Court's comments in *Bracklow*, *supra*, at para.48, are of relevance in this respect:

> To permit the award of support to a spouse disabled by illness is but to acknowledge the goal of equitably dealing with the economic consequences of marital breakdown that this Court in *Moge, supra*, recognized as lying at the heart of the *Divorce Act*. It also may well accord, in my belief, with society's sense of what is just. [Emphasis added.]

Marriages are complex relationships of trust and interdependence, in which people develop expectations and reliance that must be recognized. They are not commercial, arm's length transactions. The factors that shape the needs and expectations flowing from a particular marriage are numerous, and will include among others the length of the marriage and the functions the spouses performed during the course of the relationship. Upon marriage breakdown, the former spouses may come to some agreement relating to the support of either of them. Ideally, such an agreement will represent a genuine attempt by the parties to respond to the needs and expectations created by the marriage and its breakdown, and to recognize the effect that the dissolution of the relationship will have on the family unit as a whole, including any children of the marriage.

237 However, an agreement may respond only partially to the needs and expectations created by the marriage and its breakdown. Its existence does not allow courts to ignore the entirety of the parties' circumstances. To do so would not only be contrary to the 1985 Act but, in my view, to society's understanding of what is fair. Fairness requires that the parties' lived reality and the economic consequences that flow from it are addressed in the arrangement that governs their post-divorce relationship. It requires a court to consider *all* of the parties' needs and legitimate expectations and not only those recognized in an agreement. Where an agreement does not accord adequate weight to the actual economic dependencies flowing from the relationship or address the actual needs of the parties arising from the marital breakdown as those needs emerge in post-divorce life, in my view it is unjust and should not be upheld.

238 I must take issue with Mr. Miglin's argument, reflected in the majority's reasons, that focussing on the degree to which the terms of a support agreement realize the objectives set out in s. 15.2(6) is inconsistent with one of the broader policy goals of the 1985 Act, found in s. 9(2), the promotion of settlement. Section 9(2) requires lawyers acting on behalf of a party to a divorce proceeding to discuss the possibility of a negotiated settlement with their client and to inform their client of any mediation facilities of which they are aware. This provision reflects a broader ethical duty that binds lawyers in the conduct of all litigation as members of the Bar and officers of the court (see, for example, Rules 2.02(2) and 2.02(3) of the *Rules of Professional Conduct* of the Law Society of Upper Canada). However, while as s. 9(2) recognizes, settlement is clearly to be encouraged, I do not think that the 1985 Act may properly be understood to privilege settlement *per se*. A general provision such as s. 9(2) cannot be read independently from the very specific legislative objectives for spousal support outlined in s. 15.2(6). Parties, while encouraged by s. 9(2) to settle their affairs privately, are not permitted to contract out of the Act. The 1985 Act requires courts to make spousal support orders that aim as much as possible to comply with the objectives codified in s. 15.2(6). Given this statutory framework, what the 1985 Act may be said to encourage is not settlement in itself but rather settlements that accord with the legislative objectives for spousal support articulated in s. 15.2(6). To conclude otherwise is to fail to conceive of the 1985 Act as an integrated whole. It is also potentially to put courts in the position of enforcing unfair agreements that contradict the objectives of the very Act that empowers them to hear support applications in the first place.

239 In the spousal support context, then, the legislated policy goal is not negotiated settlement but rather the negotiation of fair settlements, with fairness evaluated according to the objectives of the 1985 Act (see also the comments of Shaffer and Rogerson, *supra*, at p. 21 in this respect). The requirement that an agreement be objectively fair at the time of the s. 15.2 application will not discourage parties from negotiating settlements, as the majority suggests. The fraction of divorces currently litigated is very small, perhaps even less than 5 percent (see Martin, *supra*, at p. 137; Payne and Payne, *Dealing with Family Law: A Canadian Guide, supra*, at p. 82). This reflects the significant benefits that negotiated settlements offer parties at marital breakdown. As Bala and Chapman, *supra*, outline at p. 1-41:

> Entering into a separation agreement avoids the financial and psychological costs of litigation, and provides for a more expeditious and less uncertain resolution of a dispute between spouses than taking their case before a judge for decision. Furthermore, a separation agreement is more likely to reflect the parties' expectations and preferences than an agreement imposed by a judge.

An objective fairness threshold for judicial intervention in spousal support agreements will not lessen parties' interest in avoiding the financial and psychological stress of litigation or in resolving their dispute expeditiously. It will allow parties to retain considerable freedom to draft

an agreement that both realizes the objectives in s. 15.2(6) and reflects their own expectations and preferences in a way a court-imposed order might not. Given these advantages, parties on marital dissolution will by and large continue to resolve their post-divorce affairs by private agreement. See Bala and Chapman, *supra*, at pp. 1-4 and 1-41.

240 I also agree with Bala and Chapman that the "vast majority of ex-spouses will *not* seek variation and the vast majority of people will honour their agreements" as the "psychological and financial costs of reopening an agreement will remain high" (p. 1-41 (emphasis in original)). These conclusions are supported by the fact that parties typically enter into and abide by agreements with regard to child support, and custody and access, despite the fact that courts enjoy a broad discretion to override the provisions of such agreements. They are also borne out by the lack of empirical evidence that a fairness threshold for judicial intervention in agreements with regard to matrimonial property division has discouraged settlement or increased litigation in British Columbia (s. 65(1) of the *Family Relations Act*, R.S.B.C. 1996, c. 128, empowers courts to override an agreement for the division of matrimonial property where it is "unfair"). See McLeod, "Annotation: *B. (G). v. G. (L.)*", *supra*, at p. 219; Bala and Chapman, *supra*, at pp. 1-41 and 1-42; Shaffer and Rogerson, *supra*, at pp. 8-9.

241 Rather than discouraging settlement, in my view a threshold for judicial intervention that involves an assessment of whether an agreement is objectively fair at the time of the application will encourage parties to negotiate fair settlements (see Bala, "Domestic Contracts in Ontario and the Supreme Court Trilogy", *supra*, at p. 61; Bala and Chapman, *supra* at p. 1-43). In the process, it will foster the genuine autonomy and dignity of both spouses. The awareness that reviewing courts will evaluate agreements in terms of the degree to which they realize the objectives in s. 15.2(6) should lead parties to prioritize reaching an equitable distribution of the economic consequences of the marriage and its breakdown. To this end, as I indicated above, parties will need to do more in an agreement than merely parrot the objectives of the 1985 Act, or the language of this Court's jurisprudence stripped of its context. The inquiry into whether an agreement is objectively fair at the time of the application is not a formalistic one, about whether the terms of the agreement appear to be in technical compliance with the Act. Rather, this inquiry involves a probing, contextual analysis of the content of the agreement and the circumstances of the parties at the time of the application in order to determine whether the substantive effect of the agreement is an equitable distribution of the economic consequences of the marriage and its breakdown.

242 In my view, it is not in line with the tenor of this Court's jurisprudence on spousal support to hold that an agreement is in "substantial compliance" with the objectives of the 1985 Act where it in fact deviates substantially from the goal of economic equity embodied in those very objectives. The threshold proposed by the majority may require only that settlements that represent a very significant departure from the spousal support objectives of the 1985 Act not receive judicial approbation. This sets the bar much too low. The goal in the family law context should be for parties to strive towards the most fair agreement they can, rather than merely for courts to set aside

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unconscionable or grossly unfair settlements. Judicial interpretation of the *Divorce Act* should not permit parties simply to avoid formal injustice when entering into separation agreements. The express wording of the 1985 Act and judicial developments since *Pelech* mandate that such agreements aspire to, and in fact achieve, substantive justice. Fairness requires nothing less.

E. Application to the Facts

243 In the circumstances of this appeal, it is not appropriate to defer to the spousal support waiver in the parties' Separation Agreement. Both the trial judge (applying in essence a fairness test) and the Court of Appeal (after finding that the material change threshold that I rejected above had been met) found that the Miglins' division of assets and maintenance arrangements for Ms. Miglin failed to meet the objectives in s. 15.2(6). I agree with this conclusion, although I think it important to clarify why, considered as a whole, the parties' financial arrangements were insufficient to fall within the generous ambit within which reasonable disagreement is possible in terms of realizing the spousal support objectives in s. 15.2(6). I also think it important to stress at the outset that, while it may be easy to be diverted by considerations of Ms. Miglin's absolute worth, the proper inquiry is a relative one that asks whether the parties' financial arrangements in fact equitably distribute between them the economic consequences of their marriage and its breakdown.

244 Before turning to the content of the parties' Separation and Consulting Agreements, I will briefly address the majority's conclusion that there was nothing about the circumstances surrounding the negotiation process and the execution of the parties' Agreements in this case sufficient to bring into question their validity. I note that it was Ms. Miglin's testimony at trial that she was not content with the Separation Agreement and that she felt pressured by Mr. Miglin to agree to the waiver of spousal support. In her words, "it was a confusing and emotional time". Given that the trial judge did not make factual findings on this issue, and that it was not Ms. Miglin's contention in her pleadings before this Court that these factors vitiated the parties' Agreements, I do not intend to draw any conclusions about the environment in which the parties' Agreements were negotiated. Nonetheless, I would caution against dismissing out-of-hand concerns about the effects of the emotional upheaval and the pressures to which Ms. Miglin testified on the negotiating process. It may be extremely difficult to assess and to quantify the subtle ways in which the parties' emotional vulnerabilities and the power imbalances between them may affect the formation of a separation agreement, even where, as here, the parties have negotiated over a period of time with the advice of independent counsel. Given these difficulties, in my view, the most appropriate way to be responsive to the unique negotiating context for separation agreements is to focus on an objective assessment of the *results* of the parties' negotiating efforts. As I outlined above, this involves an evaluation of the content of the agreement, together with the circumstances of the parties at the time of the application, in order to determine whether the Agreement in fact falls within the generous ambit within which reasonable disagreement is possible in terms of realizing the objectives in s. 15.2(6).

245 Turning to the content of the Separation and Consulting Agreements, it is clear that the Agreements failed to realize reasonably the objectives of s. 15.2(6) at the time they were negotiated and that this continued to be the case at the time of Ms. Miglin's application for corollary relief. The Separation Agreement provided that Ms. Miglin convey her one-half interest in the parties' business to Mr. Miglin in exchange for his one-half interest in the matrimonial home and his assumption of the mortgage. Ms. Miglin's disposition of the business (a "consequence of marriage breakdown" under s. 15.2(6)) resulted in significant disadvantages to her. While the parties' half-interests in each of the business and the matrimonial home were valued at approximately $250,000, it is, as the trial judge observed, difficult to see the exchange as an equal split given that Ms. Miglin exchanged an income producing asset (which was grossing close to $1.5 million per annum at the time of trial) for a non-income producing asset. Moreover, it is important to emphasize that as consequence of the breakdown of the marriage Ms. Miglin not only gave up her rights to any ongoing benefits from the parties' business - the success of which, as the trial judge held, she was equally responsible for -- she also lost her employment income of $80,500 per annum. The parties recognized that, as a result, Ms. Miglin would need an income stream -- the very existence of the Consulting Agreement testifies to this -- and also, given the Consulting Agreement's open-ended renewal clause, that her need might continue beyond the Agreement's initial five-year term. That Ms. Miglin never did much work under the Consulting Agreement underscores the fact that its primary purpose was to provide a source of income for her, as reflected in the trial judge's finding that the Agreement constituted "thinly veiled spousal support" (para. 15). The Consulting Agreement, however, provided Ms. Miglin with but $15,000 in income per annum (plus a cost of living index), an amount insufficient to address the significant financial deficit created by the loss of her position with the Lodge.

246 The resulting inequity was compounded when Mr. Miglin failed to renew the Consulting Agreement. The discontinuation of the Consulting Agreement coincided with a deterioration in the parties' post-divorce relationship that the trial judge attributed to Mr. Miglin's decreasing control over his former spouse. Ms. Miglin testified at the trial that it had been her expectation that the Consulting Agreement would be renewed. The majority, however, points to evidence that Ms. Miglin was aware that the Consulting Agreement might not be renewed, noting that she had been advised by her accountant to plan ahead for a potential drop in her income. In my view, the critical point is that, regardless of Ms. Miglin's expectations in this regard, a clear objective of the 1985 Act is to ensure that where a dependent spouse has financial needs arising from the breakdown of the marriage, these needs are adequately redressed by spousal support, provided the other spouse has the ability to pay, as is the case here. Ms. Miglin, by losing her share in the parties' successful business and her employment, disproportionately suffered the economic disadvantages of marriage breakdown. The parties' financial arrangements, in not providing spousal support and in providing only a small income to Ms. Miglin which could be, and was, terminated after five years, did not compensate for or share these disadvantages. Clearly, then, the objectives of s. 15.2(6) were not met.

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247 In addition to the disproportionate economic disadvantages arising from the breakdown of the marriage, Ms. Miglin suffered disproportionate economic disadvantages arising from the roles that the parties adopted during their 14-year marriage, both in their business relationship and in their domestic lives. The proclamation in the Separation Agreement that "[n]o pattern of economic dependency has been established in their marriage" is belied by the reality of the parties' circumstances both during and after their marriage.

248 Turning first to the business aspect of the parties' relationship, it is important to recognize that while the parties' contributions to the success of the Lodge -- a success from which Ms. Miglin no longer benefits -- were of equal value, they were nonetheless different in kind. Mr. Miglin was responsible for the overall management of the business, including all of the budgeting and long-range planning for the Lodge. Ms. Miglin was responsible for administrative and housekeeping tasks. She was sheltered in her role in the business from exposure to the workings of the market, and remained dependent throughout on Mr. Miglin's business acumen and financial decision-making. As she testified at trial: "I don't think I could've done it without him. He could do it without me."

249 When her marriage failed and she was forced to leave her job at the Lodge, Ms. Miglin was thus more vulnerable economically than she would have been had she worked outside of the family-owned and operated business for an equivalent period of time. Because her employment since 1984 had been exclusively with the Lodge, with which she was no longer connected after the separation except in a nominal consulting capacity, she did not leave the marriage with any of the advantages that typically would have flowed from long-term employment outside of the family business, such as seniority or job security.

250 Mr. and Ms. Miglin divided their responsibilities for the Lodge in much the same way that they divided the household responsibilities, with Ms. Miglin playing a role that was crucial, but that was less economically valued in the marketplace. As a result, Ms. Miglin's responsibilities at the Lodge did not leave her with the skills and experience of a manager in the hospitality industry. It is unrealistic to expect that she will be able simply to step into a position offering her a salary close to that which she received from the Lodge. Rather, the limited opportunities that Ms. Miglin had to develop marketable skills in the family business -- her only source of employment since 1978 -- will have a long-term impact on her prospects for self-sufficiency, a fact that was not recognized in the parties' allocation to Ms. Miglin of an income stream of but $15,000 and the termination of even this modest income after five years.

251 In terms of the parties' organization of their domestic lives, Ms. Miglin was the children's primary caregiver throughout the marriage, and she continues to be the primary caregiver of three of the parties' four children. During the marriage, Ms. Miglin's work responsibilities (and thus her opportunities to garner skills and experience) were circumscribed by her childcare responsibilities. Once the eldest child was in school, for instance, Ms. Miglin commuted from Toronto to Algonquin

Park during the four shoulder months (May, June, September and October) when the Lodge was open, but school was in session, rather than working full-time as Mr. Miglin did. Ms. Miglin's post-separation day-to-day childcare responsibilities will continue to have significant and long-term economic consequences for her, limiting both her opportunities for employment and her future earning capacity and thus impairing her capacity to become economically self-sufficient. The parties' financial arrangements failed to recognize this reality by providing Ms. Miglin with only a small amount of income over a short period of time. Moreover, the structure of the parties' agreements afforded Mr. Miglin the discretion to terminate even this limited income stream after five years, despite the fact that Ms. Miglin was experiencing ongoing need arising in part from the childcare responsibilities that the parties agreed she would assume both during and after the marriage.

252 The majority suggests, based on correspondence between the parties' counsel during the negotiation of the separation agreement, that it was Ms. Miglin's preference to release Mr. Miglin from spousal support on the condition that her economic needs were addressed through child support, in other words, on the condition that she received sufficient child support payments to cover her own expenses and meet her own economic needs as well as those of the children. Even if this was indeed her preference, the financial arrangements between the parties did not in fact adequately address the economic needs of Ms. Miglin, in part because they failed to equitably acknowledge the long-term financial consequences of her childcare responsibilities. In other words, the parties' financial arrangements were not appropriately attentive to the objective in s. 15.2(6)(*b*), of apportioning between the spouses the financial consequences arising from the care of the parties' children *over and above any obligation for the support of the children of the marriage*.

253 For the reasons that I have identified, the parties' financial arrangements manifestly failed to address the fact that Ms. Miglin disproportionately suffered economic disadvantages flowing both from the roles that the parties adopted during their 14-year marriage (and in terms of childcare, after the marriage as well) and from the breakdown of the marriage. This was not a situation in which the parties' financial arrangements upon separation provided for an income stream for the dependent spouse that, although somewhat lower than what a court might have awarded, was nonetheless reasonable in the circumstances. The Separation Agreement provided no spousal support or income stream whatsoever to Ms. Miglin, while the Consulting Agreement allowed for only $15,000 annually, which Mr. Miglin terminated after five years despite Ms. Miglin's ongoing need. While the majority suggests that Ms. Miglin's net worth has increased since the parties' separation, the reality is that Ms. Miglin will have no income stream, other than the support that she receives for her children, for the foreseeable future unless she sells her home or divests herself of her RRSPs, which she requires for her future security.

254 Considered as a whole, then, the parties' financial arrangements were insufficient to fall within the generous ambit within which reasonable disagreement is possible in terms of realizing

the spousal support objectives in s. 15.2(6) at the time of Ms. Miglin's application. It was thus appropriate for the trial judge to intervene and award her corollary relief. As the question of quantum of support was not pleaded before this Court, I assume without deciding that the amount awarded by the trial judge, and upheld by the Court of Appeal, was appropriate.

255 I agree with the Court of Appeal's decision to set aside the trial judge's order imposing a five-year term on spousal support. While Ms. Miglin has a responsibility, under s. 15.2(6)(*d*), to take steps towards achieving self-sufficiency, the Court must be careful to understand this responsibility in its proper context, particularly in light of the fact that Ms. Miglin is raising young children and that this is in fact full-time work for her. Mr. Miglin did not oppose Ms. Miglin's decision to stay at home with the children. As the trial judge noted, he was "fully aware at the time of negotiating the separation agreement that his wife would be involved in full time care of his four children, and that there was little likelihood that she could become economically self-supporting until the children matured" (para. 32). Given the ages of the parties' children and Ms. Miglin's responsibilities to them, I share Abella J.A.'s view that the five-year time limit was "unhelpfully speculative". The situation here is not, however, a static one. Ms Miglin must be alive to the fact that she has an ongoing obligation to make herself self-sufficient, in so far as is practicable. As Ms. Miglin's children grow older, her responsibility for finding employment may well increase, and the court retains the jurisdiction to intervene if, at some later date, it becomes clear that Ms. Miglin is not making a serious effort to move towards self-sufficiency.

V. Disposition

256 I would dismiss the appeal and affirm the order of the Ontario Court of Appeal. Ms. Miglin will have her costs throughout.

Appeal allowed in part.

Pourvoi accueilli en partie.

2004 FC 972, 2004 CF 972
Federal Court

Patterson v. Bath Institution

2004 CarswellNat 2199, 2004 CarswellNat 7529, 2004 FC 972, 2004 CF 972, [2004] F.C.J. No. 1191, 132 A.C.W.S. (3d) 438, 18 Admin. L.R. (4th) 57

Gary Wayne Gabriel Patterson (Applicant) and Therese Gascon, Warden of Bath Institution and Correctional Service of Canada (Respondents)

Tabib Prothonotary

Judgment: July 8, 2004
Docket: T-820-04

Counsel: Gary Wayne Gabriel Patterson (written) for himself
Alexandre Kaufman (written) for Respondent

***Tabib Prothonotary*:**

1 In the context of a notice of application for a writ of prohibition against the Respondents, I am seized of a request to rule on the Respondent Correctional Services of Canada's ("CSC") objections to the Applicant's request under Rule 317 of the *Federal Court Rules, 1998*.

2 By his application, the Applicant seeks a writ of prohibition precluding the Respondent from:

> i) refusing to prepare an offender for release back into the community on the basis that the offender does not admit guilt and/or take responsibility for either alleged, acquitted or convicted offences; and
>
> ii) refusing to assist the successful reintegration of an offender into the community as a law abiding citizen on the basis that the offender does not admit guilt and/or take responsibility for either alleged, acquitted or convicted offences; and
>
> iii) relying on an offender remaining adamant about his innocence as a legitimate basis for decision-making on either entitlements or privileges set out in the CCRA;

3 In essence, the Applicant alleges that the Respondent engages in a practice of imposing illegitimate conditions, or taking improper consideration of certain matters in taking decisions as to the administration of offenders' sentences. His application seeks to prohibit the Respondent from

engaging in this practice in respect of any further decisions as to offenders' release, entitlements or privileges.

4 As part of his notice of application, the Applicant requests, pursuant to Rule 317, the Respondent Correctional Service of Canada to send a certified copy of the following material:

> a) Copy of Applicant's Offender Security Level Decision Sheet, Decision #25 signed March 29, 2004 by Warden Therese Gascon.
>
> b) Copy of Applicant's Assessment for Decision on Institutional Voluntary Transfer, signed January 20, 2004 by Parole Officer Susanne Kellermann and Unit Manager Greg Ewing.
>
> c) Copy of Applicant's Memorandum to Unit Manager Scott Edwards dated February 24, 2004, that requested correction of inaccurate information contained in the Assessment for Decision on Institutional Voluntary Transfer signed January 20, 2004.
>
> d) Copies of every single one of the Applicant's grievances and Respondent's replies thereto, from each and every level of the grievance process, since the Applicant's date of incarceration.
>
> e) CSC and NPB statistics on both Recidivism and Parole Revocation rates from 1995 to the present.

5 Rule 317(1) reads as follows:

> 317(1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.
>
> 317(1) Une partie peut demander que des documents ou éléments matériels pertinents à la demande qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande lui soient transmis en signifiant à l'office fédéral et en déposant une demande de transmission de documents qui indique de façon précise les documents ou éléments matériels demandés.

6 The Respondent's main ground for objection to the Applicant's request is the inapplicability of Rule 317 to any case where the application is not for judicial review of one particular decision of a tribunal. Here, without admitting that judicial review proceedings are appropriate in respect of the alleged practice of the Respondent, the Respondent argues that Rule 317 applies only to material in possession of a tribunal "whose order is the subject matter of the application", such that it is inapplicable where there is no order under review, but only a practice. Subsidiarily, the

Respondent contends that the material sought is not relevant to the application, and in any event, is in the possession of the Applicant.

7 In response, the Applicant has filed an affidavit stating that while he may previously have had possession or access to the requested documents, they are not or no longer in his possession. He also asserts that the documents requested are relevant, and indeed necessary, to establishing the very existence of the alleged practice under review. As to the scope of Rule 317, the Applicant argues that Rule 317, rather than being a mechanism specifically tailored to judicial review of discrete orders or decisions, provides for a general mode of production of documents in any judicial review proceeding, the exercise of which is conditional only upon the following criteria being met:

> (a) the request is addressed to *a* tribunal as defined in section 2 of the *Federal Courts Act*;
>
> (b) that the material be relevant *to the subject* of the application;
>
> (c) that the material be in relation to *an* "order" of a tribunal, as defined in Rule 2;
>
> (d) that the material not be in possession of the Applicant.

8 The Applicant's interpretation of Rule 317, it can be noted, reprises the essential words of Rule 317, but in quite different relation to each other as the actual text of Rule 317 plainly suggests. Thus, the notions of tribunal and order are seen in isolation from each other and from the application, the order referred to need no longer to be the subject of the application and the material's relevance is no longer to the application itself but to its subject-matter.

9 This widening of Rule 317's interpretation, it is argued, reflects the "spirit" of Rule 317, as a means of facilitating the production of material held by tribunals so that a full and complete record be placed before the Court.

10 With respect, this Court has consistently held that applications for judicial review are meant to be summary in nature, such that disclosure and discovery are necessarily curtailed, and that Rule 317 is not intended to provide or facilitate discovery of all documents which may be in a tribunal's possession, however relevant to the underlying dispute. (See for example *Canada (Attorney General) v. Canada (Information Commissioner)* (1997), [1998] 1 F.C. 337 (Fed. T.D.) and *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.* (2000), 183 F.T.R. 267 (Fed. T.D.)). The interpretation of Rule 317 urged by the Applicant is therefore neither reasonable in view of the clear wording of Rule 317 nor consistent with the spirit and intent of the Rules.

11 Because a tribunal's obligation to provide certified copies of materials in its possession arises only, under Rule 317, where one of its own orders is the subject of the judicial review application, Rule 317 is only applicable in this matter if the practice, which is the subject matter of this application, is assimilated to an "order" as contemplated by Rule 317. There can be no

production under Rule 317 unless an order of the tribunal exists and is under review (*Eli Lilly & Co. v. Nu-Pharm Inc.* (1996), [1997] 1 F.C. 3 (Fed. C.A.)).

12 It appears, from the Federal Court of Appeal's decision in *Krause v. Canada*, [1999] 2 F.C. 476 (Fed. C.A.), that a practice or policy, while not a "decision or order" within the meaning of the *Federal Courts Act* or its rules of practice, may be the subject of judicial review proceedings; that a practice or policy may stem from an identifiable decision, which can itself be the subject of judicial review; and that despite the reviewability of an initial decision instituting the practice or policy, the practice itself can remain subject to judicial review long after the time where the initial decision ceases to be reviewable. By extension, and as was found in *Sweet v. R.*, [1999] F.C.J. No. 1539 (Fed. C.A.), the policy or practice might remain subject to judicial review even where it is implemented in a specific decision or order which could individually be review.

13 Consequently, it is clear that a policy or practice is not an "order" of a tribunal, so as to trigger the application of Rule 317.

14 The material requested here are all the applications, requests and grievances made by the Applicant himself to the Respondent, the Respondent's actual decisions thereon and certain statistics on recidivism and parole revocation. The Applicant submits that these documents are relevant because they will serve to establish the existence of the policy complained of, and the Respondent's awareness of this practice when it rendered each decision.

15 As stated above, the individual decisions in respect of the Applicant are not the subject of this judicial review application. While the Applicant correctly notes that, with the exception of the statistical data, he would be entitled to production of all documents requested if his request had been made in the context of a judicial review of each decision, the fact is that this judicial review proceeding concerns the alleged practice, not the individual decisions.

16 While the decisions requested might be relevant to establishing the existence of the alleged practice, relevance, in and of itself, does not trigger the application of Rule 317.

17 In conclusion, while I am satisfied that the documents requested, with the exception of the statistical data, are sufficiently well-identified and focussed, that they might be relevant to establishing a practice, and that they are not currently in the possession of the Applicant, I find that Rule 317 does not apply to compel production of material in the possession of a tribunal where the subject matter of the judicial review is a practice and the material merely evidences the impugned practice, but did not form the basis of the tribunal's decision to adopt the said practice.

Order

IT IS ORDERED THAT:

The objection of the Respondent to the Applicant's request under Rule 317 is sustained.

Objection sustained.

2006 FC 1505, 2006 CF 1505
Federal Court

Renova Holdings Ltd. v. Canadian Wheat Board

2006 CarswellNat 4527, 2006 CarswellNat 6351, 2006 FC 1505, 2006 CF 1505, 154 A.C.W.S. (3d) 263, 306 F.T.R. 169 (Eng.)

Renova Holdings Ltd., John Jackson, and Dave Bouchard each on their own behalf and on behalf of all persons who have been producers or are producers and do reside or have resided in the designated area between July 5, 1935 and the present day, Applicants and The Canadian Wheat Board and the Attorney General of Canada, Respondents

M.A. Kelen J.

Heard: December 4, 2006
Judgment: December 15, 2006
Docket: T-612-06

Counsel: Mr. Richard Yaholnitsky, for Applicants
Ms Thor Hansell, for Respondents

***M.A. Kelen J.*:**

1 The applicants have brought a motion for an Order under Rule 318(4) of the *Federal Courts Rules* compelling the respondents to produce the materials and documents requested by the applicants in their notice of application.

2 This application for judicial review arises as a result of the Reasons for Order and Order of Mr. Justice Edmond Blanchard dated January 25, 2006 in *Renova Holdings Ltd. v. Canadian Wheat Board*, 2006 FC 71 (F.C.). In that Order, Justice Blanchard stayed the action commenced by the plaintiffs on February 8, 2002. That action was against the defendants for the allegedly improper use by the Canadian Wheat Board (the Board) of monies in pooled accounts earned from the sale of grain produced by the plaintiffs. Justice Blanchard stayed the action because the plaintiffs must first challenge the legality of the Board's actions by way of an application for judicial review following the Federal Court of Appeal's judgment in *Grenier c. Canada (Procureur général)*, 2005 FCA 348, [2006] 2 F.C.R. 287, 262 D.L.R. (4th) 337, 344 N.R. 102 (F.C.A.).

3 Accordingly, this application for judicial review is directly a result of Justice Blanchard's Order that the plaintiffs commence an action for judicial review challenging the legality of the Board's practice and staying the action for damages pending the final outcome of the application for judicial review.

Background

4 On March 28, 2006, the applicants filed a notice of application for judicial review. The appellants allege that the Board failed to maintain separate accounts as directed by sections 7 and 33 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, and wrongfully deducted expenses from a separate account in violation of its statutory mandate.

5 The backgrounds of the parties was summarized by Mr. Justice Edmond Blanchard at paragraphs 3 and 4 of his reasons for order in *Renova*, above:

> The Plaintiffs are a corporation and individuals who qualify as "producers" under section 2 of the Canadian Wheat Board Act, R.S.C. 1985, c. C-24 (the Act) in the "designated area", as defined by the Act. For our purposes the designated area is defined to comprise Manitoba, Saskatchewan, Alberta, and the Peace River District of British Columbia.
>
> The defendant Wheat Board is a corporation created under the Act and is responsible for marketing wheat and barley, including wheat and barley produced in the designated area. The Attorney General of Canada is named as representing the defendant Crown (Her Majesty in right of Canada), pursuant to the Crown Liability and Proceedings Act, R.S. 1985 c. C-50, section 23.

6 The applicants, as stated in their notice of application, seek production under Rule 317 of the following documents:

> [The Board's] annual financial statements and summaries setting out the expenses it charged to the section 36 separate accounts, for losses under section 7(3) and expenses other than those allowed expenses under section 33(1)(a) of *The Canadian Wheat Board Act*, and such other further relevant documents relating to the issue in question on the application as is available. [the "requested documents".]

7 The Board originally objected to the production of the requested documents on several grounds. However, during the hearing of the motion, and after the Court indicated its preliminary views, the parties agreed that the applicants have not established that they have standing or the right to seek judicial review in respect of each year dating back to 1935; that an application for judicial review can apply to a "course of conduct"; and that this application for judicial review was not brought out of time because it was directed by Justice Blanchard when he stayed the original action in this case to allow for this application for judicial review.

8 In the course of argument, the parties agreed that the 2002 financial year would likely be representative of the Board's impugned practice and that the document production should be limited to the 2002 annual financial statements and summaries setting out the expenses charged to the separate accounts maintained under the *Canadian Wheat Board Act*.

Relevant Rules

9 Rule 317(1) of the *Federal Courts Rules* provides a means for parties to obtain material in the possession of the tribunal:

> Material from tribunal
>
> **317.** (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.
>
> Avis à l'office fédéral
>
> **317.** (1) Une partie peut demander que des documents ou éléments matériels pertinents à la demande qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande lui soient transmis en signifiant à l'office fédéral et en déposant une demande de transmission de documents qui indique de façon précise les documents ou éléments matériels demandés.

Rule 318 requires a tribunal served with a request for material under rule 317 to forward the material to the Registry and the requesting party within 20 days. Rule 318(4) authorizes the Court to order that all or part of the material requested by forwarded to the Registry:

> **Material to be transmitted**
>
> **318.** (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit
>
> (a) a certified copy of the requested material to the Registry and to the party making the request; or
>
> (b) where the material cannot be reproduced, the original material to the Registry.
>
> **Objection by tribunal**
>
> (2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.
>
> **Directions as to procedure**

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

Documents à transmettre

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet:

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directives de la Cour

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

Issue

10 The issue raised in this motion is whether the applicant is entitled to an order that all or part of the material requested be forwarded to the Registry.

Analysis

11 A review of the procedural history of these proceedings indicates that the applicants originally commenced an action with a statement of claim alleging breach of fiduciary duty, negligence, administrative misfeasance in public office and abuse of public office.

12 The theory of the applicants' case was that the Board unlawfully used funds taken from its pooled accounts held for the benefit of producers within the designated area. These funds were used to cover expenses incurred in the course of issuing export licences, interprovincial transport licences, and licences to process grains to individuals and corporations from regions outside and inside the designated area. The applicants argue that, under the *Canadian Wheat Board Act*, only expenses incurred in the course of selling products from the designated area may be deducted from the aggregate funds received from the sale of products from the designated area. The applicants seek to hold the Board accountable to the producers for the funds which were, in their view, wrongfully deducted from the pooled accounts.

13 The applicants' application for judicial review does not identify a specific decision of the Board in respect of which review is sought. Rather, the application states that it is:

> [...] in respect of The Canadian Wheat Board's failure to maintain the separate accounts directed by section 36 of *The Canadian Wheat Board Act*, and, pursuant to section 7 and section 33 of the Act, wrongfully deducting expenses from the separate account not permitted by the statute contrary to its statutory mandate.

14 The applicants seek as relief a declaration under paragraph 18.1(3)(b) of the *Federal Courts Act* that the actions of the respondents are invalid or unlawful.

15 It follows from the notice of application that the applicants are challenging the Board's activities related to the deduction of expenses from the pooled accounts, rather than challenging a discrete order or decision of the Board. The appropriate scope of tribunal record is therefore linked, in my view, to the Board's account management during the period which the applicants were directly affected by such activities. This is because subsection 18.1(1) of the *Federal Courts Act* requires that an application for judicial review be made by the Attorney General of Canada or "by anyone directly affected by the matter in respect of which relief is sought". If, for example, none of the applicants were directly affected by the Board's account management in 1935 because none of them held an interest in the Board's pooled accounts at that time, then the Board's financial records from 1935 would clearly not form part of the tribunal record under Rule 317. Such material would be unnecessary and extraneous to the relief sought and the grounds cited by the applicants, and could not affect the decision of the Court. The courts have consistently held that such material cannot become the subject of a fishing expedition as part of an application for judicial review. In *Bradley-Sharpe v. Canada (Human Rights Commission)*, 2001 FCT 1130 (Fed. T.D.), Mr. Justice Blais denied a motion for production under Rule 317 on the grounds that the applicant's request for documents was too broad and amounted to a discovery or fishing expedition; see also *Pathak*

v. Canada (Human Rights Commission), [1995] 2 F.C. 455 (Fed. C.A.); *Sierra Club of Canada v. Canada (Minister of Finance)* (1997), 131 F.T.R. 298 (Fed. T.D.); *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)* (1993), 17 Admin. L.R. (2d) 16, 164 N.R. 60 (Fed. C.A.).

16 At the same time, as Justice Blais recognized at paragraph 16 of *Bradley-Sharpe*, above, the applicant must be provided with the material necessary to prove the grounds of judicial review alleged in the notice of application. Without these materials, the applicants in this case would be unable to fully argue the merits of their application. Mr. Justice Blais invited the applicant in *Bradley-Sharpe* to bring a further motion with a more specific and focussed list of documents. In this case, as counsel for the applicants acknowledged during the hearing, it should be possible to argue the merits of the application based on material related to a single financial year in which the respondent applied the impugned deductions. Counsel for the applicant also agreed that, if there was a single year that would likely be representative of the respondent's impugned practice, it would be the 2002 financial year in which the Board incurred significant expenses in connection with its defence under *NAFTA*. Accordingly, I would limit the scope of production required by the respondent to those financial statements and expense summaries requested by the applicant for the 2002 financial year.

17 The Board argues that Rule 317 does not apply where a policy or practice, rather than an order or decision, is the subject of a judicial review application. It is clear, however, from the Federal Court of Appeal's judgment in *Krause v. Canada*, [1999] 2 F.C. 476 (Fed. C.A.), that judicial review is available in respect of practices or policies.

18 Given the availability of judicial review in respect of administrative policies and practices, as confirmed by the Federal Court of Appeal in *Krause*, above, it would be inconsistent to deny applicants access to the material necessary to establish the grounds for review. The practice or policy could be presented by the Board in numerous ways, including as a statement from the Board. However, in this case, the most logical and expedient way is for the Board to produce the summary in respect of the 2002 financial year, which, as the parties have agreed, is likely to be representative of the Board's impugned practice.

Conclusion

19 For the reasons above, the applicants are entitled to an order directing the Board to forward to the Registry a certified copy of the financial statements and expense summaries in respect of the 2002 financial year. An order will issue accordingly.

Amended Style of Cause

20 Counsel for the applicants brought an oral motion, on consent, to amend the style of cause to delete the last named applicant Ron Duffy.

Order

THIS COURT ORDERS that:

1. the style of cause is amended to delete the last named applicant Ron Duffy;

2. this motion for production is allowed in part;

3. the Board forward to the Registry a certified copy of the financial statements and summaries of the expenses charged to the separate accounts for the designated area of the applicants in respect of the 2002 financial year; and

4. there is no order as to costs.

Motion granted.

1997 CarswellNS 301
Supreme Court of Canada

R. v. S. (R.D.)

1997 CarswellNS 301, 1997 CarswellNS 302, [1997] 3 S.C.R. 484, [1997] S.C.J. No. 84, 10 C.R. (5th) 1, 118 C.C.C. (3d) 353, 151 D.L.R. (4th) 193, 161 N.S.R. (2d) 241, 1 Admin. L.R. (3d) 74, 218 N.R. 1, 35 W.C.B. (2d) 520, 477 A.P.R. 241

R.D.S., Appellant v. Her Majesty the Queen, Respondent and The Women's Legal Education and Action Fund, the National Organization of Immigrant and Visible Minority Women of Canada, the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada, Interveners

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: March 10, 1997
Judgment: September 26, 1997
Docket: 25063

Proceedings: reversing (1995), 45 C.R. (4th) 352 (N.S. C.A.);

Counsel: *Burnley A. Jones* and *Dianne Pothier*, for the appellant.
Robert E. Lutes, Q.C., for the respondent.
Yola Grant and *Carol Allen*, for the interveners the Women's Legal Education and Action Fund and the National Organization of Immigrant and Visible Minority Women of Canada.
April Burey, for the interveners the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada.

Major J. **(dissenting) (*Lamer C.J.C.* and *Sopinka J.* concurring):**

1 I have read the reasons of Justices L'Heureux-Dubé and McLachlin and those of Justice Cory and respectfully disagree with the conclusion they reach.

2 The appellant (accused) R.D.S. was a young person charged with assault on a peace officer. At trial, the Crown's only evidence came from the police officer allegedly assaulted. The appellant testified as the only witness in his defence. The testimony of the two witnesses differed in material

respects. The trial judge gave judgment immediately after closing arguments and acquitted the appellant.

3 This appeal should not be decided on questions of racism but instead on how courts should decide cases. In spite of the submissions of the appellant and interveners on his behalf, the case is primarily about the conduct of the trial. A fair trial is one that is based on the law, the outcome of which is determined by the evidence, free of bias, real or apprehended. Did the trial judge here reach her decision on the evidence presented at the trial or did she rely on something else?

4 In the course of her judgment the trial judge said:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I'm not saying *that the Constable has misled the court, although police officers have been known to do that in the past*. I am not saying that the officer overreacted, *but certainly police officers do overreact, particularly when they're dealing with non-white groups. That to me indicates a state of mind right there that is questionable*. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. *That seems to be in keeping with the prevalent attitude of the day*.
>
> At any rate, *based upon my comments and based upon all the evidence before the court, I have no other choice but to acquit*. [Emphasis added.]

5 In view of the manner in which this appeal was argued, it is necessary to consider two points. First, we should consider whether the trial judge in her reasons, properly instructed herself on the evidence or was an error of law committed by her. The second, and somewhat intertwined question, is whether her comments above could cause a reasonable observer to apprehend bias. The offending comments in the statement are:

> (i) "police officers have been known to [mislead the court] in the past";
>
> (ii) "police officers do overreact, particularly when they're dealing with non-white groups";
>
> (iii) "[t]hat, to me, indicates a state of mind right there that is questionable";
>
> (iv) "[t]hat seems to be in keeping with the prevalent attitude of the day"; and,
>
> (v) "based upon my comments and based upon all the evidence before the court, I have no other choice but to acquit."

6 The trial judge stated that "police officers have been known to [mislead the court] in the past" and that "police officers do overreact, particularly when they're dealing with non-white groups" and went on to say "[t]hat, to me, indicates a state of mind right there that is questionable." She in effect was saying," sometimes police lie and overreact in dealing with non-whites, therefore I have

a suspicion that this police officer may have lied and overreacted in dealing with this non-white accused." This was stereotyping all police officers as liars and racists, and applied this stereotype to the police officer in the present case. The trial judge might be perceived as assigning less weight to the police officer's evidence because he is testifying in the prosecution of an accused who is of a different race. Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that *this* particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial.

7 Our jurisprudence has repeatedly prohibited the introduction of evidence to show propensity. In the present case had the police officer been charged with assault the trial judge could not have reasoned that as police officers have been known to mislead the Court in the past that based on that evidence she rejected this police officers credibility and found him guilty beyond reasonable doubt.

8 In the same vein, statistics show that young male adults under the age of 25 are responsible for more accidents than older drivers. It would be unacceptable for a court to accept evidence of that fact to find a defendant liable in negligence yet that is the consequence of the trial judge's reasoning in this appeal.

9 It is possible to read the trial judge's reference to the" prevalent attitude of the day" as meaning her view of the prevalent attitude in society today. If the trial judge used the" prevalent attitude of society" towards non-whites as evidence upon which to draw an inference in this case, she erred, as there were no facts in evidence from which to draw that inference. It would be stereotypical reasoning to conclude that, since society is racist, and, in effect, tells minorities to "shut up," we should infer that *this* police officer told *this* appellant minority youth to" shut up." This reasoning is flawed.

10 Trial judges have to base their findings on the evidence before them. It was open to the appellant to introduce evidence that this police officer was racist and that racism motivated his actions or that he lied. This was not done. For the trial judge to infer that based on her general view of the police or society is an error of law. For this reason there should be a new trial.

11 In addition to not being based on the evidence, the trial judge's comments have been challenged as giving rise to a reasonable apprehension of bias. The test for finding a reasonable apprehension of bias has challenged courts in the past. It is interchangeably expressed as a "real danger of bias," a" real likelihood of bias," a "reasonable suspicion of bias" and in several other ways. An attempt at a new definition will not change the test. Lord Denning M.R. captured the essence of the inquiry in his judgment in *R. v. London Rent Assessment Panel Committee* (1968), [1969] 1 Q.B. 577 (Eng. C.A.), at p. 599:

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would,

> or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg. v. Huggins*, and *Rex v. Sunderland Justices, per* Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg. v. Camborne Justice, Ex parte Pearce*, and *Reg. v. Nailsworth Licensing Justices, Ex parte Bird*. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

See also *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.); *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256 (Eng. K.B.).

12 The appellant and the interveners argued that the trial judge's statements were simply a review of the evidence and were her reasons for judgment. They said she was relying on her life experience and to deny that is to deny reality. I disagree.

13 The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.

14 The trial judge could not decide this case based on what some police officers did in the past without deciding that all police officers are the same. As stated, the appellant was entitled to call evidence of the police officer's conduct to show that there was in fact evidence to support either his bias or racism. No such evidence was called. The trial judge presumably called upon her life experience to decide the issue. This she was not entitled to do.

15 The bedrock of our jurisprudence is the adversary system. Criminal prosecutions are less adversarial because of the Crown's duty to present all the evidence fairly. The system depends on each side's producing facts by way of evidence from which the court decides the issues. Our system, unlike some others, does not permit a judge to become an independent investigator to seek out the facts.

16 Canadian Courts have, in recent years, criticized the stereotyping of people into what is said to be predictable behaviour patterns. If a judge in a sexual assault case instructed the jury

or him- or herself that because the complainant was a prostitute he or she probably consented, or that prostitutes are likely to lie about such things as sexual assault, that decision would be reversed. Such presumptions have no place in a system of justice that treats all witnesses equally. Our jurisprudence prohibits tying credibility to something as irrelevant as gender, occupation or perceived group predisposition.

17 Similarly, we have eliminated the requirement for corroboration of the complainant's evidence. The absolute requirement of corroboration for particular sexual offences and the lesser requirement of a warning to the jury about relying on the victim's uncorroborated testimony have been abolished: see *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8, and S.C. 1980-81-82, c. 125, s. 5. Also eliminated is the need for corroboration in cases where a prosecution is based on the unsworn evidence of children: see S.C. 1987, c. 24, s. 18. The elimination of corroboration shows the present evolution away from stereotyping various classes of witnesses as inherently unreliable.

18 It can hardly be seen as progress to stereotype police officer witnesses as likely to lie when dealing with non-whites. This would return us to a time in the history of the Canadian justice system that many thought had past. This reasoning, with respect to police officers, is no more legitimate than the stereotyping of women, children or minorities.

19 In my opinion the comments of the trial judge fall into stereotyping the police officer. She said, among other things, that police officers have been known to mislead the courts, and that police officers overreact when dealing with non-white groups. She then held, in her evaluation of this particular police officer's evidence, that these factors led her to "a state of mind right there that is questionable". The trial judge erred in law by failing to base her conclusions on evidence.

20 Judges, as arbiters of truth, cannot judge credibility based on irrelevant witness characteristics. All witnesses must be placed on equal footing before the court.

21 The trial judge concluded the impugned part of her reasons with the following: "[a]t any rate, based upon my comments and based upon all the evidence before the Court, I have no other choice but to acquit." What did she mean by basing her judgment, in part, upon her own comments? Did she mean based on her stereotyping of police officers? Or, did she mean based on her comments analysing the evidence of the parties? Based on the trial record what is clear is that the trial judge did not reach her conclusion on any facts presented at the trial.

22 It is irrelevant conjecture as to what the trial judge actually intended by these statements. I agree with my colleague Cory J., that there are other plausible explanations of these impugned comments. It may be that all of her remarks were merely intended as a hypothetical response to the Crown's suggestion that the police officer had no reason to lie, and therefore innocuous. However, we are concerned with both the fairness and the appearance of fairness of the trial, and the absence of evidence to support the judgment is an irreparable defect.

23 I agree with the approach taken by Cory J. with respect to the nature of bias and the test to be used to determine if the words or actions of a judge give rise to apprehension of bias. However, I come to a different conclusion in the application of the test to the words of the trial judge in this case. It follows that I disagree with the approach to reasonable apprehension of bias put forward by Justices L'Heureux-Dubé and McLachlin.

24 The error of law that I attribute to the trial judge's assessment of the evidence or lack of evidence is sufficiently serious that a new trial is ordered.

25 In the result, I would uphold the disposition of Flinn J.A. in the Court of Appeal (1995), 145 N.S.R. (2d) 284 (N.S. C.A.), and dismiss the appeal.

***Gonthier J.* (*La Forest J.* concurring):**

26 I have had the benefit of the reasons of Justice Cory, the joint reasons of Justices L'Heureux-Dubé and McLachlin and the reasons of Justice Major. I agree with Cory J. and L'Heureux-Dubé and McLachlin JJ. as to the disposition of the appeal and with their exposition of the law on bias and impartiality and the relevance of context. However, I am in agreement with and adopt the joint reasons of L'Heureux-Dubé and McLachlin JJ. in their treatment of social context and the manner in which it may appropriately enter the decision-making process as well as their assessment of the trial judge's reasons and comments in the present case.

***L'Heureux-Dubé and McLachlin JJ.*:**

I. Introduction

27 We have read the reasons of our colleague, Justice Cory, and while we agree that this appeal must be allowed, we differ substantially from him in how we reach that outcome. As a result, we find it necessary to write brief concurring reasons.

28 We endorse Cory J.'s comments on judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumption of judicial integrity. However, we approach the test for reasonable apprehension of bias and its application to the case at bar somewhat differently than our colleague.

29 In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.

30 We find that on the basis of these principles, there is no reasonable apprehension of bias in the case at bar. Like Cory J. we would, therefore, overturn the findings by the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal that a reasonable apprehension of bias arises in this case, and restore the acquittal of the R.D.S. This said, we disagree with Cory J.'s position that the comments of Judge Sparks were unfortunate, unnecessary, or close to the line. Rather, we find them to reflect an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose — a context known to Judge Sparks and to any well-informed member of the community.

II. The Test for Reasonable Apprehension of Bias

31 The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.). Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.); *Lippé c. Charest* (1990), [1991] 2 S.C.R. 114 (S.C.C.); *Ruffo c. Québec (Conseil de la magistrature)*, [1995] 4 S.C.R. 267 (S.C.C.). De Grandpré J. stated, at pp. 394-95:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> The grounds for this apprehension must, however, be substantial and I ... [refuse] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

32 As Cory J. notes at para. 32 of his reasons, the scope and stringency of the duty of fairness articulated by de Grandpré depends largely on the role and function of the tribunal in question. Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances": *United States v. Morgan*, 313 U.S. 409 (U.S. S.C. 1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England III*, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Radicalized Perspective in *R. v. R.D.S.*" (1995), 18 *Dal.L.J.* 408, at p. 417," [t]he law will not suppose possibility of bias in a judge,

who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (N.S. C.A.), at pp. 60-61.

33 Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias — "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833 (S.C.C.), at pp. 842-43.

34 In order to apply this test, it is necessary to distinguish between the impartiality which is required of all judges, and the concept of judicial neutrality. The distinction we would draw is that reflected in the insightful words of Benjamin N. Cardozo in *The Nature of the Judicial Process* (1921), at pp. 12-13, and 167, where he affirmed the importance of impartiality, while at the same time recognizing the fallacy of judicial neutrality:

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. ... In this mental background every problem finds it setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.
>
> . . . . .
>
> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [he or she] be litigant or judge.

35 Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality:

> ... the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

III. The Reasonable Person

36 The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (*Committee for Justice & Liberty, supra*.) The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

37 It follows that one must consider the reasonable person's knowledge and understanding of the judicial process and the nature of judging as well as of the community in which the alleged crime occurred.

A. The Nature of Judging

38 As discussed above, judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

39 It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. As David M. Paciocco and Lee Stuesser write in their book *The Law of Evidence* (1996), at p. 277:

> *In general, the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact*. [Emphasis in original.]

40 At the same time, where the matter is one of identifying and applying the law to the findings of fact, it must be the law that governs and not a judge's individual beliefs that may conflict with the law. Further, notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all parties before them. The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.

41 It is axiomatic that all cases litigated before judges are, to a greater or lesser degree, complex. There is more to a case than who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous actors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those forces. In short, they must be aware of the context in which the alleged crime occurred.

42 Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky's "Embodied Diversity and Challenges to Law" (1997), 42 *McGill L.J.* 91, at p. 107, offers the following comment:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an" enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective. ... It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.

43 Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. For example, in a case involving alleged police misconduct in denying an accused's right to counsel, this Court inquired not simply into whether the accused had been read their *Charter* rights, but also used a contextual approach to ensure that the purpose of the constitutionally protected right was fulfilled: *R. v. Bartle*, [1994] 3 S.C.R. 173 (S.C.C.). The Court, placing itself in the position of the accused, asked how the accused would have experienced and responded to arrest and detention. Against this background, the Court went on to determine what was required to make the right to counsel truly meaningful. This inquiry provided the Court with a larger picture, which was in turn conducive to a more just determination of the case.

44 An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context: (see *R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.), *R. v. Parks* (1993), 15 O.R. (3d) 324 (Ont. C.A.), and *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.)), from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential pre-condition.

45 A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality.

B. The Nature of the Community

46 The reasonable person, identified by de Grandpré J. in *Committee for Justice & Liberty, supra*, is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions. These are matters of which judicial notice may be taken. In *Parks, supra*, at p. 342, Doherty J.A., did just this, stating:

> Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.

47 The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: *Royal Commission on the Donald Marshall, Jr., Prosecution* (1989); *R. v. Smith* (1991), 109 N.S.R. (2d) 394 (N.S. Co. Ct.). The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia. In *Nova Scotia (Minister of Community Services) v. S. (S.M.)* (1992), 110 N.S.R. (2d) 91 (N.S. Fam. Ct.), it was stated at p. 108:

> [Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. *Royal Commission on the Donald Marshall, Jr., Prosecution*). A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally.

48 We conclude that the reasonable person contemplated by de Grandpré J., and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.

49 Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

IV. Application of the Test to the Facts

50 In assessing whether a reasonable person would perceive the comments of Judge Sparks to give rise to a reasonable apprehension of bias, it is important to bear in mind that the impugned reasons were delivered orally. As Professor Devlin puts it in "We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*", *supra*, at p. 414:

> Trial judges have a heavy workload that allows little time for meticulously thought-through reasoning. This is particularly true when decisions are delivered orally immediately after counsel have finished their arguments. (See also *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), at p. 664.)

It follows that for the purposes of this appeal, the oral reasons issued by Judge Sparks should be read in their entirety, and the impugned passages should be construed in light of the whole of the trial proceedings and in light of all other portions of the judgment.

51 Judge Sparks was faced with contradictory testimony from the only two witnesses, the appellant R.D.S., and Constable Stienburg. Both testified as to the events that occurred and were subjected to cross-examination. As trier of fact, Judge Sparks was required to assess their testimony, and to determine whether or not, on the evidence before her, she had a reasonable doubt as to the guilt of the appellant R.D.S. It is evident in the transcript that Judge Sparks proceeded to do just that.

52 Judge Sparks briefly summarized the contradictory evidence offered by the two witnesses, and then made several observations about credibility. She noted that R.D.S. testified quite candidly, and with considerable detail. She remarked that contrary to the testimony of Constable Stienburg, it was the evidence of R.D.S. that when he arrived on the scene on his bike, his cousin was handcuffed and not struggling in any way. She found the level of detail that R.D.S. provided to have "a ring of truth", and found him to be "a rather honest young boy". In the end, while Judge Sparks specifically noted that she did not accept all the evidence given by R.D.S., she nevertheless found him to have raised a reasonable doubt by raising queries in her mind as to what actually occurred.

53 It is important to note that having already found R.D.S. to be credible, and having accepted a sufficient portion of his evidence to leave her with a reasonable doubt as to his guilt, Judge Sparks necessarily disbelieved at least a portion of the conflicting evidence of Constable Stienburg. At that point, Judge Sparks made reference to the submissions of the Crown that "there's absolutely no reason to attack the credibility of the officer", and then addressed herself to why there might, in fact, be a reason to attack the credibility of the officer in this case. It is in this context that Judge Sparks made the statements which have prompted this appeal:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. And I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court, I have no other choice but to acquit.

54 These remarks do not support the conclusion that Judge Sparks found Constable Stienburg to have lied. In fact, Judge Sparks did quite the opposite. She noted firstly, that she was *not* saying Constable Stienburg had misled the Court, although that could be an explanation for his evidence. She then went on to remark that she was *not* saying that Constable Stienburg had overreacted, though she was alive to that possibility given that it had happened with police officers in the past, and in particular, it had happened when police officers were dealing with non-white groups. Finally, Judge Sparks concluded that, though she was not willing to say that Constable Stienburg did overreact, it was her belief that he *probably* overreacted. And, in support of that finding, she noted that she accepted the evidence of R.D.S. that "he was told to shut up or he would be under arrest".

55 At no time did Judge Sparks rule that the probable overreaction by Constable Stienburg was motivated by racism. Rather, she tied her finding of probable overreaction to the evidence that Constable Stienburg had threatened to arrest the appellant R.D.S. for speaking to his cousin. At the same time, there was evidence capable of supporting a finding of racially motivated overreaction. At an earlier point in the proceedings, she had accepted the evidence that the other youth arrested that day, was handcuffed and thus secured when R.D.S. approached. This constitutes evidence which could lead one to question why it was necessary for both boys to be placed in choke holds by Constable Stienburg, purportedly to secure them. In the face of such evidence, we respectfully

disagree with the views of our colleagues Cory and Major JJ. that there was no evidence on which Judge Sparks could have found "racially motivated" overreaction by the police officer.

56 While it seems clear that Judge Sparks *did not in fact* relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks *had* chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.

57 That Judge Sparks recognized that police officers *sometimes* overreact when dealing with non-white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities. As found by Freeman J.A. in his dissenting judgment at the Court of Appeal (1995), 145 N.S.R. (2d) 284 (N.S. C.A.), at p. 294:

> The case was racially charged, a classic confrontation between a white police officer representing the power of the state and a black youth charged with an offence. Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding.

58 Given these facts, the question is whether a reasonable and right-minded person, informed of the circumstances of this case, and knowledgeable about the local community and about Canadian *Charter* values, would perceive that the reasons of Judge Sparks would give rise to a reasonable apprehension of bias. In our view, they would not. The clear evidence of prejudgment required to sustain a reasonable apprehension of bias is nowhere to be found.

59 Judge Sparks' oral reasons show that she approached the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt. Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution of the case before her.

V. Conclusion

60 In the result, we agree with Cory J. as to the disposition of this case. We would allow the appeal, overturn the findings of the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal, and restore the acquittal of the appellant R.D.S.

***Cory J.* (*Iacobucci J.* concurring):**

61 In this appeal, it must be determined whether a reasonable apprehension of bias arises from comments made by the trial judge in providing her reasons for acquitting the accused.

I. Facts

62 R.D.S. is an African-Canadian youth. When he was 15 years of age he was charged with three offences: unlawfully assaulting Constable Donald Stienburg; unlawfully assaulting Constable Stienburg with the intention of preventing the arrest of N.R.; and unlawfully resisting Constable Stienburg in the lawful execution of his duty.

63 The Crown proceeded with the charges by way of summary conviction. There were only two witnesses at the trial: R.D.S. himself and Constable Stienburg. Their accounts of the relevant events differed widely. The credibility of these witnesses would determine the outcome of the charges.

A. Constable Stienburg's Evidence

64 Constable Stienburg testified that he was in his police cruiser with his partner when a radio transmission alerted them that other officers were in pursuit of a stolen van. In the car was a "ride-along", Leslie Lane, who was unable to testify at the trial. The occupants of the stolen van were described as "non-white" youths. When Constable Stienburg and his partner arrived at the designated area they saw two black youths running across the street in front of them. Constable Stienburg detained one of the individuals, N.R., while his partner pursued the other. He testified that there were a number of other people standing around at the time.

65 N.R. was detained outside the police car since the "ride along" was in the back seat. While Constable Stienburg was standing by the side of the road with N.R., the accused, R.D.S., came towards Constable Stienburg on his bicycle. Constable Stienburg testified that R.D.S. ran into his legs, and while still on the bicycle, yelled at him and pushed him. R.D.S. was then arrested for interfering with the arrest of N.R., and Constable Stienburg called for back-up. Constable Stienburg stated that he put both R.D.S. and N.R. in "a neck restraint". When R.D.S. was finally brought to the police station, he was read his rights, and charged with the three offences.

66 In cross-examination, it was suggested to Constable Stienburg that R.D.S. had been overcharged. It was pointed out that R.D.S. had no prior record and it was suggested, although not particularly clearly, that R.D.S. had been singled out because he was black.

B. Testimony of R.D.S.

67 R.D.S. testified that he remembered that the weather on the particular day was misty and humid. While riding his bike from his grandmother's to his mother's house he saw the police car

and the crowd standing beside it. A friend told him that his cousin N.R. had been arrested. R.D.S. approached the crowd, and stopped his bike when he saw N.R. and the officer. R.D.S. then tried to talk to N.R. to ask him what had happened and to find out if he should tell N.R.'s mother. Constable Stienburg told him:" Shut up, shut up, or you'll be under arrest too". When R.D.S. continued to ask N.R. if he should call his mother, Constable Stienburg arrested R.D.S. and put him in a choke hold. R.D.S. indicated that he could not breathe, and that he heard a woman tell the officer to "Let that kid go. ..."He also heard her ask for his phone number. He could not talk so N.R. gave the number to her. R.D.S. indicated that the crowd standing around were all "little kids" under the age of 12. He denied that he ran into anyone or that he intended to run into anyone on his bike. He also testified that his hands remained on the handlebars, and he did not push the officer.

68 In cross-examination, he indicated that the reason he approached the crowd was because he was "being nosey". He remembered that N.R. was handcuffed when he arrived. Both R.D.S. and N.R. were placed in a choke hold at the same time. He repeated his denial that he touched the officer either with his bicycle or his hands. He also denied that he said anything to Constable Stienburg prior to his arrest. He indicated that all his questions were directed to N.R.

C. History of Proceedings

69 In Youth Court, Judge Sparks weighed the evidence of the two witnesses and determined that R.D.S. should be acquitted. In her oral reasons, she made comments which were challenged as raising a reasonable apprehension of bias. They are the subject of this appeal. After the reasons had been given and an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, Judge Sparks issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made.

70 In the Trial Division, Glube C.J.S.C., sitting as summary conviction appeal judge, allowed the Crown's appeal. She held in oral reasons that a new trial was warranted on the basis that the remarks of Judge Sparks gave rise to a reasonable apprehension of bias. This decision was upheld in the Nova Scotia Court of Appeal by Flinn J.A. and Pugsley J.A., Freeman J.A. dissenting.

II. Judgments Below

A. Youth Court, [1994] N.S.J. No. 629 (QL)

71 In her oral reasons, Judge Sparks reviewed the details of Constable Stienburg's testimony, and noted that R.D.S.'s evidence was directly opposed to it. In describing R.D.S.'s testimony, she observed that she was impressed with his clear recollection of the weather conditions on that day, and his candour in pointing out that he was simply being nosey in approaching the crowd. She also noted that his description of being placed in the choke hold was vivid. R.D.S. stated clearly that when he was placed in the choke-hold, he could not speak and had difficulty breathing. In

fact, he was unable to respond when a woman asked him for his phone number so she could notify his mother.

72 The Youth Court Judge paid particular attention to R.D.S.'s testimony that N.R. was handcuffed when R.D.S. arrived on the scene. This aspect of R.D.S.'s testimony suggested that N.R. was not a threat to the officer. Significantly, Constable Stienburg did not mention that N.R. was handcuffed, and gave the Court the distinct impression that he had difficulty restraining N.R. In Judge Sparks' view, R.D.S.'s testimony that N.R. was handcuffed had "a ring of truth" to it, which raised questions in her mind about the divergence between R.D.S.'s evidence and the evidence of Constable Stienburg on this point.

73 In general, Judge Sparks described R.D.S's demeanour as" positive", even though he was not particularly articulate. She found him to be a "rather honest young boy". In particular, she was struck by his openness in acknowledging his own" nosiness" and by his surprise at the hostility of the police officer. Judge Sparks indicated that she was not saying that she accepted everything that R.D.S. said, but noted that "certainly he has raised a doubt in my mind". She still had queries about "what actually transpired on the afternoon of October the 17th". As a result, she concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offence beyond a reasonable doubt.

74 She concluded her reasons with the controversial remarks that gave rise to this appeal. They are as follows:

> The Crown says, well, why would the officer say that events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court, I have no other choice but to acquit.

In conclusion, she agreed with the defence counsel that the accused had been overcharged, and that the first two counts duplicated each other. However, nothing turned on this since she dismissed all three charges.

B. Nova Scotia Supreme Court (Trial Division), [1995] N.S.J. No. 184 (N.S. S.C.) (QL)

75 On appeal, Glube C.J.S.C. expressed the view that she could not consider the supplementary reasons provided by the Youth Court Judge. The decision was, in her view, made in the oral reasons at the original trial, and the supplementary reasons did not form the basis for the Crown's appeal. If Judge Sparks had intended to issue additional reasons, she should have indicated this to counsel either at the trial or shortly thereafter. Both parties agreed that Judge Sparks was *functus officio* when she issued her supplementary reasons, and that they could not be considered. Glube C.J.S.C. indicated that her own review of the case law supported this conclusion.

76 Glube C.J.S.C. then considered the allegations of actual and apprehended bias made by the Crown on the basis of Judge Sparks' final remarks in her oral reasons. She rejected the defence's argument that there is no appeal on questions of fact and summarized the general principles pertaining to appellate review of those findings. She observed, at para. 17, that a Crown's appeal from an acquittal will only succeed "where the verdict is unreasonable or not supported by the evidence".

77 She expressed the view that if a reasonable apprehension of bias arises, the verdict would not be supported by the evidence. Relying on *R. v. Wald* (1989), 47 C.C.C. (3d) 315 (Alta C.A.), she indicated that the entitlement to an impartial decision-maker applies to the Crown as well as the accused. The principles of fundamental justice "include ... natural justice and a duty to act fairly" (para. 21). These principles impose a duty on the decision-maker to be and to appear to be impartial. If these principles apply to administrative tribunals, they must apply even more to courts.

78 Glube C.J.S.C. found nothing in the transcript of the hearing itself that would give rise to an impression that Judge Sparks was biased. Furthermore, if the reasons of Judge Sparks had ended with her conclusion that the Crown had not satisfied its burden of proof, there would be no basis for the appeal. Judge Sparks had made clear findings of credibility that favoured the accused. Unfortunately, however, she went on and made the impugned comments. Glube C.J.S.C. was of the view that there was no basis in the evidence for Judge Sparks' statements. In particular, there was no evidence of the" prevalent attitude of the day". She stated at para. 25 that" judges must be extremely careful to avoid expressing views which do not form part of the evidence".

79 She found that the test for reasonable apprehension of bias is an objective one, based on what the reasonable, right-minded person with knowledge of the facts would conclude. In her view, the reasonable person would conclude that there was a reasonable apprehension of bias on the part of Judge Sparks, in spite of her thorough review of the facts and her findings of credibility. As a result, a new trial was warranted.

C. Court of Appeal (1995), 145 N.S.R. (2d) 284 (N.S. C.A.)

(i) Flinn J.A. (Pugsley J.A. concurring)

80 Flinn J.A. noted that the Crown can only appeal a summary conviction acquittal on a question of law with leave of the court. If the summary conviction appeal court judge made no error of law, then there is no appeal from her decision. He then rejected the accused's argument that Glube C.J.S.C. had improperly re-examined and re-determined issues of credibility. Since her decision was based on reasonable apprehension of bias, she did not err in law in declining to defer to the trial judge's findings.

81 Flinn J.A. reviewed the test for reasonable apprehension of bias. He concluded that bias reflects the inability of the judge to act impartially. The test is objective and the standard of reasonableness applies to the person who perceives the bias, as well as the apprehension of bias itself. The test requires a consideration of what the reasonable, right-minded person, with knowledge of all the facts, would think with regard to the apprehension of bias. The apprehension must be reasonable, and suspicion or conjecture is not enough. Finally, it is not necessary to show that actual bias influenced the result.

82 In Flinn J.A.'s opinion, Glube C.J.S.C. made no error in applying the test to the decision of the Youth Court Judge. She was correct to point out that there was no evidence to justify Judge Sparks' comments. Whether or not the comments reflected "an unfortunate social reality", the issue was whether Judge Sparks considered factors not in evidence when she made her critical findings of credibility and decided to acquit the accused. Judge Sparks used her general comments to conclude that Constable Stienburg overreacted. There was no evidence regarding "the prevalent attitude of the day" or the reasons why the officer overreacted. Concerns regarding overreaction were not canvassed in cross-examination of the officer, and the officer had no opportunity to address these concerns in his testimony.

83 As a result, Flinn J.A. was of the view that "the unfortunate use of these generalizations, by the Youth Court judge" would lead a reasonable, fully informed person to conclude that Judge Sparks had based her findings of credibility at least partially on the basis of matters not in evidence. This was unfair. The appeal was therefore dismissed.

84 Finally, Flinn J.A. rejected the argument that Glube C.J.S.C. had inappropriately adopted a formal equality approach to the question of reasonable apprehension of bias. He agreed with the Crown that the appellant's *Charter* argument on this point was not properly raised by the appeal, and in any event, that Glube C.J.S.C.'s approach was not inappropriate.

(ii) Freeman J.A. (dissenting)

85 Freeman J.A. agreed with the articulation of the law set out by the majority. However, he was of the view at p. 292 that "it was perfectly proper for the trial judge, in weighing the evidence before her, to consider the racial perspective". He was not satisfied that this gave rise to a perception that she was biased.

86 He indicated that although it was not clear what Judge Sparks meant by her reference to the "prevalent attitude of the day", it was possible that she was referring to the attitudes exhibited on the day of R.D.S.'s arrest. There was evidence before her on that point. At any rate, he was prepared to give Judge Sparks the benefit of the doubt on this remark, and to regard it as a neutral factor in the decision. The only remaining remarks related to the possible racism of the police.

87 Freeman J.A. was struck by the delicate racial dynamics of the courtroom. In his view, at p. 294, "Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding". He noted the unfortunate truth that most individuals generally know that police officers have on occasion misled the court or overreacted when dealing with non-white groups. Judge Sparks did not state that the officer did either of these things. Such a finding would have required evidence.

88 Judge Sparks did state that the officer overreacted, but she related it to her finding that she believed R.D.S.'s statement that the officer told him to shut up or he would be under arrest. This was not a biased conclusion, since it indicated her concern that the charges might have arisen more as a result of R.D.S.'s verbal interference, than of any physical act. There was certainly some evidence on which Judge Sparks could conclude that the officer overreacted, and this determination was within her purview. If the finding of overreaction did not give rise to a reasonable apprehension of bias, Freeman J.A. was not satisfied that any other comments made by Judge Sparks would do so. He would have allowed the appeal.

III. Issues

89 Only one issue arises on this appeal:

> Did the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension of bias?

IV.

A. Can This Court Consider Judge Sparks' Supplementary Reasons?

90 Glube C.J.S.C. correctly concluded that the supplementary reasons issued by Judge Sparks after the appeal had been filed could not be taken into account in assessing whether or not the reasons of Judge Sparks gave rise to a reasonable apprehension of bias. The parties did not dispute this determination in the Court of Appeal. In this Court, the appellant did not raise this issue in argument and proceeded on the basis that the supplementary reasons were not before the Court. The respondent Crown submitted in oral argument that the supplementary reasons should be considered as part of the overall picture in determining whether a reasonable apprehension of bias arose from Judge Sparks' conduct. The Crown appeared to be suggesting that the very fact of their issuance,

as well as their substance, was an important factor in the impression of bias that was created. At this late stage it would be most unfair to accept that submission. Accordingly, the supplementary reasons should not be considered.

B. Ascertaining the Existence of a Reasonable Apprehension of Bias

(i) Fair Trial and The Right to an Unbiased Adjudicator

91 A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.

92 It is a well-established principle that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them. See for example *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.), at p. 636. In order to fulfil this duty the decision-maker must be and *appear* to be unbiased. The scope of this duty and the rigour with which it is applied will vary with the nature of the tribunal in question.

93 For very good reason it has long been determined that the courts should be held to the highest standards of impartiality. *Newfoundland Telephone, supra*, at p. 638; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), at pp. 660-61. This principle was recently confirmed and emphasized by the majority in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 (S.C.C.), at para. 7, where it was said "[t]he right to a trial before an impartial judge is of fundamental importance to our system of justice". The right to trial by an impartial tribunal has been expressly enshrined by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

94 Trial judges in Canada exercise wide powers. They enjoy judicial independence, security of tenure and financial security. Most importantly, they enjoy the respect of the vast majority of Canadians. That respect has been earned by their ability to conduct trials fairly and impartially. These qualities are of fundamental importance to our society and to members of the judiciary. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.

95 Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to

all Canadians of every race, religion, nationality and ethnic origin. This is a far more difficult task in Canada than it would be in a homogeneous society. Remarks which would pass unnoticed in other societies could well raise a reasonable apprehension of bias in Canada.

96 Usually, in a criminal trial, actual or perceived judicial bias is alleged by the accused. However, nothing precludes the Crown from making a similar allegation. Indeed it has a duty to make such a submission in appropriate circumstances. Even in the absence of explicit constitutional protection, it is an important principle of our legal system that a trial must be fair to all parties — to the Crown as well as to the accused. See, for example, *R. v. Gushman* (April 22, 1994), Doc. U1382/93 (Ont. Gen. Div.). In *Curragh, supra*, this Court recently upheld an allegation of perceived bias arising from the conduct of a trial judge towards a Crown attorney. In a slightly different context, it has been held that if a judge forms or appears to form a biased opinion against a Crown witness, for example, a sexual assault complainant, the trial may be unfair to the Crown: *Wald, supra*, at p. 336.

97 The question which must be answered in this appeal is whether the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension that she was not impartial as between the Crown and the accused. The Crown's position, in essence, is that Judge Sparks did not give the essential and requisite appearance of impartiality because her comments indicated that she pre-judged an issue in the case, or to put it another way, she reached her determination on the basis of factors which were not in evidence.

(ii) Standard of Review

98 Before dealing with the issue of apprehended bias, it is necessary to address an argument raised by the appellant and the interveners African-Canadian Legal Clinic *et al*. They stressed that this appeal turns entirely on findings of credibility. There were only two witnesses, and their evidence was contradictory. Judge Sparks' role was therefore simply to determine the issue of credibility. The appellant and the interveners argued that it is a well-established principle of law that appellate courts should defer to such findings, and that Glube C.J.S.C. improperly reviewed Judge Sparks' findings of credibility. In my view, these submissions are not entirely correct.

99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. See *Curragh, supra*, at para. 5; *Gushman, supra*, at para. 28. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held": *Curragh, supra*, at para. 5.

100 If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone,*

supra, at p. 645; see also *Curragh, supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833 (S.C.C.), at p. 843. However, if the words or conduct of the judge, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

101 Therefore, while the appellant is correct that appellate courts have wisely adopted a deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, it is somewhat misleading to characterize the issue in this appeal as one of credibility alone. If Judge Sparks' findings of credibility were tainted by bias, real or apprehended, they would be made without jurisdiction, and would not warrant appellate deference. On the other hand, if her findings were not tainted by bias, then the case turned entirely on her findings of credibility and an appellate court should not interfere with those findings, unless they were clearly unreasonable or not supported by the evidence. See for example, *R. v. W. (R.)*, [1992] 2 S.C.R. 122 (S.C.C.), at pp. 131-32.

102 Thus the sole issue is whether Judge Sparks' reasons demonstrated actual or perceivable bias. If they did, then Glube C.J.S.C. not only had the jurisdiction to overturn them but also an obligation to order a new trial. A judicial determination at first instance that real or apprehended bias exists may itself be worthy of some deference by appellate courts: *Huerto v. College of Physicians & Surgeons (Saskatchewan)* (1996), 133 D.L.R. (4th) 100 (Sask. C.A.), at p. 105. However, an allegation of judicial bias raises such serious and sensitive issues that the basic interests of justice require appellate courts to retain some scope to review that determination.

(iii) What is Bias?

103 It may be helpful to begin by articulating what is meant by impartiality. In deciding whether bias arises in a particular case, it is relatively rare for courts to explore the definition of bias. In this appeal, however, this task is essential, if the Crown's allegation against Judge Sparks is to be properly understood and addressed. See Prof. Richard Devlin," We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" (1995), 18 *Dal. L.J.* 408, at pp. 438-39.

104 In *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), at p. 685, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he word' impartial' ... connotes absence of bias, actual or perceived". See also *R. v. Généreux*, [1992] 1 S.C.R. 259 (S.C.C.), at p. 283. In a

more positive sense, impartiality can be described — perhaps somewhat inexactly — as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

105 In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia J. in *Liteky v. United States*, 114 S. Ct. 1147 (U.S. Sup. Ct. 1994), at p. 1155:

> The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). [Emphasis in original.]

Scalia J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable — in other words, it is not "wrongful or inappropriate": *Liteky, supra*, at p. 1155.

106 A similar statement of these principles is found in *R. v. Bertram* (December 5, 1989), Doc. Toronto RE 1411/89 (Ont. H.C.), in which Watt J. noted at pp. 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

See also *R. v. Stark* (February 23, 1994), Doc. 7270/92 (Ont. Gen. Div.), at para. 64; *Gushman, supra*, at para. 29.

107 Doherty J.A. in *R. v. Parks* (1993), 15 O.R. (3d) 324 (Ont. C.A.), leave to appeal denied [1994] 1 S.C.R. x (S.C.C.), held that partiality and bias are in fact not the same thing. In addressing the question of potential partiality or bias of jurors, he noted at p. 336 that:

> Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases.

In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence: *Parks, supra*, at pp. 336-37.

108 This analysis is certainly not exhaustive. Different factors may determine the issue where, for example, the allegation relates to direct pecuniary bias or some other personal interest in the outcome of a case. Yet the concepts articulated can be used as guiding principles in the consideration of this case.

(iv) The Test for Finding a Reasonable Apprehension of Bias

109 When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. *Idziak, supra*, at p. 660. It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See *Newfoundland Telephone, supra*, at p. 636.

110 It was in this context that Lord Hewart C.J. articulated the famous maxim: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256 (Eng. K.B.), at p. 259. The Crown suggested that this maxim provided a separate ground for review of Judge Sparks' decision, and implied that the threshold for appellate intervention is lower when reviewing a decision for" appearance of justice" than for "appearance of bias". This submission cannot be sustained. The *Sussex Justices* case involved an allegation of bias. The requirement that justice should be seen to be done simply means that the person alleging bias does not have to prove actual bias. The Crown can only succeed if Judge Sparks' reasons give rise to a reasonable apprehension of bias.

111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at p. 394.

> the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra*, at pp. 54-55;

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Gushman, supra, at para. 31. Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick* (November 4, 1983), Osler J. (Ont. H.C.), at para. 14. See also *Stark, supra*, at para. 74; *R. v. Lin* (April 27, 1995), Doc. Vancouver CC950475 (B.C. S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

112 The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice, supra*, at pp. 394-95:

> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias',' reasonable suspicion of bias', or 'real likelihood of bias'. *The grounds for this apprehension must, however, be substantial* and I agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. See *R. v. Justice of Camborne*, [1954] 2 All E.R. 850 (Eng. Q.B.); *R. v. London Rent Assessment Panel Committee*, [1968] 3 All E.R. 304 (Eng. C.A.); *R. v. Gough* (1992), [1993] 2 W.L.R. 883 (Eng. C.A.); *Bertram, supra*, at p. 53; *Stark, supra*, at para. 74; *Gushman, supra*, at para. 30.

113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

114 The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram, supra*, at p. 28; *Lin, supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

115 Finally, in the context of the current appeal, it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more

likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

(v) Judicial Integrity and the Importance of Judicial Impartiality

116 Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

117 Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. See *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (N.S. C.A.), and *Lin, supra*. This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. *Smith & Whiteway, supra*, at p. 61; *Lin, supra*, at para. 37. The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

118 It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

119 The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial:

> ... does not mean that a judge does not or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question,

> all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. [Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.]

It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging. See for example the discussion by The Honourable Maryka Omatsu," The Fiction of Judicial Impartiality" (1997) C.J.W.L. 1. See also Devlin, *supra*, at pp. 408-409.

120 Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was pre-determined or that a question was decided on the basis of stereotypical assumptions or generalizations.

(vi) Should Judges Refer to Aspects of Social Context in Making Decisions?

121 It is the submission of the appellant and interveners that judges should be able to refer to social context in making their judgments. It is argued that they should be able to refer to power imbalances between the sexes or between races, as well as to other aspects of social reality. The response to that submission is that each case must be assessed in light of its particular facts and circumstances. Whether or not the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements will depend on the facts of the case.

122 At the outset, I would note that this appeal was not put forward by the appellant as engaging the principles of judicial notice. Rather it was the appellant's contention that the references to social context by Judge Sparks simply made use of her background, experience and knowledge of social conditions to assist her in the analysis of the persons involved in the case. One of the interveners did argue that the principles of judicial notice apply in this case. However, since the appellant did not put forward this position, it would be inappropriate to consider the question as to whether the existence of anti-black racism in society is a proper subject for judicial notice.

123 Certainly judges may, on the basis of expert evidence adduced, refer to relevant social conditions in reasons for judgment. In some circumstances, those references are necessary, so that the law may evolve in a manner which reflects social reality. For example, in *R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.), expert evidence of the psychological experiences of battered women

was used to inform the standard of reasonableness to be applied when self-defence is invoked by women who have been victims of domestic violence.

124 In *Lavallee*, the references to social context were based on expert evidence and were used solely to develop the relevant legal principle. In an individual case, however, it is still the responsibility of the woman putting forward the defence to establish that the general principles about women's experiences of domestic violence actually apply. The trier of fact still retains the important task of determining whether the evidence of a battered woman of her experiences in the particular case is in fact believable — in other words, whether the generalizations about social reality apply to the individual female accused. *Lavallee*, *supra*, at p. 891.

125 Similarly, judges have recently made use of expert evidence of social conditions in order to develop the appropriate legal framework to be utilized for ensuring juror impartiality. In *Parks, supra*, Doherty J.A. referred to a body of studies and reports documenting the prevalence of anti-black racism in the Metropolitan Toronto area. On the basis of his conclusions that anti-black racism is a "grim reality" in that community he developed a legal framework permitting jurors to be challenged for cause on the basis of racial preconceptions. This legal framework is applicable in circumstances where a realistic possibility exists that such preconceptions might threaten juror impartiality.

126 Other cases have applied and extended these principles on the basis of expert knowledge of the social context existing in the particular community, or in the particular relationships between parties to the case. See, for example, *R. v. Wilson* (1996), 29 O.R. (3d) 97 (Ont. C.A.); *R. v. Glasgow* (1996), 93 O.A.C. 67 (Ont. C.A.).

127 In *Parks* and *Lavallee*, for instance, the expert evidence of social context was used to develop principles of general application in certain kinds of cases. These principles are legal in nature, and are structured to ensure that the role of the trier of fact in a particular case is not abrogated or usurped. It is clear therefore that references to social context based upon expert evidence are sometimes permissible and helpful, and that they do not automatically give rise to suspicions of judicial bias. However, there is a very significant difference between cases such as *Lavallee* and *Parks* in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.

(vii) Use of Social Context in Assessing Credibility

128 It is, of course, true that the assessment of the credibility of a witness is more of an "art than a science". The task of assessing credibility can be particularly daunting where a judge must assess the credibility of two witnesses whose testimony is diametrically opposed. It has been held that "[t]he issue of credibility is one of fact and cannot be determined by following a set of rules...": *R. v. White*, [1947] S.C.R. 268 (S.C.C.), at p. 272. It is the highly individualistic nature of a

determination of credibility, and its dependence on intangibles such as demeanour and the manner of testifying, that leads to the well-established principle that appellate courts will generally defer to the trial judge's factual findings, particularly those pertaining to credibility. See, for example, *W. (R.), supra*.

129 However, it is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.

130 When making findings of credibility it is obviously preferable for a judge to avoid making any comment that might suggest that the determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. It is true that judges do not have to remain passive, or to divest themselves of all their experience which assists them in their judicial fact finding. See *R. v. Brouillard*, [1985] 1 S.C.R. 39 (S.C.C.); *Commentaries on Judicial Conduct, supra*, at p. 12. Yet judges have wide authority and their public utterances are closely scrutinized. Neither the parties nor the informed and reasonable observer should be led to believe by the comments of the judge that decisions are indeed being made based on generalizations.

131 At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made. Obviously the evidence of a policeman, or any other category of witness, cannot be automatically preferred to that of accused persons, any more than the testimony of blue eyed witnesses can be preferred to those with gray eyes. That must be the general rule. In particular, any judicial indication that police evidence is always to be preferred to that of a black accused person would lead the reasonable and knowledgeable observer to conclude that there was a reasonable apprehension of bias.

132 In some circumstances it may be acceptable for a judge to acknowledge that racism in society might be, for example, the motive for the overreaction of a police officer. This may be necessary in order to refute a submission that invites the judge as trier of fact to presume truthfulness or untruthfulness of a category of witnesses, or to adopt some other form of stereotypical thinking. Yet it would not be acceptable for a judge to go further and suggest that all police officers should therefore not be believed or should be viewed with suspicion where they are dealing with accused persons who are members of a different race. Similarly, it is dangerous for a judge to suggest that a particular person overreacted because of racism unless there is evidence adduced to sustain this

finding. It would be equally inappropriate to suggest that female complainants, in sexual assault cases, ought to be believed more readily than male accused persons solely because of the history of sexual violence by men against women.

133 If there is no evidence linking the generalization to the particular witness, these situations might leave the judge open to allegations of bias on the basis that the credibility of the individual witness was pre-judged according to stereotypical generalizations. This does not mean that the particular generalization — that police officers have historically discriminated against visible minorities or that women have historically been abused by men — is not true, or is without foundation. The difficulty is that reasonable and informed people may *perceive* that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility. As a general rule, judges should avoid placing themselves in this position.

134 To state the general proposition that judges should avoid making comments based on generalizations when assessing the credibility of individual witnesses does not lead automatically to a conclusion that when a judge does so, a reasonable apprehension of bias arises. In some limited circumstances, the comments may be appropriate. Furthermore, no matter how unfortunate individual comments appear in isolation, the comments must be examined in context, through the eyes of the reasonable and informed person who is taken to know all the relevant circumstances of the case, including the presumption of judicial integrity, and the underlying social context.

135 Before applying these principles to the facts of this case, it may be helpful to review some selected examples of the way in which courts have dealt with allegations of bias in similar cases.

(viii) How Have Courts Addressed Allegations of Judicial Bias?

136 Allegations of reasonable apprehension of bias are entirely fact-specific. It follows that other cases in which courts have dealt with similar allegations are of very limited precedential value. It is simply not possible to look at an individual case and conclude that the determination of the presence or absence of bias in that case must apply to the case at bar. Nonetheless, it is helpful to review some selected cases in which similar allegations have been made if only to observe the benchmarks against which the allegations were measured.

137 Thus, in *Bertram, supra*, some comments made by the trial judge during the course of a sentencing hearing suggested that he was pre-disposed to give effect to a joint sentencing submission before he had heard the details of the submission. Although the comments were described at p. 60 as "wholly inappropriate", Watt J. indicated that the remarks must not be looked at in isolation. On the basis of a review of the whole proceedings, Watt J. concluded that no reasonable apprehension of bias arose from the trial judge's conduct because he had on other occasions stressed his willingness to hear submissions on the question that he appeared to have pre-determined. In the circumstances, therefore, it could not be said that a reasonable person hearing

his comments, with knowledge of the case, would conclude that he might not be impartial. See also *Inquiry Pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337 (N.W.T. Bd. of Inquiry), at pp. 345-47; *R. v. Teskey* (1995), 167 A.R. 122 (Alta. Q.B.); *Lin*, *supra*.

138 In *Pirbhai Estate v. Pirbhai* (December 11, 1987), Doc. CA006335 (B.C. C.A.), leave to appeal denied, [1988] 1 S.C.R. xii (S.C.C.), the British Columbia Court of Appeal considered an allegation of reasonable apprehension of bias. The trial judge, in assessing the credibility of a witness commented that the demeanour of the witness had been shifty and evasive. The trial judge then said "It is obvious to me that he carried on a successful business in Pakistan in a corrupt society ...." Seaton J.A. looked at the whole proceeding, and held, at pp. 5-6, that "I think the remarks unfortunate, but that no reasonable person reading them would apprehend any bias on the part of the trial judge in this case". The remainder of the trial judge's reasons revealed that he came to his conclusions on credibility on the basis of the evidence, not on the basis of the kind of bias or prejudice suggested by his comments about the "corrupt society".

139 By contrast, a reasonable apprehension of bias was found in *Foto v. Jones* (1974), 45 D.L.R. (3d) 43 (Ont. C.A.). In that case, at p. 44, the trial judge in finding that the plaintiff in the case was not a credible witness stated that: "I regret to have to say that too many newcomers to our country have as yet not learned the necessity of speaking the whole truth. ... They have not yet learned that frankness is essential to our system of law and justice". The Court of Appeal concluded that a reasonable apprehension of bias arose in that these were not acceptable ingredients of any judgment, and ought not to influence or appear to influence the trial judge's determination of credibility.

140 In the current appeal, the Crown's position is that in *Foto*, *supra*, the circumstances are precisely the same as in the case at bar. I disagree. In *Foto*, *supra*, the remarks of the trial judge were fundamental to his findings of credibility, and appeared to be the sole basis on which the witness was disbelieved. This is not the situation in the current appeal, which has to be assessed on its own particular facts, and in its own context.

141 These examples demonstrate that allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.

C. Application of These Principles to the Facts

142 Did Judge Sparks' comments give rise to a reasonable apprehension of bias? In order to answer that question, the nature of the Crown's allegation against Judge Sparks must be clearly understood. At the outset, it must be emphasized that it is obviously not appropriate to allege bias

against Judge Sparks simply because she is black and raised the prospect of racial discrimination. Further, exactly the same high threshold for demonstrating reasonable apprehension of bias must be applied to Judge Sparks in the same manner it would be to all judges. She benefits from the presumption of judicial integrity that is accorded to all who swear the judicial oath of office. The Crown bears the onus of displacing this presumption with "cogent evidence".

143 Similarly, her finding that she could not accept the evidence of Constable Stienburg cannot raise a reasonable apprehension of bias. Neither Constable Stienburg nor any other police officer has an automatic right to be believed, any more than does the accused R.D.S. or any other accused. Police officers cannot expect to be immune from a finding that their testimony is not credible on some occasions. The basic function of a trial judge to determine issues of credibility and make findings of fact would be rendered meaningless if the credibility of police officers were to be accepted without question whenever their evidence diverged from that given by another witness. An unfavourable finding relating to the credibility of Constable Stienburg could only give rise to an apprehension of bias if it could reasonably be perceived to have been made on the basis of stereotypical generalizations, or as Scalia J. put it in *Liteky* , *supra*, on the basis of "wrongful or inappropriate" opinions not justified in the evidence.

144 The Crown contended that the real problem arising from Judge Sparks' remarks was the inability of the Crown and Constable Stienburg to respond to the remarks. In other words, the Crown attempted to put forward an argument that the trial was rendered unfair for failure to comply with" natural justice". This cannot be accepted. Neither Constable Stienburg nor the Crown was on trial. Rather, it is essential to consider whether the remarks of Judge Sparks gave rise to a reasonable apprehension of bias. This is the only basis on which this trial could be considered unfair.

145 Before finding that a reasonable apprehension of bias did arise Glube C.J.S.C. found that Judge Sparks conducted an acceptable review of all the evidence before making the comments that are the subject of the controversy. She concluded that if the decision had ended after the general review of the evidence and the resulting assessments of credibility, there would be no basis on which to impugn Judge Sparks' decision. I agree completely with this assessment. It is with the finding of a reasonable apprehension of bias that I must, with respect, differ.

146 A reading of Judge Sparks' reasons indicates that before she made the challenged comments, she had a reasonable doubt as to the veracity of the officer's testimony and had found R.D.S. to be a credible witness. She gave convincing reasons for these findings. It is clear that Judge Sparks was well aware that the burden rested on the Crown to prove all the elements of the offence beyond a reasonable doubt, and she applied that burden. None of the bases for reaching these initial conclusions on credibility was based on generalizations or stereotypes. Her reasons for rejecting or accepting testimony could be applied to any witness, regardless of race or gender.

147 Did Judge Sparks' subsequent comments about race taint her findings of credibility? The unfortunate remarks took this form:

> The Crown says, well, why would the officer say that events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

148 The statement that police officers have been known to mislead the court, or to overreact is not in itself offensive. Police officers are subject to the same human frailties that affect and shape the actions of everyone. The remarks become more troubling, however, when it is stated that police officers do overreact in dealing with non-white groups.

149 The history of anti-black racism in Nova Scotia was documented recently by the *Royal Commission on the Donald Marshall, Jr., Prosecution* (1989). It suggests that there is a realistic possibility that the actions taken by the police in their relations with visible minorities demonstrate both prejudice and discrimination. I do not propose to review and comment upon the vast body of sociological literature referred to by the parties. It was not in evidence at trial. In the circumstances it will suffice to say that they indicate that racial tension exists at least to some degree between police officers and visible minorities. Further, in some cases, racism may have been exhibited by police officers in arresting young black males.

150 However, there was *no* evidence before Judge Sparks that would suggest that anti-black bias influenced *this particular police officer's reactions*. Thus, although it may be incontrovertible that there is a history of racial tension between police officers and visible minorities, there was no evidence to link that generalization to the actions of Constable Stienburg. The reference to the fact that police officers may overreact in dealing with non-white groups may therefore be perfectly supportable, but it is nonetheless unfortunate in the circumstances of this case because of its potential to associate Judge Sparks' findings with the generalization, rather than the specific evidence. This effect is reinforced by the statement "[t]hat to me indicates a state of mind right there that is questionable" which immediately follows her observation.

151 There is a further troubling comment. After accepting R.D.S.'s evidence that he was told to shut up, Judge Sparks added that "[i]t seems to be in keeping with the prevalent attitude of the day". Again, this comment may create a perception that the findings of credibility have been made on the basis of generalizations, rather than the conduct of the particular police officer. Indeed these comments standing alone come very close to indicating that Judge Sparks predetermined the

issue of credibility of Constable Stienburg on the basis of her general perception of racist police attitudes, rather than on the basis of his demeanour and the substance of his testimony.

152 The remarks are worrisome and come very close to the line. Yet, however troubling these comments are when read individually, it is vital to note that the comments were not made in isolation. It is necessary to read all of the comments in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know.

153 The reasonable and informed observer at the trial would be aware that the Crown had made the submission to Judge Sparks that" there's absolutely no reason to attack the credibility of the officer". She had already made a finding that she preferred the evidence of R.D.S. to that of Constable Stienburg. She gave reasons for these findings that could appropriately be made based on the evidence adduced. A reasonable and informed person hearing her subsequent remarks would conclude that she was exploring the possible reasons why Constable Stienburg had a different perception of events than R.D.S. Specifically, she was rebutting the unfounded suggestion of the Crown that a police officer by virtue of his occupation should be more readily believed than the accused. Although her remarks were inappropriate they did not give rise to a reasonable apprehension of bias.

154 A reasonable and informed person observing the entire trial and hearing the reasons would be aware that Judge Sparks did not conclude that Constable Stienburg misled the court or overreacted on the basis of the racial dynamics of the situation. This is clear from her observation "I am not saying that the Constable has misled the court" and "I am not saying that the officer overreacted". Although she went on to suggest that she believed he probably did overreact, she did not say that he did so because he was discriminating against R.D.S. on the basis of race. She links her findings that Constable Stienburg overreacted to the statement made to R.D.S.: "Shut up, shut up, or you'll be under arrest too".

155 Judge Sparks suggested that Constable Stienburg overreacted on *some* basis. Although she noted that he was young, she was careful not to make a final determination as to the reason for his overreaction. In fact, it was not necessary for her to resolve the question as to why the officer might have overreacted. The reasonable and informed observer would know that the Crown at all times bore the onus of proving the offence beyond a reasonable doubt. It was obvious that Judge Sparks had a reasonable doubt on the evidence. As long as she had a reasonable doubt regarding the veracity of the officer's testimony, R.D.S. was entitled to an acquittal. Judge Sparks' remarks could reasonably be taken as demonstrating her recognition that the Crown was required to *prove* its case, and that it was not entitled to use presumptions of credibility to satisfy its obligation.

156 Judge Sparks accepted the evidence of R.D.S. that he was told to shut up or he would be under arrest because that was the "prevalent attitude of the day". This comment is particularly unfortunate because of its potential to associate her findings of credibility with generalizations.

However, it is ambiguous. It is not clear whether it refers to a prevalent attitude of anti-black racism, or the attitude that prevailed on the day in question. I accept that it refers to the specific day of the incident.

157 Finally, she concluded that "at any rate", on the basis of her comments and all the evidence in the case, she was obliged to acquit. A reasonable, informed person reading the concluding statement would perceive that she has reached her determination that R.D.S. should be acquitted on the basis of all the evidence presented. The perception that her impugned remarks were made in response to the Crown's suggestion that she should automatically believe the police officer is reinforced by her use of the words "at any rate".

158 A high standard must be met before a finding of reasonable apprehension of bias can be made. Troubling as Judge Sparks' remarks may be, the Crown has not satisfied its onus to provide the cogent evidence needed to impugn the impartiality of Judge Sparks. Although her comments, viewed in isolation, were unfortunate and unnecessary, a reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias. Her remarks, viewed in their context, do not give rise to a perception that she prejudged the issue of credibility on the basis of generalizations, and they do not taint her earlier findings of credibility.

159 Both Glube C.J.S.C. and the majority of the Court of Appeal correctly articulated the test to be applied when a reasonable apprehension of bias is alleged. However, in applying the test to the facts and circumstances of this case they failed to consider the impugned comments in context and to take into account the high threshold that must be met in order to find that a reasonable apprehension of bias has been established.

V. Conclusion

160 In the result the judgments of the Court of Appeal and of Glube C.J.S.C. are set aside and the decision of Judge Sparks dismissing the charges against R.D.S. is restored. I must add that since writing these reasons I have had the opportunity of reading those of Major J. It is readily apparent that we are in agreement as to the nature of bias and the test to be applied in order to determine whether the words or actions of a trial judge raise a reasonable apprehension of bias. The differences in our reasons lies in the application of the principles and test we both rely upon to the words of the trial judge in this case. The principles and the test we have both put forward and relied upon are different from and incompatible with those set out by Justices L'Heureux-Dubé and McLachlin.

Appeal allowed.

Pourvoi rejeté.

2017 CAF 128, 2017 FCA 128
Federal Court of Appeal

Tsleil-Waututh Nation v. Canada (Attorney General)

2017 CarswellNat 2708, 2017 CarswellNat 6822, 2017 CAF 128,
2017 FCA 128, [2017] F.C.J. No. 601, 280 A.C.W.S. (3d) 228

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/ SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY (Applicants) and ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC (Respondents) and ATTORNEY GENERAL OF ALBERTA (Intervener)

David Stratas J.A.

Heard: June 16, 2017
Judgment: June 16, 2017
Docket: A-78-17, A-217-16, A-218-16, A-223-16, A-224-16, A-225-16, A-232-16, A-68-17, A-73-17, A-74-17, A-75-17, A-76-17, A-77-17, A-84-17, A-86-17

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***David Stratas J.A.*:**

A. Introduction

1 There are two motions before the Court:

• *The June 2, 2017 motion of the applicant, the Tsleil-Waututh Nation*. It objects to the inadequate state of the evidentiary record placed before the Court in these consolidated applications for judicial review. Among other things, it seeks production of relevant documents from Canada.

• *The June 6, 2017 motion of the Attorney General of Canada.* The Attorney General seeks leave to add a supplementary affidavit to the evidentiary record. The supplementary affidavit corrects errors and omissions in an earlier affidavit.

B. The judicial review proceedings before the Court

2 Before the Court are fifteen applications for judicial review, now consolidated, in which, collectively, twenty-seven parties seek to quash certain administrative decisions approving the Trans Mountain Expansion Project. The decisions are a Report dated May 19, 2016 by the National Energy Board, purportedly acting under section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 and the Order in Council, PC 2016-1069, dated November 29, 2016 and made by the Governor in Council. It can be found in the *Canada Gazette*, Part I, vol. 150, no. 50, December 10, 2016.

3 In brief, the Project — the capital cost of which is $7.4 billion — adds new pipeline, in part through new rights of way, thereby expanding the existing 1,150-kilometre pipeline that runs roughly from Edmonton, Alberta to Burnaby, British Columbia. The Project also entails the construction of new works such as pump stations and tanks and the expansion of an existing marine

terminal. The immediate effect will be to increase capacity from 300,000 barrels per day to 890,000 barrels per day.

4 The applicants challenge the administrative approvals on a number of grounds. In support of their challenges, the applicants invoke administrative law and relevant statutory law. The Indigenous applicants also invoke section 35 of the *Constitution Act, 1982* and associated case law concerning the obligations owed to them, including Canada's duty to consult and, in some cases, to accommodate. The applicants also raise many issues concerning the Project's "environmental effects," as defined by section 5 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

5 These consolidated applications have been progressing quickly. In the space of roughly three months, counsel have worked hard getting the matter ready for hearing, guided by 3 sets of detailed reasons, 8 orders and 14 directions (including the reasons and order on these motions). The hearing will take place in early October, 2017.

C. The motion of the Attorney General of Canada

6 In response to the applications for judicial review and several affidavits filed in support of the applications, the Attorney General filed an affidavit of Mr. Gardiner. The aim of his affidavit is to supply evidence concerning what has taken place concerning the duty to consult and accommodate Indigenous groups.

7 Mr. Gardiner has now sworn a supplementary affidavit to correct dates in his original affidavit and supply missing records. The errors and omissions are said to be inadvertent.

8 The Attorney General of Canada now moves for leave to file the supplementary affidavit. Trans Mountain consents.

9 The Indigenous applicants either take no position or do not oppose the Attorney General's motion. However, four Indigenous applicants noted that portions of the supplementary affidavit were irrelevant to the consolidated applications. The Attorney General has agreed to remove the irrelevant portions.

10 The authority for allowing a party to file an additional affidavit on judicial review is Rule 312 of the *Federal Courts Rules*, SOR/98-106. The Rule merely permits such a filing with leave of the Court. It does not set out any criteria for the granting of that leave.

11 However, case law under Rule 312 assists. Additional affidavits are permitted only where it is "in the interests of justice": *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2002 FCA 503, 299 N.R. 244 (Fed. C.A.) at paras. 8-9. The case law shows that the Court must have regard to whether:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);

- admitting the evidence will cause substantial or serious prejudice to the other side;

- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

(*Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101, 392 N.R. 248 (F.C.A.) at para. 2; *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 (F.C.A.) at para. 6; *House of Gwasslaam v. Canada (Minister of Fisheries & Oceans)*, 2009 FCA 25, 387 N.R. 179 (F.C.A.) at para 4.) I note that this Court has applied these same factors in deciding whether a reply affidavit should be permitted to be filed in an application for leave to appeal under Rule 355, a rule that, like Rule 369(3), does not explicitly allow reply affidavits: *Quarmby v. National Energy Board of Canada*, 2015 FCA 19 (F.C.A.).

12 On balance, these factors lie in favour of admitting Mr. Gardiner's supplementary affidavit into these consolidated applications.

13 The dominant consideration underlying my exercise of discretion is that a fuller and more accurate record will promote the proper determination of the applications on their merits, consistent with Rule 3 of the *Federal Courts Rules*. Rule 3 provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

14 The applicants have offered no evidence of prejudice and, in fact, do not oppose. Cross-examinations of Mr. Gardiner have not yet taken place. Corrections of errors and the supplementing of information likely would have taken place at those cross-examinations anyway. The Court will also be open to an extension of the period for cross-examinations should the applicants request it, as long as the consolidated applications are ready for hearing on the date set by the Court.

15 No doubt more complete and more accurate information was available earlier and ideally should have appeared in Mr. Gardiner's first affidavit. This motion could have been brought sooner but it was delayed by Mr. Gardiner's absence from Canada. The Attorney General has brought this motion just before cross-examinations were to start. The delay is unfortunate — especially since this Court's Order of March 9, 2017 expedites these proceedings, sets a strict schedule, and warns all parties that "the schedule will be amended only if absolutely necessary." But the Attorney General's motion does not materially affect the progress of these proceedings.

16 Thus, leave shall be granted to admit Mr. Gardiner's supplementary affidavit (with the irrelevant portions removed) into these proceedings.

D. The motion of the Tsleil-Waututh Nation

(1) Introduction

17 The Tsleil-Waututh Nation has moved for an order to address what it says are serious deficiencies in the evidentiary record before this Court. The Indigenous applicants support the Tsleil-Waututh Nation.

18 The Tsleil-Waututh Nation says that a request for disclosure under Rule 317 *Federal Courts Rules* has gone unfulfilled. It also says that the materials that the Governor in Council relied upon in making its decision to approve the Trans Mountain Extension Project are not all before the Court. And, more generally, it says that more evidence is in the possession of Canada and should be produced.

19 Mixed in with its motion are issues concerning section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the provision that allows Canada to assert that certain information considered by the Governor in Council, commonly called the Cabinet, cannot be disclosed. Canada issued a section 39 certificate here. As we shall see, it also did this in the recent successful challenge in this Court to the Northern Gateway Pipeline Project: *Gitxaala Nation v. R.*, 2016 FCA 187 (F.C.A.) ("*Gitxaala Nation (2016)*"). As a result, certain information the Governor in Council considered in making its decision will not be placed before the Court.

(2) The issues before the Court

20 The motion brought by the Tsleil-Waututh Nation raises several issues concerning the record before the reviewing court in judicial review proceedings:

- The sufficiency of Canada's certificate under section 39 of the *Canada Evidence Act* and the effect of the certificate, which is to prohibit any disclosure of the evidence considered by the Governor in Council to the parties and to the reviewing court.

- The importance and role of the record before the reviewing court.

- The function and limits of Rule 317 of the *Federal Courts Rules*. This is the Rule that provides for an applicant to obtain the evidence that was before the administrative decision-maker. Related to this, though not in issue here, is how the applicant places the evidence, once obtained, before the administrative decision-maker.

- The admissibility in the reviewing court of evidence other than that which was before the administrative decision-maker.

- Whether, notwithstanding the above, an applicant in a judicial review may compel production of evidence from the administrative decision-maker or from others and have it placed before the reviewing court. In what circumstances should the reviewing court make a production order?

• Where, in the end, there are gaps in the evidentiary record before the reviewing court, how, if at all, can the reviewing court go about its task of review?

The submissions before me address or touch on these issues — all of which bear to a varying degree on what the Tsleil-Waututh Nation seeks in this motion.

(3) Should this Court decide the motion now?

21 This motion has been brought on an interlocutory basis. As is the normally the case for interlocutory motions raised on judicial review, the Court must consider whether the motions should be decided now or whether they should be left for the hearing panel.

22 Before us are issues concerning the content and sufficiency of the evidentiary record before the reviewing court. On an application for judicial review, the reviewing court can handle these issues and often does.

23 In my view, there is enough legal certainty surrounding this motion and its outcome on the facts for it to be determined now. As well, resolving a number of points raised by the motion and settling the parties' situations in this litigation will allow the parties to proceed in an orderly way with the pre-hearing cross-examinations and the hearing itself. Indeed, I expect that these reasons may assist the parties in focusing the submissions that they will make to the panel hearing these consolidated applications. See generally *Collins v. R.*, 2014 FCA 240, 466 N.R. 127 (F.C.A.) at paras. 6-7; *Gitxaala Nation v. Canada*, 2015 FCA 27 (F.C.A.) at paras. 7 and 12; *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.) at paras. 9-12 ("*Bernard (2015)*"); *McConnell v. Canada (Human Rights Commission)*, 2004 FC 817 (F.C.), aff'd 2005 FCA 389 (F.C.A.); *P.S. Part Source Inc. v. Canadian Tire Corp.*, 2001 FCA 8, 200 F.T.R. 94 (note) (Fed. C.A.).

(4) Has Canada complied with section 39 of the Canada Evidence Act?

24 Canada has issued a certificate under section 39 of the *Canada Evidence Act*. Section 39 "is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings": *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 (S.C.C.) at para. 21.

25 Certificates are issued to protect Cabinet confidences and nothing more. A certificate cannot be issued to "thwart public inquiry" or "gain tactical advantage in litigation": *Babcock* at para. 25.

26 According to the Supreme Court in *Babcock* (at para. 27), a certificate is valid if it is done by the Clerk or a Minister of the Crown, it relates to the information set out in subsection 39(2), it is done *bona fide*, and it is aimed at preventing disclosure of information that has been and is confidential.

27 The role of this Court in reviewing a section 39 certificate is limited. We must refuse disclosure of the information covered by the certificate "without examination or hearing of the information": *Babcock* at para. 38. We only review to ensure that the decision to make the certificate and the certificate itself "flow from statutory authority clearly granted and properly exercised": *Babcock* at para. 39, citing *Roncarelli c. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.).

28 In practice, this means the Court may consider whether the information for which immunity is claimed does not fall within subsection 39(2) or whether the Clerk or Minister has improperly exercised the discretion conferred by subsection 39(2): *Babcock* at para. 39. The Supreme Court amplified on this as follows (at para. 40):

> The court, person or body reviewing the issuance of a s. 39 certificate works under the difficulty of not being able to examine the challenged information. A challenge on the basis that the information is not a Cabinet confidence within s. 39 thus will be generally confined to reviewing the sufficiency of the list and evidence of disclosure. A challenge based on wrongful exercise of power is similarly confined to information on the face of the certificate and such external evidence as the challenger may be able to provide. Doubtless these limitations may have the practical effect of making it difficult to set aside a s. 39 certification.

29 The certificate covers the following documents:

> #1: Letter to the Honourable Scott Brison, President of the Treasury Board, in November 2016 from the Honourable Jim Carr, Minister of Natural Resources, regarding the scheduling of consideration of a proposed Order in Council concerning the Trans Mountain Expansion Project.
>
> This information is a record reflecting communications between ministers of the Crown concerning agenda of Council. The information is therefore within the meaning of paragraphs 39(2)(c) and 39(2)(d) respectively of the *Canada Evidence Act*.
>
> #2: Submission to the Governor in Council in November, 2016 in English and French from the Honourable Jim Carr, Minister of Natural Resources, regarding a proposed Order in Council concerning the Trans Mountain Expansion Project, including signed Ministerial recommendation, summary and accompanying materials.
>
> This information, including all its attachments in their entirety which are integral parts of the document, constitutes a memorandum the purpose of which is to present proposals or recommendations to Council. The information is therefore within the meaning of paragraphs 39(2)(a) of the *Canada Evidence Act*.

810

30 The Tsleil-Waututh Nation submits that Canada has not complied with section 39 of the *Canada Evidence Act*: the documents are not sufficiently described. It says that the certificate does not specify the exact dates on which Documents #1 and #2 on the certificate were delivered to their recipients. Further, it says that there is no itemized and specific description of the materials that are said to have accompanied Document #2.

31 *Babcock* guides this Court in cases where, as here, the sufficiency of the description of documents is contested (at para. 28):

> It may be useful to comment on the formal aspects of certification. As noted, the Clerk must determine two things: (1) that the information is a Cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the Clerk's decision requires that her certificate bring the information within the ambit of the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) This follows from the principle that the Clerk or minister must exercise her statutory power properly in accordance with the statute. The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. On the other hand, if the documents containing the information are properly identified, a person seeking production and the court must accept the Clerk's determination. The only argument that can be made is that, on the description, they do not fall within s. 39, or that the Clerk has otherwise exceeded the powers conferred upon her.
>
> [emphasis added]

32 In this passage, the Supreme Court says that the description should approximate "the kind of description required for claims of solicitor-client privilege under the civil rules of court." But it adds that "normally" the "date, title, author and recipient of the document" should be disclosed.

33 These two statements conflict somewhat. To assert solicitor-client privilege successfully over a document, it is not always necessary to disclose the date, title, author and recipient of the document. Sometimes the disclosure of this information — especially the title of the document — can reveal privileged information. In my view, based on a complete reading of Babcock, the dominant consideration that overrides this potential conflict is that the certificate must provide

enough information to allow a court to assess, from the face of the certificate, that the Clerk has listed documents that fit under section 39, and has not exceeded her or his statutory powers.

34 Document #2 meets this overall test. A submission from a particular Minister to the entire Governor in Council during the month of its meeting (November, 2016) with "signed Ministerial recommendation, summary and accompanying materials" — attachments that are said to be "integral parts of the document [i.e., the submission]" — qualifies for protection under paragraph 39(2)(*a*) ("a memorandum the purpose of which is to present proposals or recommendations to Council") and paragraph 39(2)(*d*) ("a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy").

35 Would a description such as the one provided here be adequate for the assertion of a claim of solicitor-client privilege? In my view, yes.

36 Suppose a lawyer writes a memorandum dated "November 2016" to her team of lawyers concerning litigation their client is defending. The litigation concerns breach of contract. The memorandum is for the team to consider in advance of a meeting at which the team will decide upon a course of action for their client. In the memorandum, the lawyer set out her recommendations and attached certain documents so that her team could consider the matter properly. On this description alone, the entire bundle of documents would be privileged. See, for example, the discussion of privilege in *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 (F.C.A.).

37 This is not to say that individual documents that are attached are privileged for all time in all contexts. Suppose one of the documents considered by the lawyer team is a contract entered into between the client and the opposite party in litigation. In the bundle of documents supplied to the lawyer team, it is privileged. The opposite party has no right to see what the lawyer team considered in its meeting about the client's affairs. However, the contract itself will be admissible in the litigation.

38 The Tsleil-Waututh Nation complains that the exact dates and titles of documents are not disclosed and this triggers a consequence: under *Babcock* (at para. 28) when there is such non-disclosure, "the onus falls on the government to establish [the documents fall under section 39], should a challenge ensue." That may be so, but for the reasons set out above, that onus has been met, merely from the description provided on the face of the certificate: a description that has persuaded me that here there has not been any exceedance of statutory power.

39 Further, concerning the undisclosed exact dates and titles, I note that in the solicitor-client context — one that *Babcock* invites us to use — disclosure of such information can reveal privileged information. In the above example, if the lawyer team were to disclose to the other side the title, the authors and the date of the contract, the other side would know that the lawyer team had the contract before them. If the lawyer team were to disclose the title, the authors, the dates

and recipients of all the attachments, the other side might well be able to piece together what was placed before the lawyer team. Indeed, with that information, it might be able to take an informed guess regarding the subject matter of the issue the lawyer team was considering.

40 The description of Document #2 says that "all its attachments in their entirety...are integral parts of the document" which is described as a "[s]ubmission to the Governor in Council." This suggests that a more particularized description of the attachments, such as their exact dates, authors and titles — like the contract in the above example — would shed light on what the submission said and, thus, reveal a Cabinet confidence.

41 In its reply submissions, the Tsleil-Waututh Nation asks the Court to draw an inference that the Clerk has selectively withheld disclosure of the exact dates to gain a tactical litigation advantage. On the material before me, I see no basis for drawing that inference, nor do I see any evidence of bad faith. As I have explained, the more likely reason why exact dates and some other specifying information have not been provided is that parties may be able to deduce exactly what was placed before and discussed by the Governor in Council, undercutting the protective purpose of section 39 of the *Canada Evidence Act*.

42 In this case, I consider the description of Document #2 adequate. If more particularity in the descriptions were supplied, there would be a substantial likelihood that the information that lies at the heart of what section 39 exists to protect would be disclosed to some extent. Enough concerning Document #2 has been disclosed to convince me that the decision to make the certificate and the certificate itself, in the words of *Babcock*, "flow from statutory authority clearly granted and properly exercised."

43 Document #1 stands in a different position. It is a letter in November 2016 from one Minister to another "regarding the scheduling of consideration" of a proposed order in council concerning the Project. We know that the Order in Council was made on November 29, 2016. Is a discussion of the timing of a meeting, without more, a confidence falling under subsection 39(2)? The Attorney General offered no cases on this specific point, nor could I find any myself.

44 But the description does not stop with timing. It adds that the communication is "concerning [the] agenda" of the Council. This injects vagueness and inconsistency into the description. Does Document #1 go beyond the timing and shed light on substantive reasons that might affect the timing, such as the preparation of the submission to the Governor in Council? Does the mere fact there is a discussion of timing taking place reveal something that is covered within subsection 39(2)? Does the communication contain a discussion about the substance of the agenda, such as the topics that the Governor in Council should, could or will discuss? If the answer to any of those questions were "yes," I would have found that Document #1 falls under subsection 39(2) and there is no exceedance of statutory power. But I cannot tell.

45 In short, the description of Document #1 does not lead me to conclude that it falls under subsection 39(2).

46 As well, I am not satisfied that a document in November 2016 discussing only timing and nothing else — which is what the first part of the description of Document #1 suggests — falls within subsection 39(2). Going back to cases like *Babcock* and *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161 (S.C.C.), I am not persuaded on the evidence or the brief submissions presented by the Attorney General on this point that a document that merely asks, "Should we do this on November 22 or November 29?" without any argumentation, debate or reasons is a Cabinet confidence falling under the specific paragraphs of subsection 39(2).

47 Although the description of Document #1 does not persuade me that it falls under subsection 39(2), I would not grant the Tsleil-Waututh Nation any relief. If Document #1 concerns only timing and nothing more, it is irrelevant and, thus, not admissible in the consolidated applications. Nothing in these consolidated applications turns on discussions of the timing of Cabinet's consideration of the matter. The only thing that matters is the legality of the Order in Council, which we all know is dated November 29, 2016.

48 The Tsleil-Waututh Nation makes a wider argument against the certificate. It suggests that the certificate is defective because it "adversely impacts [the Tsleil-Waututh Nation's] ability to review the decision(s) being challenge[d]." In particular, the failure to identify the documents in question with specificity — and here I believe the Tsleil-Waututh Nation has the attachments to Document #2 front of mind — undercuts its ability to know whether certain matters raised by it as late as November 28, 2016, were considered by the Governor in Council when it approved the Project.

49 I reject this submission. The Supreme Court in *Babcock*, above, makes it clear that the impact that a section 39 certificate might have on litigation is not a relevant factor for assessing the validity or sufficiency of a certificate.

50 Putting this aside for a moment, the Tsleil-Waututh Nation's concern about immunization is a significant one and in no way do I minimize it. I wish to discuss this for a moment, as it will be relevant later in my reasons to the Tsleil-Waututh Nation's request for a production order against Canada and it may benefit the parties as they prepare for the hearing of the consolidated applications.

51 As will be discussed below, under our law the exercise of public powers is not to be immunized from meaningful review. But I do not share the Tsleil-Waututh Nation's concern that this certificate necessarily has the effect of immunizing from review what the Governor in Council has done.

52 In a sense, this sort of effect caused by a certificate is nothing new. Administrative tribunals can rely on deliberative secrecy and, thus, can withhold key information from an applicant for judicial review: see *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.) at page 965. Legal professional privilege can also apply even on key issues in the judicial review: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (S.C.C.). In these cases, the reviews of the administrative decision-makers still went ahead. The withholding of just some materials from the reviewing court does not, by itself, necessarily mean that the administrative decision-maker is being immunized from review.

53 And while the impact of a section 39 certificate on litigation is not a relevant consideration in assessing the validity of the certificate, the issuance of a section 39 certificate may indeed impact the litigation to a challenger's benefit. The issuance of a certificate is no small thing. In *Gitxaala Nation (2016)*, this Court registered its concern about the issuance of a certificate as follows (at para. 319):

> The balance of the record that could shed light on this, *i.e.*, the staff recommendations flowing from the Phase IV consultation process, the ministerial recommendation to the Governor in Council and the information before the Governor in Council when it made his decision, are all the subject of Canada's claim to Cabinet confidence under section 39 of the *Canada Evidence Act* and thus do not form part of the record. Canada was not willing to provide even a general summary of the sorts of recommendations and information provided to the Governor in Council.

54 Can this sort of concern lead to an adverse finding? Arguably yes. In *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), a majority of the Supreme Court found that a tobacco advertising ban was contrary to the Charter and was of no force or effect. In finding that the ban was not justified under section 1 of the Charter, McLachlin J. (as she then was), writing in separate reasons for three Justices, appeared to take into account the issuance of the certificate (at paras. 165-166):

> These considerations suggest that the advertising ban imposed by s. 4 of the Act may be more intrusive of freedom of expression than is necessary to accomplish its goals. Indeed, Health and Welfare proposed less-intrusive regulation instead of a complete prohibition on advertising. Why then, did the government adopt such a broad ban? The record provides no answer to this question. The government presented no evidence in defence of the total ban, no evidence comparing its effects to less invasive bans.
>
> This omission is all the more glaring in view of the fact that the government carried out at least one study of alternatives to a total ban on advertising before enacting the total ban. The government has deprived the courts of the results of that study. The Attorney General of Canada refused to disclose this document and approximately 500 others demanded at the trial

> by invoking s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review the documents for which privilege is claimed under s. 39. References to the study were blanked out of such documents as were produced: Reasons at Trial, at p. 516. In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.

55 In its submissions, the Attorney General suggests that the section 39 certificate does not have the drastic effect the Tsleil-Waututh Nation suggests. Ultimately, this will be for the hearing panel of the Court to assess, but there are certain matters raised by the Attorney General or consequent to what she has raised that are worth mentioning.

56 First, in this case there is an evidentiary record, partly described below. It is growing. It seems to be at least equivalent to the one placed before this Court in *Gitxaala Nation (2016)*. And in that case this Court did not find that the issuance of a certificate improperly immunized the Governor in Council's approval of the Northern Gateway Project from review. In fact, in *Gitxaala Nation (2016)*, this Court was able to meaningfully review the Order in Council. It quashed it on account of inadequate consultation with Indigenous groups.

57 Second, the Attorney General submits that the issue whether the Crown met its duty to consult Indigenous applicants "is determined on the basis of the evidence filed by the parties in relation to what actually took place during the consultation process" rather than by what the Governor in Council may have considered. This is seen from a Federal Court case where a section 39 certificate had been filed and the issue before the Court was whether the duty to consult had been fulfilled:

> The record does not reveal a lack of transparency; on the contrary, it shows that the Crown repeatedly shared information, replied to the [First Nation's] correspondence, met the [First Nation's] representatives, and made policy decisions in light of the [First Nation's] concerns. The applicant was not entitled to disclosure of the Minister's advice to Cabinet: as they acknowledge, the Minister properly asserted privilege (*Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39(2)). Furthermore, the duty to consult is determined by the actions that Canada took during the consultation process, not by what the Governor in Council may have considered.

(*Athabasca Chipewyan First Nation v. Canada (Minister of the Environment)*, 2014 FC 1185 (F.C.) [hereinafter Adam] at para. 79.)

58 As well, in the same vein, this Court stated in *Gitxaala Nation (2016)* that the duty to consult arises in cases like this in two ways. Before the Governor in Council, it can be a basis for finding unreasonableness on the basis of the evidence before it. But, notwithstanding whatever was before the Governor in Council, if the duty to consult owed by the Crown has not been fulfilled, the approval cannot stand: *Gitxaala Nation (2016)* at para. 159; *semble*, *Adam*, above.

59 No doubt the parties will make submissions on these and related matters at the hearing of these consolidated applications.

60 This suffices to determine the portion of the Tsleil-Waututh Nation's motion dealing with section 39 of the *Canada Evidence Act*. I turn now to a consideration of the Rule 317 issue the Tsleil-Waututh Nation has raised in its motion and its request for an order requiring Canada to produce more material.

61 To set the stage for this, it is necessary to offer some background legal discussion regarding the record before reviewing courts.

62 First, I shall examine the role of the evidentiary record before the reviewing court in judicial reviews and the principles that govern the court's interpretation of relevant statutory provisions and procedural rules. I shall also review the basic principles of admissibility in judicial review proceedings.

63 Then I shall descend into more practical and mechanical considerations concerning issues relating to the record before the reviewing court: how applicants can obtain evidence relevant to an application for judicial review and how all of the evidence is to be placed before the reviewing court. These two concepts, along with issues relating to the admissibility of evidence, are frequently confused. They must be kept separate.

64 I do not apologize for starting at such a level of generality. As we journey through areas like this, we can get lost in a dense forest of case law, with multiple issues flying about and various procedural rules seeming like predators poised to strike. But if we step back and view things from above, we can see the whole forest and find our way.

65 Here, the whole forest is an appreciation of the important role played by the record in judicial reviews, certain fundamental principles concerning judicial reviews, legislative provisions that bear on the problem, and how courts go about their task of review. With that appreciation in mind, we can better understand different things in the forest and their relationship to each other.

66 Only by doing this can Rule 317 — a rule about obtaining evidence from the administrative decision-maker — be placed in its proper context and understood. Only then can the Tsleil-Waututh Nation's complaint about non-compliance of Rule 317 be considered. And only then can its broader request for an order requiring Canada to produce further material be addressed.

(5) The evidentiary record before reviewing courts: some background

(a) The role of the evidentiary record before reviewing courts and relevant principles governing it

67 Subject to constitutional considerations, we must follow the statutory provisions and rules that govern and define the content of the evidentiary record before the reviewing court. Properly interpreted in accordance with their text, context and purpose, they sometimes give reviewing courts some ambit for discretion. Thus, we must have front of mind the role that the evidentiary record plays in reviewing courts. It lies at the heart of meaningful judicial review. Its importance cannot be understated.

68 First is the role the evidentiary record plays in the reviewing court's discernment of the reasons of the administrative decision-maker. Where the reasons of the administrative decision-maker are sparse or even non-existent on a key point, they can sometimes be deduced from comparing the result reached with the evidentiary record: see, *e.g.*, *P.S.A.C. v. Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572 (S.C.C.).

69 Even where the reasons are more fulsome, the record the administrative decision-maker had in front of them can play a key role in construing and interpreting its reasons. See generally *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.) at para. 15; *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 86 (F.C.A.) at para. 39.

70 The reasons of the administrative decision-maker — and, thus, the evidentiary record intimately associated with them — are no small thing. They are the starting point and the focus for the reviewing court's judicial review analysis: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at paras. 48 and 56; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) at para. 26.

71 And, quite apart from the foregoing, the evidentiary record before the administrative decision-maker is indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review. In most judicial reviews, the reviewing court must evaluate the substantive correctness or acceptability and defensibility of the administrative decision. It is alert to errors or defects that might render the decision unreasonable. Often error or unacceptability and indefensibility is found by comparing the reasons with the result reached in light of the legislative scheme and — most importantly for present purposes — the evidentiary record before the administrative decision-maker.

72 For example, a key evidentiary finding made without anything in the evidentiary record in circumstances where evidence was necessary can render an administrative decision unreasonable: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 (F.C.A.) at para. 100; *Delios*, above at para. 27. So can a finding that is completely at odds with the evidentiary record. In the case of reasonableness review, where a key part of the record — for example, any evidence on an essential element — is missing and, as a result, the reviewing court cannot assess whether the decision is within the range of acceptability and defensibility and, thus, reasonable, sometimes the reviewing court has no choice but to quash the administrative decision:

see, *e.g.*, *Leahy v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766 (F.C.A.) at para. 137; *Kabul Farms Inc. v. R.*, 2016 FCA 143 (F.C.A.) at paras. 31-39.

73 Related to this is the role of the evidentiary record in preventing administrative decision-makers and their decision-maker from being immunized from review.

74 Where the record placed before the reviewing court is deficient, certain grounds for setting aside an administrative decision can be foreclosed. To take an extreme example, if the evidentiary record of the administrative decision-maker is not before the reviewing court, how can a reviewing court evaluate whether the administrative decision-maker's decision was based on any evidence at all?

75 This point has been expressed in different ways. The Saskatchewan Court of Appeal put it this way:

> In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question.

(*Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 (Sask. C.A.) at para. 24.)

76 An academic commentator expressed it this way:

> Without knowing the reasoning behind a decision, it is impossible for a judge to determine if it is founded upon arbitrary reasoning. Thus, in order for a judge to determine whether a decision maker acted lawfully, the decision maker must provide reasons adequate to allow a reviewing judge to determine why the decision maker made the decision they did and whether it followed explicit statutory requirements [or the basis for the decision must be apparent in the record]. If the judge cannot ascertain how the decision was made [even in light of the evidentiary record], then the court cannot fulfill this role and decisions made in violation of the rule of law may be sanctioned by the court.

(Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 C.J.A.L.P. 87 at p. 113.)

77 In support of its motion, the Tsleil-Waututh Nation forcefully and repeatedly makes the point about immunization. It cites the dissenting reasons of this Court in *Slansky*, above, correctly noting that the majority did not disagree with the propositions put on this point. *Slansky* put the point this way (at para. 276):

> If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the tribunal. In

other words, an inadequate evidentiary record before the reviewing court can immunize the tribunal from review on certain grounds.

78 In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 (S.C.C.) at paragraph 70. Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law: *Slansky* at paras. 313-315. Subject to any concerns about justiciability, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1 (S.C.C.); *Dunsmuir*, above; *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737 (F.C.A.) at para. 66; *Habtenkiel v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 180 (F.C.A.) at para. 38; *Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2015 FCA 89, 382 D.L.R. (4th) 720 (F.C.A.) at para. 140. But, at least in the situation where the evidentiary record of the administrative decision-maker is not before the reviewing court in any way whatsoever — *i.e.*, there is not even a summary or hint of what was before the administrative decision-maker — or the record is completely lacking on an essential element, concerns about immunization of administrative decision-making can come to the fore.

79 In this Court, administrative decision-makers whose decisions cannot be fairly evaluated because of a complete lack of anything in the record on an essential element — situations where in effect the administrative decision-maker says on an essential element, "Trust us, we got it right" — have seen their decisions quashed: see, *e.g.*, *Leahy* above at para. 137; *Kabul Farms Inc.* at paras. 31-39; *Public Performance of Musical Works 2003-2007 & Public Performance of Sound Recordings 2003-2007, Re*, 2006 FCA 337, 54 C.P.R. (4th) 15 (F.C.A.) at para. 17. The test would seem to be that if a particular evidentiary record — even if bolstered by permissible inferences and any evidentiary presumptions — disables the reviewing court from assessing reasonableness under an acceptable methodology (such as that contemplated in cases like *Delios*, above and *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 (F.C.A.)), the decision must be quashed.

80 There are a number of other principles that can affect the reviewing court's consideration of the adequacy of the evidentiary record before it.

81 In an ideal world, in complicated cases like this, a judicial review should not go ahead until every available crumb of evidence has been placed before the reviewing court. But this is simply not possible.

82 Subsection 18.4(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 requires judicial reviews to be heard and determined "without delay and in a summary way." This is a Parliamentary commandment writ in law. Under the hierarchy of law, a statutory provision takes precedence over any subordinate Rules found in the *Federal Courts Rules* and the case law of this Court: Stratas, David, *The Canadian Law of Judicial Review: Some Doctrine and Cases*, at pp. 10-15 (April 20, 2017 version) (online: https://ssrn.com/abstract=2924049). The rationale for promptness was discussed by this Court in *Larkman v. Canada (Department of Indian Affairs and Northern Development)*, 2012 FCA 204, 433 N.R. 184 (F.C.A.) at paras. 86-88 (albeit in the context of the short limitation period in subsection 18.1(2)).

83 Further, Rule 3 of the *Federal Courts Rules* provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits." The concepts in Rule 3 have been underscored by the Supreme Court's recent call for courts and litigants to embrace a new litigation culture: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.).

84 There are also certain general values and principles in administrative law — the rule of law, good administration, democracy and the separation of powers — that on occasion deserve voice in decisions concerning the content of the record before the reviewing court: see generally Paul Daly, "Administrative Law: A Values-Based Approach" in John Bell, Mark Elliott, Jason Varuhas and Philip Murray eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2015).

85 Finally, and perhaps most significantly, reviewing courts are not trial courts. Trial courts build the evidentiary record for the first time, making findings of fact. They decide the merits. But reviewing courts are different. Reviewing courts review the decisions of administrative decision-makers. Those administrative decision-makers — not the reviewing courts — have been empowered by Parliament to determine the merits of matters. The administrative decision-makers are the merits-deciders and the reviewing courts are restricted to reviewing those merits-based decisions. See generally, *e.g.*, *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.) at paras. 14-19; *Bernard (2015)*, above at paras. 22-28. This consideration alone significantly affects the law of admissibility of evidence in the reviewing court, a topic I turn to now.

(b) The general rule of admissibility in judicial review courts: the record before the administrative decision-maker is the record on review

86 As a general rule, only the evidentiary record that was before the administrative decision-maker is admissible on judicial review: *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.).

87 The main principle behind this general rule is the one just discussed: the distinction between the administrative decision-makers as the bodies designated by Parliament as the merits-deciders and the Federal Courts as merely reviewing courts, nothing more.

(c) How do applicants for judicial review obtain the record before the administrative decision-maker?

88 Usually applicants for judicial review participated fully before the administrative decision-maker whose decision is under review. Sometimes they already will have the record in their possession.

89 Sometimes, however, applicants for judicial review do not have the full record or are not certain that they do. This is where Rule 317 comes in. Under Rule 317, applicants can request the administrative decision-maker for "material relevant to an application that is in the possession of [the decision-maker]...and not in the possession of the [applicants] by serving on [the decision-maker] and filing a written request, identifying the material requested."

90 Under Rule 318, the administrative decision-maker can object to production of the material. Usually the objection is based on relevance, deliberative privilege, solicitor-client privilege or public interest privilege. The objection is litigated in the manner specified by cases such as *Lukács v. Canadian Transportation Agency*, 2016 FCA 103 (F.C.A.) and *Bernard v. PSAC*, 2017 FCA 35 (F.C.A.).

91 Note that Rule 317 is only a mechanism by which applicants can obtain the record before the administrative decision-maker. It is not a means by which the record is placed before the reviewing court.

(d) How does the record before the administrative decision-maker get before the reviewing court?

92 In the Federal Courts system, applicants can place the record of the administrative decision-maker — whether obtained through their own participation before the administrative decision-maker or obtained under Rules 317-318 — before the reviewing court by offering an affidavit in support of their application for judicial review: Rule 306. The record of the administrative decision-maker is appended as one or more exhibits.

93 Insofar as placing the record before the administrative decision-maker before the reviewing court is concerned, respondents who consider the affidavit of the applicant to be incomplete or inaccurate may offer their own affidavit material: Rule 307.

94 Thereafter, cross-examinations on affidavits can take place: Rule 308.

95 The parties place their affidavits, the transcripts of the cross-examinations and the exhibits from any cross-examinations into records that they file with the Court: Rules 309 and 310.

96 The entire process of placing the record before the administrative decision-maker before the reviewing court is set out in more detail in *Canadian Copyright Licensing Agency v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 (F.C.A.).

(e) Exceptions to the admissibility of evidence on judicial review

97 There are exceptions to the general rule that only the evidentiary record before the administrative decision-maker is admissible before the reviewing court. These do not offend the distinction between the administrative decision-maker as the merits-decider and the reviewing court whose role is restricted to review. See, *e.g.*, *Association of Universities*, above; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (F.C.A.); *Bernard (2015)*, above; *Delios*, above at paras. 41-42.

98 These cases show that there are three recognized exceptions and the list of exceptions is not closed:

- Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review.

- Sometimes an affidavit is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness.

- Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

The last two are really just one exception: where a tenable ground of review is raised that can only be established by evidence outside of the administrative decision-maker's record, the evidence is admitted.

99 Suppose, for example, that an administrative decision-maker received a payment from a party after a hearing. In the reviewing court, the applicant alleges, with some credence, that this payment was a corrupt bribe. The bribe can only be proven by adducing post-hearing evidence, *i.e.*, evidence that was not before the administrative decision-maker. Or suppose that in the reviewing court the applicant alleges an improper purpose on the part of the administrative decision-maker in circumstances where the allegation has some basis and is not just a bare allegation made to engage

in a fishing expedition. Evidence of that improper purpose is often not in the record before the administrative decision-maker and must be proven by collateral evidence. This is another example where reviewing courts will admit evidence that was not before the administrative decision-maker. See, *e.g.*, *Roncarelli c. Duplessis*, above; *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (Ont. C.A.); *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Ont. Div. Ct.).

100 For the purposes of these reasons, I shall refer to this sort of evidence — evidence admitted by way of exception to the general rule of admissibility — as "exceptional evidence."

(f) How does one obtain the exceptional evidence and place it before the Court?

101 Exceptional evidence may be available from witnesses. The standard way and the way that allows judicial reviews to be heard and determined "without delay and in a summary way" (as required by subsection 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules*) is through an affidavit; because of subsection 18.4(1), this will always be the preferred way. The affidavits can be subject to cross-examination and are presented to the Court by including them in the records that are filed with the Court.

102 Another way to gather exceptional evidence is to cross-examine a deponent in the course of the judicial review proceeding. Undertakings can be given that, in some circumstances, where appropriate, exceptional evidence will have to be produced.

103 In some cases, witnesses may be less than forthcoming. In rare cases, witnesses may be subpoenaed to produce a document or other material on an application for judicial review: Rule 41(1) and Rule 41(4)(*c*).The subpoena power in Rule 41 applies to "proceedings" and Rule 300 shows that applications are "proceedings." This is allowed with leave of the Court where:

- the evidence is necessary;
- there is no other way of obtaining the evidence;
- it is clear that an applicant is not engaged in a fishing expedition but, instead, has raised a credible ground for review beyond the applicant's say-so; and
- a witness is likely to have relevant evidence on the matter.

104 As well, a judicial review may be treated and proceeded with as an action, thereby allowing for discovery and live witnesses: sections 18.4(2) and 28(2) of the *Federal Courts Act*. However, the situations where this is allowed are most rare: see, *e.g.*, the requirements set out in *Assoc. des Crabiers Acadiens Inc. c. Canada (Procureur général)*, 2009 FCA 357, 402 N.R. 123 (F.C.A.).

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105 Finally, rather than taking the foregoing steps to obtain exceptional evidence, the parties can agree to facts and submit them to the reviewing court. However, caution must be exercised: the reviewing court must always respect the fact that the administrative decision-maker has been designated under the administrative regime as the exclusive decider of the merits.

(g) The limits of a request under Rule 317

106 Rule 317 plays a limited role. As mentioned above, it allows applicants to obtain from the administrative decision-maker "material relevant to an application that is in the possession of [the decision-maker]...and not in [their] possession."

107 Rule 317 means what it says. The only material accessible under Rule 317 is that which is "relevant to an application" and is "in the possession" of the administrative decision-maker, not others. Rule 318(1) shows us that the material under Rule 317 must come from the administrative decision-maker, not others.

108 The material must be actually relevant. Material that "could be relevant in the hopes of later establishing relevance" does not fall within Rule 317: *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 (F.C.A.) at para. 21. The principles canvassed above — particularly those in section 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules* relating to promptness and the orderly progression of judicial reviews — discourage fishing expeditions.

109 Relevance is defined by the grounds of review in the notice of application:

> A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.

(*Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455 (Fed. C.A.) at page 460.)

110 The grounds of review are to be read in order to obtain "a realistic appreciation" of their "essential character" by reading them holistically and practically without fastening onto matters of form: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at paras. 50 and 102; *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 79 (F.C.A.) at para. 29.

111 It is evident from the text of Rule 317 that it cannot be used to obtain material that is in the possession of others.

112 It is often said in the case law that Rule 317 is restricted to the actual material the administrative decision-maker had before it when making the decision and nothing more: *Pathak*, above; *1185740 Ontario Ltd. v. Minister of National Revenue*, [1998] 3 C.T.C. 215, 150 F.T.R. 60 (Fed. T.D.).

113 This standard has been repeatedly applied by this Court. In *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)* (1993), 164 N.R. 60 (Fed. C.A.) at page 66, this Court stated:

> The obligation which is imposed on the tribunal by rules 1612 and 1613 [now Rules 317 and 318] is "without delay" to "provide" or "forward" a "certified copy" of "material" which is "in its possession" and which is "specified". In my view, this presumes that it is material which already exists at the time when the request to obtain the material is made, which the tribunal used in its hearing, deliberations or decision, which is part of its record and of which it is in a [position] to provide a certified copy.

114 In cases where some other government entity has information and supplied some of it to the administrative decision-maker, again only the information that was actually before the administrative decision-maker is obtainable under Rule 317:

> This surely has reference to "material" that was before the federal board, commission or other tribunal whose decision is the subject of an application for judicial review pursuant to section 18.1 of the [*Federal Courts Act*] and not to the contents of a Minister's file where no decision of his [or her] is the subject of the judicial review.

(*Eli Lilly & Co. v. Nu-Pharm Inc.* (1996), [1997] 1 F.C. 3 (Fed. C.A.) at pages 28-29.) To the same effect, see *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.* (2000), 35 C.E.L.R. (N.S.) 1, 183 F.T.R. 267 (Fed. T.D.) at para. 27:

> To engage in such a review of all of the documents that were before the Responsible Authorities would in effect be a challenge to the comprehensiveness of the Comprehensive Study Report and indeed of the underlying science relied upon by the Responsible Authorities and of their expertise. This goes far beyond the judicial review of a Minister's decision which was based upon a report arising out of many months investigation by the Responsible Authorities.

115 Rule 317 does not in any way "serve the same purpose as documentary discovery in an action": *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 (F.C.A.) at para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 1156 (Fed. T.D.) at para. 11.

116 As a result of the foregoing, it is hard to see Rule 317 being used to obtain exceptional evidence. The only circumstance I can imagine is where the exceptional evidence happens to be in the possession of the administrative decision-maker — quite rare, I suspect.

117 The Tsleil-Waututh Nation submits that materials other than those before the administrative decision-maker may be considered relevant and producible under Rule 317 where it is alleged the decision-maker breached procedural fairness. Perhaps underneath this is a confusion of concepts of admissibility — exceptional evidence can sometimes be adduced to demonstrate procedural unfairness — with the substantive requirements of Rule 317. These must be kept apart. Not everything that is admissible can be obtained under Rule 317. For one thing, this submission overlooks the point, developed above, that the materials must be in the possession of the administrative decision-maker.

118 In support of this submission, the Tsleil-Waututh Nation cites the Federal Court decisions in *Canadian National Railway v. Louis Dreyfus Commodities Ltd.*, 2016 FC 101 (F.C.) and *Gagliano v. Gomery*, 2006 FC 720 (F.C.). In *Dreyfus*, the Federal Court suggests that materials that should have been before the administrative decision-maker are producible under Rule 317. In support of this, the Federal Court cites *Access Information Agency*, above and *Gagliano*, above. *Access Information Agency* nowhere says that materials that should have been before the administrative decision-maker are producible under Rule 317. And *Gagliano* is best construed as the rare case where exceptional evidence was admissible and happened to be in the possession of the administrative decision-maker.

119 Both *Dreyfus* and this particular submission of the Tsleil-Waututh Nation underscore the need to keep analytically separate different concepts such as obtaining evidence, placing the evidence before the Court, the admissibility of evidence, the requirements for particular tools (*e.g.*, Rule 317), and how courts go about reasonableness review.

(6) Analysis of the Rule 317 request in this case

(a) Procedures followed concerning Rule 317 in this case

120 The Tsleil-Waututh Nation placed its Rule 317 request in its application for judicial review.

121 Under Rule 318(1), the Attorney General was to have responded to the request within twenty days.

122 The Attorney General did not do so. And the Tsleil-Waututh Nation did not register a protest against the Attorney General's inaction for approximately two months.

123 Neither can be faulted. In its Order dated March 9, 2017, this Court granted leave to apply for judicial review in nine cases, consolidated these nine applications with seven others, and then

comprehensively scheduled the consolidated applications. The March 9, 2017 Order contemplated that the Attorney General would produce the record of the Governor in Council.

(b) The Rule 317 request in this case

124 I have reviewed the grounds of review in the application for judicial review of the Tsleil-Waututh Nation.

125 I am broadly summarizing, but in terms of the issues relating to the duty to consult and accommodate, the Tsleil-Waututh Nation is arguing that:

- the Governor in Council's decision cannot stand on the state of the evidence before it; and
- as the duty to consult and accommodate has not been fulfilled at the present time, the Governor in Council's decision must be quashed.

126 This mirrors the grounds that were considered in *Gitxaala Nation (2016)*, above. In that case, this Court noted that the duty to consult arose in two potential ways. If the Governor in Council incorrectly or unreasonably held that the Crown's obligations had been fulfilled at the time of its decision, its Order in Council is liable to be quashed. But, more generally, "if that duty [owed by the Crown] were not fulfilled, the Order in Council cannot stand": *Gitxaala Nation (2016)* at para. 159.

127 In its notice of application in file A-78-17, the Tsleil-Waututh Nation requested "any material that was before the [Governor in Council] or that it considered or relied on in making the Order."

128 To assess whether Rule 317 has been satisfied, it is first necessary to examine what has been produced concerning the current state of the record on these issues. Has the Tsleil-Waututh Nation persuaded me that — excluding the material covered by the section 39 certificate — there is still evidence in the hands of the administrative decision-maker, here the Governor in Council, that was before it and that is relevant to the grounds raised by the Tsleil-Waututh Nation?

(c) The current state of the record: has the Rule 317 request been satisfied?

129 As far as consultation is concerned, the Order in Council that approved the Project and that is attacked in these proceedings provides as follows:

> Whereas, by Order in Council P.C. 2016-435 of June 3, 2016, the Governor in Council, pursuant to subsection 54(3) of the *National Energy Board Act*, extended the time limit referred to in that subsection by four months to allow for additional Crown consultation with potentially affected Aboriginal groups, public engagement, and an assessment of the upstream greenhouse gas emissions associated with the Project;

> Whereas the Governor in Council, having considered Aboriginal concerns and interests identified in the *Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project* dated November 21, 2016, is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated;

130 Behind this is an explanatory note: *Canada Gazette*, vol. 150, no. 50, December 10, 2016, pp. 4-23. The explanatory note discusses the participation of Indigenous peoples before the National Energy Board, the concerns they raised and other views. In assessing the impact on Indigenous groups, the explanatory note says the following (starting on page 14):

> Both social and environmental issues raised by Indigenous groups were considered and addressed through the NEB review process. The 157 conditions recommended by the NEB will require Trans Mountain to implement all commitments it made through the review process, and further implement mitigation measures for impacts that might otherwise occur to people and the environment, including in relation to air quality and greenhouse gases; water quality; soil, vegetation and wetlands; wildlife and wildlife habitat; fish and fish habitat; and marine mammals. Several of the conditions specifically address Aboriginal interests, such as requiring the proponent to continue reporting on the availability and findings of traditional use studies, hiring of Aboriginal monitors during construction, and ongoing filing of Aboriginal engagement reports. There are also specific conditions tied to concerns by the Coldwater Indian Band and Stó:l? Collective.
>
> With respect to rights associated with subsection 35(1) of the *Constitution Act, 1982*, the Board concluded that, having considered all the evidence submitted in this proceeding, the consultation undertaken with Aboriginal groups, the impacts on Aboriginal interests, the proposed mitigation measures, including conditions, to minimize adverse impacts on Aboriginal interests, and Board imposed requirements for ongoing consultation, it was satisfied that the Board's recommendation and decisions with respect to the Project are consistent with subsection 35(1) of the *Constitution Act, 1982*.

131 These paragraphs may shed light on what the Governor in Council had in mind when it approved the Project: submissions at the hearing before the panel in these consolidated applications will be required on that. Contextual materials such as the explanatory note may shed light on what was considered by the Governor in Council: *New Brunswick Broadcasting Co. v. Canadian Radio-Television & Telecommunications Commission*, [1984] 2 F.C. 410, 13 D.L.R. (4th) 77 (Fed. C.A.).

132 In this regard, I note that none of the parties in their notices of application or in their affidavits has alleged bad faith in the sense that an explanatory note or any preambles or factual statements cannot be taken as true. Statements such as these often enjoy a rebuttable presumption of regularity and as best as I can tell no evidence has yet emerged that would suggest otherwise:

see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, 41 D.L.R. (4th) 429 (S.C.C.) at para. 38 and authorities cited therein; *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, [2001] 1 S.C.R. 221, 194 D.L.R. (4th) 385 (S.C.C.).

133 As well, it is apparent from these paragraphs in the explanatory note that the Governor in Council was aware of the proceedings before the National Energy Board and its Report. Just how aware is a matter on which submissions should be made to the panel in these consolidated applications.

134 Also of possible significance are an Amending Order to National Energy Board Order CPCN OC-49 and an Amending Order to Certificate of Public Convenience and Necessity OC-2 that the Governor in Council approved: *Canada Gazette*, vol. 150, no. 50, December 10, 2016 at pp. 23-247 and 248-501. These documents point to a body of information that must have been before the Governor in Council. Just what information is a matter on which submissions should be made to the panel in these consolidated applications.

135 Mr. Gardiner's first affidavit points to other evidence of consultation before the Order in Council was made but whether this was considered directly or indirectly by the Governor in Council is unclear based on the material before the Court on this motion. His affidavit also points to post-Order in Council consultations. I have discussed the possible relevance of this evidence elsewhere: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (F.C.A.).

136 There is now also the supplementary affidavit from Mr. Gardiner that corrects certain mistakes in his original affidavit and that adds additional information about consultative activities. Whether any of this was considered directly or indirectly by the Governor in Council is unclear based on the material before the Court on this motion.

137 In various places in its submissions, the Tsleil-Waututh Nation appears to misunderstand the limits of Rule 317. For example, it appears to be under the misapprehension that Rule 317 can be used to access documents held by government departments other than the Governor in Council. For the reasons explained above, this is not so.

138 Overall, I am not persuaded at this time that, aside from its section 39 certificate, Canada has withheld information responsive to the Rule 317 request that must be produced. This can be tested by the Tsleil-Waututh Nation on cross-examination.

139 The Tsleil-Waututh Nation suggests that the fact that the Attorney General has adduced a supplementary affidavit from Mr. Gardiner to fix errors and omissions in disclosure shows that it and others have not taken care in the disclosure process both under Rule 317 and overall. This submission overlooks the scope and complexity of these proceedings. Although it is not desirable, at the best of times mistakes can be made. I believe that the offering of the supplementary affidavit shows that the Attorney General and her lawyers are cognizant of their ethical responsibilities and

their responsibilities as officers of the Court and have stressed the importance of disclosure to those that hold documents. The evidence disclosed by the supplementary affidavit does not suggest to me otherwise. Below, at para. 151 of these reasons, I refer to a further commitment the Attorney General has made concerning disclosure. I conclude that the Attorney General is taking steps on an ongoing basis to ensure that any disclosure she is required to give is complete and accurate.

140 By itself, this is not at all dispositive of the Tsleil-Waututh Nation's motion for enforcement of its Rule 317 request. But it affords the Court some comfort that a genuine effort has been made to ensure that, despite the section 39 certificate, the material responsive to the Rule 317 request has been produced.

141 Under para. 7(3)(*b*) of this Court's Order of March 9, 2017, the Attorney General was obligated to produce "documents before the Governor in Council leading up to its determination." By necessary implication, this was subject to section 39 of the *Canada Evidence Act* if a certificate were to be filed. The Court is not satisfied on the evidence before it that the Attorney General has breached this Order.

142 To the extent that material supplied by the Tsleil-Waututh Nation was not placed before the Governor in Council, counsel can make submissions to the panel hearing these consolidated applications. To the extent that the material was considered by others in various Ministries and only summaries provided to the Governor in Council, the sufficiency of that is a matter for argument before the panel hearing these consolidated applications.

(7) The Tsleil-Waututh Nation's request for production of evidence from Canada

143 As mentioned, I am not persuaded that there is any evidence that has been improperly withheld under Rule 317. But, as I have explained, except in the rare circumstance explained above, Rule 317 allows for the obtaining of only materials relevant to the judicial review that were in the possession of the administrative decision-maker and that it relied upon in making the decision.

144 Here, more materials — materials not obtainable under Rule 317 — are potentially relevant. As mentioned, quite aside from what the Governor in Council had before it to support the reasonableness of its decision, if the duty to consult has not been complied with overall, the decision of the Governor in Council (*i.e.*, its Order in Council) cannot stand. Thus, evidence other than that which was before the Governor in Council is relevant to this ground of review. This evidence is what I have called exceptional evidence.

145 In this case, should the Court make an order requiring Canada to produce more evidence, including exceptional evidence? The Tsleil-Waututh Nation asks for just that. As mentioned, it seeks documents relevant to the grounds it has raised relating to the overall adequacy of Canada's consultation with it concerning the Project.

146 In my view, on the material before me, such an order should not be made.

147 First, to some extent, the Tsleil-Waututh Nation appears to be suggesting in its submissions that Rule 317 can be used to get exceptional evidence. As discussed, except for the rare situation described in paragraph 116, above, it cannot.

148 Next, there is no such thing as a "production order" for exceptional evidence under the *Federal Courts Rules*. As I have explained above, exceptional evidence may be obtained through cross-examination, by adducing an affidavit from a witness (which the Indigenous applicants have done), by a motion under Rule 41 or by converting the applications to actions under section 18.4(2) and section 28(2) of the *Federal Courts Act*.

149 Even if the Tsleil-Waututh Nation were to pursue these methods by motion at this time, I would dismiss the motion.

150 I understand that cross-examinations of Mr. Gardiner are about to be conducted. Plenty of exceptional evidence, if admissible, may be obtained in that way.

151 Further, the Attorney General has made the following commitment:

> ...Canada is willing to informally assist [Tsleil-Waututh Nation] in obtaining relevant consultation documents that may, by inadvertence, have been omitted from the affidavit and supplementary affidavit of Timothy Gardiner. Should [Tsleil-Waututh Nation] (or any other applicant) be aware of any such documents, counsel for Canada would welcome being advised as soon as possible in light of the impending deadline for completion of cross-examinations on affidavits.

152 As well, I am not persuaded at this time that there is exceptional evidence that cannot be had as a result of cross-examination. The Attorney General has filed evidence from Mr. Gardiner that relates to Canada's consultative activities both before and after the Order in Council was made. This falls into the category of exceptional evidence. The Indigenous applicants have filed evidence about their consultative activities and Canada's consideration or non-consideration of things put to it and its responses or non-responses. All of this is also exceptional evidence going to the overall issue of the duty to consult.

153 The Tsleil-Waututh Nation complains that Canada has not produced all of its evidence concerning its consideration of things put to it by the Indigenous applicants. One answer to that is that gaps in evidence do not always call for production orders. If there are gaps in the evidence Canada may suffer for that if, on the law and the state of the imperfect evidentiary record, it deserves to. In preparing their submissions for the panel hearing these consolidated applications, the parties may wish to consider when the Court can draw adverse inferences from missing

evidence: see, *e.g.*, *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 400 D.L.R. (4th) 723 (F.C.A.) at paras. 169-170 and authorities cited therein. If the Tsleil-Waututh Nation put something important to Canada and there is a gap in the evidence concerning what Canada did in reaction to it, Canada may have to explain the gap. Absent evidence of Canada's reaction, the panel may be driven to find that Canada did not react. As well, I have already mentioned some of the disadvantages that Canada might suffer as a result of its issuance of a section 39 certificate.

154 It is also worth mentioning that gaps in the evidence concerning Canada's responses do not automatically determine the consultation issues against Canada. Errors and omissions in fulfilment of the duty to consult and accommodate can be tolerated — but only to a certain point. Put another way, compliance with the duty to consult and accommodate need not be exacting. As this Court said in *Gitxaala Nation (2016)* (at paras. 182-183):

> Canada is not to be held to a standard of perfection in fulfilling its duty to consult. In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.
>
> In determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required," just reasonable satisfaction: *Ahousaht v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722, at paragraph 54; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209, at paragraph 133; *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148, 474 N.R. 350, at paragraph 56; *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA*, 2015 FCA 179, 474 N.R. 96, at paragraph 47.

155 In support of its view that there are serious gaps in the evidence offered by the Attorney General, the Tsleil-Waututh Nation points to information requests it has made under the *Access to Information Act*, R.S.C. 1985, c. A-1. It has directed these requests to Natural Resources Canada, Transport Canada, Fisheries and Oceans Canada and Environment and Climate Change Canada. These departments have each asked for significant extensions of time to address the requests. Natural Resources Canada has sought the longest extension: 510 days.

156 However, the requests are of exceptionally broad scope and seek every last crumb of information, even information that has absolutely no realistic bearing on this matter.

157 All four requests are similar. To illustrate their scope, here is the request addressed to Natural Resources Canada:

> Please provide: any and all information, documents, or correspondence created between August and November, 2016 and shared between Major Projects Management Office (Natural

> Resources Canada) and Environment Canada, Fisheries and Oceans Canada, or transport Canada officials/staff in relation to Trans Mountain Expansion Project, including but not limited to: any meeting minutes and/or notes of representatives that attended any meetings; any draft Order in Council materials or information; any briefing notes that were prepared in advance of or after any meetings; and any correspondence, including emails in August, September, October, and November 2016 to or from Ms. Erin O'Gorman, Assistant Deputy Minister, Major Projects Management Office, and/or related emails in August, September, October, and November 2016 to or from Timothy Gardiner, Director-General — Strategic Projects Secretariat, Major Projects Management Office.
>
> Also, please provide: emails, documents and/or briefing notes related to any terms, conditions, migration measures or accommodation measures proposed or considered by Natural Resources Canada in relation to the Trans Mountain Expansion Project; any briefing notes to Minister Carr prepared by Major Projects Management Office official(s)/staff or the Deputy Minister of Natural Resources Canada in relation to the Governor in Council's decision under the National Energy Board Act and the Canadian Environmental Assessment Act, 2012 for the trans Mountain Expansion Project; any briefing notes to the federal cabinet, the prime minister, or the Governor in Council prepared by Major Projects Management Office official(s)/staff, the Deputy Minister of Natural Resources Canada, or Minister Carr in relation to the Governor in Council's decision for the Trans Mountain Expansion Project; and any briefing notes, emails or other documents in relation to Canada's engagement or consultation with the Tsleil-Waututh National in relation to the Trans Mountain Expansion.

158 No doubt, some of this information is covered by the section 39 certificate. No doubt some is already on the table. And no doubt more will emerge from the cross-examinations. And at some point, materiality and proportionality — not just bare relevance — must come to bear on the matter.

159 I have mentioned Rule 3 above: the need to "secure the just, most expeditious and least expensive determination of every proceeding on its merits" I have also mentioned subsection 18.4(1) of the *Federal Courts Act*: the Parliamentary commandment that judicial reviews be heard and determined "without delay and in a summary way." And there is the admonition of the Supreme Court of Canada in *Hryniak*, above.

160 These concerns are significant in this case.

161 Before the Court made its Order of March 9, 2017 scheduling these consolidated applications, it circulated a draft version of it to all parties. The draft contained the following recitals:

> **AND WHEREAS** it is appropriate that this Court issue an order to ensure that these proceedings are conducted in an orderly, fair and prompt manner;

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> **AND WHEREAS** this Order is intended to give effect in these proceedings to the principles set out in Rule 3 of the *Federal Courts Rules*, SOR/98-106, which provides that proceedings are to be conducted in a manner that secures the just, most expeditious and least expensive determination of every proceeding on its merits;
>
> . . . . .
>
> **AND WHEREAS** concerning the issue of scheduling:
>
> (a) without expressing any prejudgment on the matter, a report, an Order in Council and a Certificate have been made under the purported authority of legislation advancing the public interest and themselves have been made in the public interest, and all have effect until set aside; further, owing to the substantial interests of all parties in these proceedings, the proceedings should be prosecuted promptly; therefore, delays in the prosecution of these consolidated matters must be minimized;
>
> (b) therefore, this Court shall set a schedule for the prompt and orderly advancement of these consolidated proceedings and the schedule will be amended only if absolutely necessary;

162 No party took issue with these recitals.

163 The Order of March 9, 2017 also scheduled the proceedings on an expedited basis up until the filing of the overall electronic record and the memoranda of fact and law. Here again, the schedule was circulated in advance and no objections were received. By direction on May 29, 2017, this Court sought the parties' input on a schedule it suggested for the rest of the proceedings and for the date of the hearing. Except for minor modifications, the parties accepted the proposed schedule.

164 And in their submissions on these motions, all parties urged the Court to rule now on the motions so the schedule is not disrupted.

165 For all these reasons, this Court will not delay or adjourn these consolidated applications so that every last crumb of information sought by the information requests, no matter how microscopic, can be gathered. Nor did I take any party to suggest seriously that this should happen.

166 The paramount consideration for this Court is whether the state of the evidence is such that the spectre of immunization of public decision-making looms. I am not persuaded of this here. Even without having the benefit of the transcripts of cross-examinations and exhibits from the cross-examinations before me, I can conclude that the evidentiary record here is as great or greater than that which was before the Court in *Gitxaala Nation (2016)*. In *Gitxaala Nation (2016)*, faced with substantially similar arguments put by the Indigenous applicants, this Court was able to conduct a very meaningful review, one that was cognizant of the gaps in the evidentiary record and one that resulted in the quashing of the Governor in Council's Order in Council.

167 Overall, this Court is satisfied that the record before it, including the exceptional evidence, will be sufficient and any gaps can be properly assessed and evaluated. This Court is not persuaded that its assistance is needed to augment the evidentiary record before the reviewing court at this time.

168 As the parties enter the cross-examination phase of this litigation, it goes without saying that the Court continues to stand ready to continue to facilitate the parties' progress towards a just, most expeditious and least expensive determination of these consolidated applications on their merits.

E. Disposition

169 The motion of the Attorney General shall be granted. The supplementary affidavit of Mr. Gardiner shall be admitted into the Electronic Record but the Attorney General shall first remove the portions that the parties agree are irrelevant. Costs in the cause.

170 The motion of the Tsleil-Waututh Nation is dismissed. Costs in the cause.

First Nation's motion dismissed; Crown's motion dismissed.

2018 FCA 104
Federal Court of Appeal

Tsleil-Waututh Nation v. Canada (Attorney General)

2018 CarswellNat 2627, 2018 FCA 104, 292 A.C.W.S. (3d) 678

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY (Applicants) and ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC (Respondents) and ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF BRITISH COLUMBIA (Interveners)

Eleanor R. Dawson J.A., Yves de Montigny J.A., J. Woods J.A.

Judgment: May 31, 2018
Docket: A-78-17, A-217-16, A-218-16, A-223-16, A-224-16, A-225-16, A-232-16, A-68-17, A-74-17, A-75-17, A-76-17, A-77-17, A-84-17, A-86-17

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Jana McLean (written), for Applicants, Aitchelitz, Skowkale, Shxwá:y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose, Skwah, Kwaw-Kwaw-Apilt, Chief David Jimmie on his own behalf and on behalf of all members of the Ts'Elxwéyeqw Tribe
Sarah D. Hansen (written), for Applicants, Chief Ron Ignace and Chief Fred Seymour on their own behalf and on behalf of all other members of the Stk'Emlupsemc Te Secwepemc of the Secdwepemc Nation
Jan Brogers (written), for Respondent, Attorney General of Canada
Maureen Killoran, Q.C. (written), for Respondent, Trans Mountain Pipeline ULC

***Eleanor R. Dawson J.A., Yves de Montigny J.A., J. Woods J.A.*:**

1 Tsleil-Waututh Nation moves for an order:

i. reopening the evidentiary record to include as fresh evidence 15 documents that Tsleil-Waututh has obtained in redacted form from the National Observer; and,

ii. requiring Canada, pursuant to Rule 41, to produce unredacted copies of the 15 documents and to produce an e-mail and other documents listed in Schedule "A" to Tsleil-Waututh's motion.

2 Tsleil-Waututh asserts that the documents establish that Canada did not consult honourably in connection with the Trans Mountain Expansion Project (Project). Specifically, the documents are said to establish that:

i. Canada's representatives were not mandated to consult. Instead, they were given a truncated mandate, limited to listening to, and recording, the concerns expressed by Indigenous groups for transmission to the Cabinet in the Crown Consultation and Accommodation Report.

ii. Canada participated in the consultation process with an impermissibly "closed mind" or a "mind made up".

3 Tsleil-Waututh's motion is supported by the applicants Squamish Nation, Coldwater Indian Band, Stk'emlupsemc te Secwepemc, Stó:l? Applicants and Upper Nicola Band. The motion is opposed by the respondents Attorney General of Canada and Trans Mountain Pipeline ULC.

4 For the reasons that follow, we have concluded that the evidentiary record should not be reopened and that Tsleil-Waututh's motion should be dismissed with costs payable to the Attorney General and Trans Mountain in any event of the cause.

I. The facts

5 The facts giving rise to the motion may be briefly stated.

6 On April 18, 24 and 27, 2018, three articles were published online by the National Observer. The articles dealt with the timing of Canada's decision to approve the Project and Canada's consultation with Indigenous groups, including Tsleil-Waututh. At the time the articles were published the hearing of the underlying consolidated applications for judicial review had been concluded and the applications were under reserve, awaiting the Court's judgment.

7 On April 27, 2018, the author of the three articles provided Tsleil-Waututh with access to 15 documents that the National Observer had obtained through requests made under the *Access to Information Act*, R.S.C. 1985, c. A-1 (Act). The documents, many of which are redacted or heavily redacted, are appended to the affidavit of Miriam Bird filed in support of Tsleil-Waututh's motion. The affidavit also appends the three articles published online by the National Observer.

II. Applicable legal principles

8 Counsel have not referred the Court to any binding authority on the test to be applied by this Court when asked to reopen a concluded judicial review hearing for the purpose of reopening the evidentiary record. Nor have they made detailed submissions on the test to be applied to Tsleil-Waututh's request that Canada be required to produce unredacted copies of the 15 documents produced under the Act and the additional documents listed in Schedule "A" to Tsleil-Waututh's motion.

9 On the motion to reopen the evidentiary record, Tsleil-Waututh argues that the primary concern should be to uphold the integrity of the consolidated applications so that justice may be seen to be done. Tsleil-Waututh relies upon the decision of the Federal Court in *Varco Canada Ltd. v. Pason Systems Corp.*, 2011 FC 467, 92 C.P.R. (4th) 399 (F.C.), (*Varco #1*).

10 In *Varco #1* the Federal Court reopened a patent action after the trial had been concluded and while the Court's judgment was under reserve. Tsleil-Waututh submits that the Federal Court applied a two-part test asking:

> i. Could the evidence, if it had been presented, have had any influence on the result?
>
> ii. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

11 Canada points to three authorities that have considered requests to reopen actions after the trial has concluded: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 (S.C.C.), *Varco #1*, and *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670, 391 D.L.R. (4th) 374 (Ont. C.A.). Canada also points to a second request to reopen made in the Varco action, discussed in *Varco Canada Ltd. v. Pason Systems Corp.*, 2011 FC 1140, [2011] F.C.J. No. 1424 (F.C.) (*Varco #2*).

12 Trans Mountain adopts Canada's submissions with respect to the test to reopen and adds more detailed submissions on the need to approach the jurisprudence cited above with caution because these cases all arose in the context of civil trials for damages. Trans Mountain submits that in the present case, this Court must consider how the evidentiary principles governing judicial review applications differ from those governing trials. In this connection Trans Mountain refers to, among other things: subsection 18.4(1) of the *Federal Courts Act* which requires judicial review applications to be heard and determined "without delay and in a summary way"; Rule 3 of the *Federal Courts Rules* which requires the Rules to be "interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits"; and this Court's order of March 9, 2017, issued near the outset of the consolidated applications which directed, among other things, that "the proceedings should be prosecuted promptly; therefore, delays in the prosecution of these consolidated matters must be minimized".

13 We begin our analysis with the decision of the Supreme Court in *Sagaz* and the Court's admonition, at paragraph 61 of the reasons, that the discretion to reopen a trial is to be used "sparingly and with the greatest care" so that "abuse of the Court's processes" does not result.

14 As to the test for reopening a trial, the Supreme Court endorsed the trial judge's use of the two-part test articulated in *Scott v. Cook*, [1970] 2 O.R. 769 (Ont. H.C.). This test requires a court to consider:

i. Would the evidence, if presented at trial, probably have changed the result?

ii. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

15 The first step of the test articulated in *Scott* is a more rigorous test than that urged by Tsleil-Waututh: could the evidence have any influence on the result.

16 We agree that in *Varco #1* at paragraph 17 the Federal Court articulated the first step of the two-part test to be "could the evidence, if it had been presented, have had any influence on the result?" (see also the reasons of the Federal Court at paragraph 23). However, when applying the test the Court characterized the proposed new evidence to "go directly to critical matters at issue". The evidence was said to be "necessary for completeness of the trial testimony." Thus, the evidence went well beyond the threshold of evidence that "could" have influenced the result.

17 Any uncertainty in the test applied by the Federal Court was, in our view, clarified in *Varco #2*. *Varco #2* dealt with a second request to reopen the trial. At paragraph 7 of its reasons, the Federal Court stated the applicable legal test to be:

1. Would the evidence, if presented at trial, have changed the result?

2. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

18 In applying the test, and rejecting the second request to reopen the trial, the Federal Court noted, at paragraph 21, that to "have an influence on the result the evidence must be such that it could likely change the result." The proposed new evidence did not reach that benchmark.

19 What we take from the Federal Court's application of the two-step test in *Varco #1*, and from the Federal Court's restatement of that test in *Varco #2*, is that the jurisprudence of the Federal Court is to the effect that at the first step the question to be asked is *would* the evidence, if presented at trial, probably have changed the result? This is consistent with the test articulated in *Scott* and endorsed by the Supreme Court in *Sagaz*.

20 We have also considered, and accepted, the submission that jurisprudence arising in the context of the conduct of trials should not be applied blindly in the context of judicial review. There is ample jurisprudence to the effect that, consistent with subsection 18.4(1) of the *Federal Courts Act*, judicial review applications are to be heard and determined without delay. It is for this reason, for example, that the Court is reluctant to entertain preliminary motions in judicial review applications.

21 The imperative to hear and determine judicial review applications without delay and in a summary way means that the discretion to reopen a concluded application for judicial review should be exercised with great caution, mindful of the need not to unduly delay the adjudication of important issues, often issues of significant public interest. The parties acknowledge that the consolidated applications raise issues of significant public interest. Thus, we would add a third criterion to the test to reopen: would reopening the evidentiary record be in the public interest?

22 As for the subpoena requested under Rule 41, in order for a party to a judicial review proceeding to obtain a subpoena requiring the production of a document the party must establish that the evidence sought to be produced is necessary, there is no other way of obtaining the evidence, the party is not engaged in a fishing expedition, and the document being subpoenaed is likely to contain relevant evidence on the matter: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, [2017] F.C.J. No. 601 (F.C.A.), at paragraph 103.

III. Application of the test to reopen to the facts of this case

23 We begin our analysis by considering what the 15 documents obtained under the Act establish.

24 Tsleil-Waututh asserts that the documents:

> i. Establish that the Deputy Minister of Natural Resources Canada had a telephone call with Kinder Morgan Canada's Chief Executive Officer in January 2016 to discuss the timelines of the regulatory review of the Project.

> ii. Confirm that the then Assistant Deputy Minister convened a meeting on October 27, 2016 with senior federal officials to discuss the Project. A copy of handwritten notes from that October 27, 2016 meeting indicate that Canada had made its decision to approve the Project and that federal officials should "convey with fidelity what they [federal government] have chosen to do". In an engagement meeting earlier in the day with Tsleil-Waututh the then Assistant Deputy Minister told Tsleil-Waututh that a decision to approve the Project had not yet been made.
>
> iii. Confirm that following the October 27, 2016 meeting the then Assistant Deputy Minister "started circulating a number of Memoranda to the Deputy Minister to senior officials, and those officials subsequently held many conference calls, all in connection with Canada's decision to approve the Project under the pretense of the topic '*Critical Path for Pipelines and Related Announcements*'."

25 We disagree.

26 We have carefully read each of the 15 documents produced pursuant to the Act and have concluded that they fall far short of establishing any of the three assertions put forward by Tsleil-Waututh.

27 To illustrate, the only document which deals with the January 2016 telephone call with Kinder Morgan Canada's Chief Executive Officer is Exhibit F to the Bird affidavit, a memorandum to the Deputy Minister of Natural Resources Canada. The memorandum explains that the Chief Executive Officer had requested a call with the Deputy Minister and stated that the Chief Executive Officer:

> ... may wish to discuss: the current status of the National Energy Board's (NEB) review of the project; the Government's approach to reviewing the environmental assessment process and potential transition measures that could apply to [the Trans Mountain Expansion project]; the Government's commitment to renew its relationship with Indigenous people; and, potential developments in the company's plans related to the project.

28 The memorandum then provided an update on the status of the Project review process. The document is silent about the timing of the Project review process and there is no reference to Canada expediting the review process. We accept Trans Mountain's submission that the content of this memorandum sheds no light on whether Canada fulfilled its duty to consult with Tsleil-Waututh or any other Indigenous group.

29 The documents do establish that the then Deputy Minister convened a meeting on October 27, 2016, with senior federal officials to discuss the Project. However, contrary to the submission of Tsleil-Waututh, the handwritten notes (Exhibit J to the Bird affidavit) do not establish that Canada

had already made its decision to approve the Project. Tsleil-Waututh puts particular reliance on the following passage from the handwritten notes:

> Risks: Gov't has indicated Decision on the process as is
>
> Not changing the process
>
> All legally sound from Gitxaala
>
> Convey with fidelity what they have chosen to do

30 In our view, as submitted by Stk'emlupsemc te Secwepemc, this passage demonstrates that Canada had decided that there would be no change to the framework of the project review process. Canada would continue to rely, to the extent possible, on the National Energy Board process and would continue to operate within the four-phase consultation process. A similar multi-phase consultation process had been followed with respect to the Northern Gateway project and in *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 (F.C.A.) this Court found the consultation framework to be reasonable. Thus, the passage refers to the process as being "legally sound" following the *Gitxaala* decision.

31 Nothing in this passage or in the balance of the handwritten note demonstrates that Canada had already made the decision to approve the Project.

32 The documents that post-date the October 27, 2016 meeting do not support Tsleil-Waututh's assertion that by that date Canada had decided to approve the Project and that thereafter senior officials held conference calls "all in connection with Canada's decision to approve the Project under the pretense of the topic '*Critical Path for Pipelines and Related Announcements*'".

33 Thus, a memorandum to the Deputy Minister in advance of a November 3, 2016, conference call dealing with the rollout and implementation of the Oceans Protection Plan, Exhibit M to the Bird affidavit, sets out a communication strategy for the Oceans Protection Plan "*if* the [Trans Mountain Expansion project] is approved, to re-announce and provide additional details on initiatives that strengthen the overall marine safety system in the project area. NRCan officials will work with Transport Canada to prepare for such an approach *in the event the project is approved*" (underlining added).

34 To similar effect, a memorandum prepared for the Minister entitled "Update on Indigenous Consultations for the Trans Mountain Expansion Project" (for information by November 4, 2016) advises the Minister:

> Prior to a Government decision, Crown officials will prepare a Consultation and Accommodation Report (CAR) to inform the Government on the adequacy of Aboriginal consultation based on the examination of potential impacts on asserted Aboriginal rights and

> establish treaty rights and measures proposed to address these impacts, on every potentially impacted Indigenous group. The Major Projects Management Office (MPMO) and British Columbia's Environmental Assessment Office (EAO) have jointly been developing this report for decision-makers.
>
> (underlining added)

35 Tsleil-Waututh has failed to demonstrate that the 15 documents establish the facts asserted by Tsleil-Waututh and has failed to demonstrate that the documents would probably have an influence on the result of these consolidated applications. Tsleil-Waututh has also failed to demonstrate that unredacted copies of the documents would probably have an influence on the result of these proceedings.

36 On this point, many of the redactions relate to matters that are plainly irrelevant to Tsleil-Waututh's assertions (for example, redactions of the names of individual public servants and Conference ID Numbers used for conference calls). Other redactions were made on the basis of claims to solicitor client privilege or confidences of the Queen's Privy Council for Canada. Information falling within these claims would not be subject to production in these consolidated applications.

37 As for the additional documents listed in Schedule "A" to Tsleil-Waututh's motion, there is no evidence on which we could conclude that these documents would probably, if produced, have an influence on the result of these consolidated applications.

38 The findings that Tsleil-Waututh has failed to show that any of the documents at issue would, if produced, probably change the result of the hearing are wholly dispositive of Tsleil-Waututh's motion. It is therefore not necessary to consider the issues of reasonable diligence and whether reopening the evidentiary record at this time would be in the public interest, and we do not address these issues.

39 There is, however, one final point. In addition to relying on the content of the 15 documents provided to it by the National Observer, Tsleil-Waututh relies upon the content of the articles published in the National Observer and statements attributed to unknown persons described in the articles to be whistleblowers. These statements reported in news articles are hearsay, and there is no evidence that would permit us to conclude that the statements are sufficiently reliable so as to be given any weight. Accordingly, we have given no weight to the statements.

40 For these reasons Tsleil-Waututh's motion will be dismissed with costs payable in any event of the cause to the Attorney General and to Trans Mountain.

Motion dismissed.

2015 SCC 25, 2015 CSC 25
Supreme Court of Canada

Yukon Francophone School Board, Education
Area No. 23 v. Yukon Territory (Attorney General)

2015 CarswellYukon 37, 2015 CarswellYukon 38, 2015 SCC 25, 2015 CSC 25, [2015] 11 W.W.R. 217, [2015] 2 S.C.R. 282, [2015] S.C.J. No. 25, 252 A.C.W.S. (3d) 247, 336 C.R.R. (2d) 137, 370 B.C.A.C. 1, 383 D.L.R. (4th) 579, 471 N.R. 206, 635 W.A.C. 1, 75 B.C.L.R. (5th) 1, 84 Admin. L.R. (5th) 185, J.E. 2015-825

Yukon Francophone School Board, Education Area #23, Appellant and Attorney General of the Yukon Territory, Respondent and Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of the Northwest Territories, Commissioner of Official Languages of Canada, Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, Fédération des parents francophones de l'Alberta, Fédération nationale des conseils scolaires francophones and Fédération des communautés francophones et acadienne du Canada, Interveners

McLachlin C.J.C., Abella, Rothstein, Moldaver, Karakatsanis, Wagner, Gascon JJ.

Heard: January 21, 2015
Judgment: May 14, 2015
Docket: 35823

Proceedings: reversing in part *Commission Scolaire Francophone du Yukon No. 23 c. Territoire du Yukon (Procureure générale)* (2014), (sub nom. *Commission scolaire francophone du Yukon No. 23 v. Yukon (Procureure générale)*) 599 W.A.C. 216, 351 B.C.A.C. 216, 2014 YKCA 4, 2014 CarswellYukon 10, 2014 CarswellYukon 11, Bennett J.A., Groberman J.A., MacKenzie J.A. (Y.T. C.A.); reversing *Commission Scolaire Francophone du Yukon No. 23 c. Territoire du Yukon (Procureure générale)* (2011), [2011] Y.J. No. 132, 2011 CarswellYukon 67, 2011 CarswellYukon 64, 2011 YKSC 57, Vital O. Ouellette J. (Y.T. S.C.)

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Mark C. Power, Justin Dubois, for Interveners, Fédération nationale des conseils scolaires francophones and Fédération des communautés francophones et acadienne du Canada

Abella J. **(McLachlin C.J.C., Rothstein, Moldaver, Karakatsanis, Wagner, Gascon JJ. concurring):**

1 After a trial involving claims by the Yukon Francophone School Board about minority language education rights, the trial judge found that the Yukon government had failed to comply with its obligations under s. 23 of the *Canadian Charter of Rights and Freedoms*. Based largely on the conduct of the trial judge, the Court of Appeal concluded that there was a reasonable apprehension of bias and ordered a new trial. That conduct is at the centre of this appeal.

Background

2 The Yukon Francophone School Board was established in 1996 and is the first and only school board in the Yukon. Public schools are generally administered directly by the Yukon government in consultation with school councils. Under the *Education Act*, R.S.Y. 2002, c. 61, school boards have considerably more authority than school councils. The Yukon Francophone School Board has responsibility for one school, École Émilie-Tremblay, a French-language school founded in 1984.

3 In 2009, the Board sued the Yukon government for what it claimed were deficiencies in the provision of minority language education. The trial took place in two phases. A number of incidents occurred during the trial which set the stage for the bias argument in the Court of Appeal. It is worth noting that, even during the course of the trial, the Yukon was concerned about bias and brought a recusal motion on the ground that certain comments and decisions by the trial judge, as well as his involvement in the francophone community in Alberta both before and during his time as a judge, gave rise to a reasonable apprehension of bias. The trial judge dismissed the motion, finding that many of the acts complained of by the Yukon were procedural in nature and involved decisions of a discretionary nature. He also concluded that his involvement in the francophone community created no reasonable apprehension of bias, observing that counsel for the Yukon did not raise the issue when the case was assigned nor at an earlier point in the proceedings.

4 The trial judge's decision on the merits touched on a number of issues, only two of which remain relevant in this appeal. He concluded that the Yukon had failed to give the Board adequate management and control of French-language education in accordance with s. 23 of the *Charter* and the *Education Act*, and that the Board had the authority to determine which students would be admitted to the French school, including those not expressly contemplated by s. 23 of the *Charter*. He also ordered the Yukon to communicate with and provide services to the Board in French, in compliance with s. 6 of the *Languages Act*, R.S.Y. 2002, c. 133. The Yukon government appealed.

5 On appeal, the Court of Appeal noted that an apprehension of bias can arise either from what a judge says or does during a hearing, or from extrinsic evidence showing that the judge is likely to have strong predispositions preventing him or her from impartially considering the issues in the case. After reviewing the transcript and the trial judge's written rulings, the Court of Appeal concluded that, based on a number of incidents as well as on the trial judge's involvement in the francophone community, the threshold for a finding that there was a reasonable apprehension of bias had been met. It referred to a number of problematic occurrences during the trial.

6 The first related to an incident involving the confidentiality of student files. At one point during the trial, counsel for the Yukon, using information in student files, attempted to cross-examine a parent who testified that his children had transferred from the French school because it lacked special needs resources. Counsel for the Board objected, arguing in part that the files were confidential.

7 The trial judge heard general submissions on the issue and expressed concern that the Yukon may have breached its confidentiality obligations by sharing the files with its counsel. He indicated, however, that the issue was very important and that he would entertain additional arguments the following morning. The next morning, rather than invite further submissions, the trial judge instead immediately commenced the proceedings by ruling that, by sharing the files, the Yukon appeared to have violated the *Education Act* and the *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1. In the trial judge's view, such conduct was [TRANSLATION] "objectionable and reprehensible".

8 After the ruling, counsel for the Yukon, who had intended to present further argument on the issue, reminded the trial judge that he had indicated the previous day that he would entertain additional submissions. The trial judge, however, refused to hear further argument, instead repeatedly asking counsel whether he had obtained consent to use the files. When counsel reminded the judge that both parties had disclosed many student records during the discovery process, the trial judge accused him of playing games.

9 In reviewing the incident, the Court of Appeal found that although there was no obvious explanation for the trial judge's decision to start the proceedings before hearing from counsel with a ruling suggesting that the Yukon had breached its confidentiality obligations by sharing the

files, this by itself did not necessarily reflect an animus against the Yukon and its counsel. But his reaction to counsel's subsequent attempt to raise concerns and draw his attention to statutory provisions which had been overlooked, was more troubling. In the Court of Appeal's view, "[i]t [did] not appear that the judge's questions were genuinely directed at obtaining information; rather the impression left by the transcript is that the judge was, in effect, taunting counsel."

10 Similarly, when another issue involving the confidentiality of student files arose again later in the trial, the Court of Appeal found that the trial judge's criticism that counsel's submissions lacked conviction and sincerity, was not justified. It was also concerned more generally that the trial judge's treatment of counsel "with a lack of respect on many occasions during the trial" contributed to the conclusion that there was a reasonable apprehension of bias.

11 In another rebuke, the Court of Appeal was of the view that the trial judge's treatment of the Yukon's request to submit affidavit evidence from one of its witnesses was unwarranted. The Yukon anticipated calling Gordon DeBruyn, an employee with the Department of Education, to testify at the trial. Mr. DeBruyn, however, suffered a stroke just before the trial was to begin. The trial judge refused to grant the Yukon an adjournment, deciding instead to divide the trial into two phases, with the issues related to Mr. DeBruyn's anticipated evidence deferred to the second phase.

12 Shortly after the second phase of the trial began, counsel for the Yukon told the trial judge that he would be seeking to submit the evidence of Mr. DeBruyn by affidavit because he had not yet fully recovered from his stroke. A letter from a speech pathologist confirmed that Mr. DeBruyn continued to experience mild residual aphasia and that being confronted with questions during cross-examination could cause stress that would exacerbate his communication difficulties.

13 Criticizing counsel for not having determined the witness's condition earlier, the trial judge saw no basis for granting the request based on the letter from the speech pathologist. He noted that Mr. DeBruyn had returned to work and was present in the courtroom, and questioned whether he was, in fact, a necessary witness. While he told counsel that he could still bring the application, he also warned him that it could be viewed as an attempt to cause a delay in the proceedings which could result in an order for costs against him personally. Counsel accordingly decided not to make the application and Mr. DeBruyn did not testify. In describing the situation in his subsequent costs ruling, the trial judge found that the incident amounted to bad faith on the Yukon's part.

14 The Court of Appeal disagreed. It found that there was no basis for concluding that Mr. DeBruyn was not an important witness or, given Mr. DeBruyn's ongoing recovery from his stroke, for criticizing counsel for waiting until the beginning of the second phase before indicating that he would be seeking to submit affidavit evidence. In accusing counsel of engaging in delaying tactics and threatening him with a personal order for costs, the trial judge's conduct was suggestive of bias.

15 Moreover, the Court of Appeal found the trial judge's refusal to allow the Yukon to file reply costs submissions and his procedure for awarding costs to be "grossly unfair". After the release

of his reasons on the merits, the trial judge gave each party 14 days to make costs submissions, to be submitted at the same time. When the Yukon got the Board's submissions, it asked the trial judge if it could file a reply because the Board sought not only solicitor-client costs, but, in addition, [TRANSLATION] "punitive costs" and costs retroactive to 2002. The trial judge refused the request to make further submissions, instead asking the government provide him with [TRANSLATION] "the details of and schedule for the concessions [the Yukon] will still make to the [Board]". Based in part on his view that the evidence demonstrated bad faith and numerous breaches of s. 23 of the *Charter*, the trial judge awarded the Board $969,190 in costs on a solicitor-client basis as well as an additional "lump sum" of $484,595 (50% of the solicitor-client costs).

16 The Court of Appeal set aside the costs order. Acknowledging that a reasonable apprehension of bias with respect to the costs proceeding did not necessarily amount to a reasonable apprehension of bias at trial, it was nonetheless of the view that the Yukon should have been given the opportunity to reply because it could not reasonably have anticipated the unusually expansive costs claim advanced by the Board.

17 As for the Yukon's bias argument about the trial judge's involvement in the francophone community in Alberta, the Court of Appeal concluded that the trial judge's background *before* becoming a judge did not raise a reasonable apprehension of bias:

> The fact that the judge in this case had experience in the provision of minority language education was, in fact, a positive attribute. He was able to approach the issues with important insights gained from his experience. [para. 181]

18 On the other hand, the Court of Appeal found his involvement as a governor of the Fondation franco-albertaine while he was a judge on this case to be inappropriate. The Fondation franco-albertaine promoted a particular vision of the francophone community which, according to the Court of Appeal, would "clearly align it with some of the positions taken by the [Board] in this case." If the trial judge wanted to remain involved in the Fondation franco-albertaine, he had to refrain from sitting on cases such as the one under appeal. While there was nothing in the record suggesting that the Yukon knew or ought to have known about the judge's background, in the Court of Appeal's view, parties are not expected to research a judge's history and are entitled to assume that the judge will disclose anything of relevant concern about his or her background.

19 Ultimately, the Court of Appeal concluded that the trial judge's conduct during the trial and his association with the Fondation franco-albertaine gave rise to a reasonable apprehension of bias. A new trial was therefore ordered on most issues. The Court of Appeal, however, did not send back all the legal issues, making determinations about two of them which were appealed to this Court. First, it held that the trial judge erred in interpreting s. 23 of the *Charter* to give the Board the unilateral right to set admission criteria so as to include students who are not covered by s. 23. Second, it concluded that the trial judge erred in ordering all of the Yukon's communications with

the Board to be in French since, in its view, the s. 6 *Languages Act* claims were not appropriately part of the litigation.

Analysis

20 The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

> ... what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting)]

21 This test — what would a reasonable, informed person think — has consistently been endorsed and clarified by this Court: e.g., *Roberts v. R.*, [2003] 2 S.C.R. 259 (S.C.C.), at para. 60; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 (S.C.C.), at para. 199; *Miglin v. Miglin*, [2003] 1 S.C.R. 303 (S.C.C.), at para. 26; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 46; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), at para. 11 per Major J., at para. 31 per L'Heureux-Dubé and McLachlin JJ., at para. 111 per Cory J.; *Ruffo c. Québec (Conseil de la magistrature)*, [1995] 4 S.C.R. 267 (S.C.C.), at para. 45; *Lippé c. Charest* (1990), [1991] 2 S.C.R. 114 (S.C.C.), at p. 143; *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), at p. 684.

22 The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In *Valente*, Le Dain J. connected the dots from an absence of bias to impartiality, concluding "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" and "connotes absence of bias, actual or perceived": p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind: see *S. (R.D.)*, at para. 49, per L'Heureux-Dubé and McLachlin JJ.

23 In *Wewaykum*, this Court confirmed the requirement of impartial adjudication for maintaining public confidence in the ability of a judge to be genuinely open:

> ... public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.
>
> The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. [Emphasis added; paras. 57-58.]

24 Or, as Jeremy Webber observed, "impartiality is a cardinal virtue in a judge. For adjudication to be accepted, litigants must have confidence that the judge is not influenced by irrelevant considerations to favour one side or the other": "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger" (1984), 29 *McGill L.J.* 369, at p. 389.

25 Because there is a strong presumption of judicial impartiality that is not easily displaced (*Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital & Health Center*, [2013] 2 S.C.R. 357 (S.C.C.), at para. 22), the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" and that a judge's individual comments during a trial not be seen in isolation: see *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851 (S.C.C.), at para. 2; *S. (R.D.)*, at para. 134, per Cory J.

26 The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:

> ... allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added; para. 141.]

27 That said, this Court has recognized that a trial judge's conduct, and particularly his or her interventions, can rebut the presumption of impartiality. In *R. v. Brouillard*, [1985] 1 S.C.R. 39 (S.C.C.), for example, the trial judge had asked a defence witness almost sixty questions and interrupted her more than ten times during her testimony. He also asked the accused more questions than both counsel, interrupted him dozens of times, and subjected him and another witness to repeated sarcasm. Lamer J. noted that a judge's interventions by themselves are not necessarily reflective of bias. On the contrary,

> it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order. [p. 44]

28 On the other hand, Lamer J. endorsed and applied the following cautionary comments of Lord Denning in *Jones v. National Coal Board*, [1957] 2 All E.R. 155 (Eng. C.A.):

> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large ... . [p. 159]

(See also *Take & Save Trading CC v. Standard Bank of SA Ltd.* (South Africa C.A.), at para. 4.)

29 Although Lamer J. was not convinced that the trial judge was actually biased, there was enough doubt in his mind to conclude that a new trial was warranted in the circumstances of the case.

30 In *Miglin*, another case where the allegation of bias arose because of the trial judge's interventions, this Court agreed with the Court of Appeal for Ontario that while many of the trial judge's interventions were unfortunate and reflected impatience with one of the witnesses, the high threshold necessary to establish a reasonable apprehension of bias had not been met. The Court of Appeal observed:

> The principle [that the grounds for an apprehension of bias must be substantial] was adopted and amplified in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, ... to reflect the overriding principle that the judge's words and conduct must demonstrate to a reasonable and informed person that he or she is open to the evidence and arguments presented. The threshold for bias is a high one because the integrity of the administration of justice presumes fairness, impartiality and integrity in the performance of the judicial role, a presumption that can only be rebutted by evidence of an unfair trial. Where, however, the presumption is so rebutted, the integrity of the justice system demands a new trial.
>
> The assessment of judicial bias is a difficult one. It requires a careful and thorough review of the proceedings, since the cumulative effect of the alleged improprieties is more relevant than any single transgression. [53 O.R. (3d) 641, at paras. 29-30]

31 As for how to assess the impact of a judge's identity, experiences and affiliations on a perception of bias, Cory J.'s comments in *S. (R.D.)* helpfully set the stage:

> Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations. [para. 120]

32 But it is also important to remember the words of L'Heureux-Dubé and McLachlin JJ. in *S. (R.D.)*, where they compellingly explained the intersecting relationship between a judge's background and the judicial role:

> ... judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.
>
> It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. [paras. 38-39]

33 Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one. Bora Laskin noted that the strength of the common law lies in part in the fact that

> the judges who administer it represent in themselves and in their work a mix of attitudes and a mix of opinions about the world in which they live and about the society in which they carry on their judicial duties. It is salutary that this is so, and eminently desirable that it should continue to be so. ["The Common Law is Alive and Well — And, Well?" (1975), 9 *L. Soc'y Gaz.* 92, at p. 99]

34 The reasonable apprehension of bias test recognizes that while judges "must strive for impartiality", they are not required to abandon who they are or what they know: *S. (R.D.)*, at para. 29, per L'Heureux-Dubé and McLachlin JJ.; see also *S. (R.D.)*, at para. 119, per Cory J. A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand "life" — their own and those whose lives reflect different realities. As Martha Minow elegantly noted, the ability to be open-minded is enhanced by such knowledge and understanding:

> None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration. ["Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors" (1992), 33 *Wm. & Mary L. Rev.* 1201, at p. 1217]

35 This recognition was reinforced by Cameron A.J. of the Constitutional Court of South Africa in *South African Commercial Catering and Allied Workers Union v. Irvin & Johnson Ltd. (Seafoods Division Fish Processing)*, 2000 (3) SA 705 (South Africa Constitutional Ct.):

> ... "absolute neutrality" is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality ... . Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views — that is the keystone of a civilised system of adjudication. Impartiality requires, in short, "a mind open to persuasion by the evidence and the submissions of counsel"; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. [Citations omitted; para. 13.]

36 Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind, free from inappropriate and undue assumptions. It requires judges "to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies": Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12. As Aharon Barak has observed:

> The judge must be capable of looking at himself from the outside and of analyzing, criticizing, and controlling himself. ...
>
> The judge is a product of his times, living in and shaped by a given society in a given era. The purpose of objectivity is not to sever the judge from his environment... [or] to rid a judge of his past, his education, his experience, his belief, or his values. Its purpose is to encourage the judge to make use of all of these personal characteristics to reflect the fundamental values of the society as faithfully as possible. A person who is appointed as a judge is neither required nor able to change his skin. The judge must develop sensitivity to the dignity of his office

> and to the restraints that it imposes. [Footnote omitted; *The Judge in a Democracy* (2006), at pp. 103-4.]

37 But whether dealing with judicial conduct in the course of a proceeding or with "extra-judicial" issues like a judge's identity, experiences or affiliations, the test remains

> whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias... . [T]he assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. [Citations omitted; *Miglin*, at para. 26.]

38 Applying this test to the trial judge's conduct throughout the proceedings, I agree with the Court of Appeal that the threshold for a finding of a reasonable apprehension of bias has been met.

39 As noted, the Court of Appeal identified several incidents which, when viewed in the circumstances of the entire trial, lead inexorably to this conclusion. The first was the trial judge's conduct during the incident relating to the confidentiality of student files. When a parent testified that two of his children had left the school as a result of the school's lack of resources for addressing special needs, counsel for the Yukon attempted to cross-examine the parent based on information in the children's school files. Counsel for the Board objected, primarily on the grounds that the files were confidential, leading the trial judge to express concern that the Yukon may have breached the students' confidentiality rights by sharing the information with its counsel:

> [TRANSLATION] THE COURT: My concern and my more direct point, I'll say it again, is the basic fact that you may have taken improper advantage of having obtained confidential documents without the witness's permission.

40 Both parties had already made extensive use of information from student files. The trial judge, after hearing some argument after the confidentiality issue was raised, said that he would await further argument the following morning because he thought the issue was a very serious one:

> [TRANSLATION] THE COURT: ... However, I believe you are — I'll wait for the, for further argument tomorrow morning about the access your client gave to confidential documents. I think there's a much more fundamental issue involved here, namely whether you should have. And then, since you've done it, what are the consequences? If it's something your client did that it shouldn't have done. And so with that, we'll start again tomorrow morning.

41 The next morning, and before any argument, the trial judge ruled that the Yukon appeared to have violated the *Education Act* and the *Access to Information and Protection of Privacy Act*,

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characterizing its behaviour as [TRANSLATION] "objectionable and reprehensible". Immediately after the unexpected ruling, counsel for the Yukon asked to make further submissions:

> [TRANSLATION] MR. FAILLE: Before, before the witness is recalled, I'd like to make submissions, Your Honour, if I may.
>
> THE COURT: About what?
>
> MR. FAILLE: About what you just said, Your Honour.
>
> THE COURT: No.
>
> MR. FAILLE: I would've liked to be able to make submissions before you could make the decision you just made, because, with all due respect, we believe that, that there's no legal basis for it and, and I — I had assumed that this morning we'd be able to make submissions about this. That was what I'd understood from what you said yesterday afternoon.

42 When counsel for the Yukon tried to draw the trial judge's attention to certain provisions of the *Education Act* and the *Access to Information and Protection of Privacy Act* in support of his position, the trial judge asked counsel if he had obtained consent to use the files and refused to hear additional arguments:

> [TRANSLATION]
>
> MR. FAILLE: ... We've done legal research into this. We're perfectly familiar with the provisions of section 20 of the *Education Act*. We're also familiar with the provisions of the *Access to Information Act*, section 2 of which provides:
>
> > This act does not limit the information available by law to a party to a proceeding in court or before an adjudicative body.
>
> THE COURT: I have a question.
>
> MR. FAILLE: Yes.
>
> THE COURT: Did you or your client, did you obtain the permission required by section 20, subsection 3, of the *Education Act*?
>
> MR. FAILLE: We're saying, Your Honour, that permission —
>
> THE COURT: Yes or no.
>
> MR. FAILLE: Your Honour, we believe —
>
> THE COURT: The answer is no?

MR. FAILLE: Your Honour, the answer is that permission is implied, that confidentiality is waived. We know very well that the information is confidential and, if I may, Your Honour, I'd like to make submissions on this point.

THE COURT: No. I've made my ruling, and if you don't want to give a direct answer about whether you obtained permission from the parents, from either of them, or from [the older child], as he seems to be 17 years old now, for the children's student records to be used in — not for the purposes contemplated in the section but for the trial, I don't need to hear any other submissions.

43 When counsel for the Yukon suggested that the Board may have breached its confidentiality obligations as well, the trial judge acknowledged this possibility and then accused counsel of playing games:

[TRANSLATION]

MR. FAILLE: In that case, Your Honour, if I may, Ms. Taillefer, in the context of this case, gave us 170 student registration forms, which are also part of the student record. With the name of the physician of each student registered at École Émilie-Tremblay, the health insurance number, medical information about each student. That is what was given to us by the plaintiff in the context of this case without the parents' written permission. Is the plaintiff also guilty under section 20?

THE COURT: Maybe. Maybe.

MR. FAILLE: I think maybe so, in fact, because there was no reason to do so. We did so because we didn't raise the question of confidentiality. The first person to raise questions of confidentiality about medical information, dealing with [the two children], was the witness. It wasn't us, and we believe we're entitled to defend ourselves against the allegations that have been made against us, and the law on this is clear. That when the question of medical questions is raised, that the opposing party is entitled to, that the, the right to confidentiality is implicitly waived as a result. I would've made submissions on this point, but you say, Your Honour, that you are — that you don't want to allow it, but before you find the defendant's conduct improper, I would like to file in evidence the 170 student registration forms sent to the defendant by Ms. Taillefer, clearly in violation of section 20 of the Act. Unless it's decided instead that, in the context of this case, there's information that's going, that'll be shared.

THE COURT: It seems to me that a little game is being played here.

MR. FAILLE: It's not a game, Your Honour. It's not a game.

44 The Court of Appeal criticized the trial judge for telling counsel he would entertain additional arguments on the matter the next day, yet starting the proceedings with his ruling without giving the parties any opportunity to present further argument. While this by itself is unwise, his refusal to hear the Yukon's arguments *after* his ruling, and his reaction to counsel, were more disturbing. Viewed in the context of the entire record, the Court of Appeal properly concluded that the trial judge's conduct was troubling and problematic.

45 The Court of Appeal also held that the trial judge's conduct was improper in connection with the Yukon's request to submit affidavit evidence from Mr. DeBruyn, the witness who had suffered a stroke. When counsel for the Yukon advised the trial judge early in the second phase of the trial that he intended to bring an application to have the evidence admitted by affidavit but had not yet completed the supporting documentation, the trial judge asked to see the letter circulating among the lawyers from a speech pathologist explaining Mr. DeBruyn's condition. The letter stated in part:

> Although Mr. DeBruyn has recovered extremely well, he continues to experience mild residual aphasia. Aphasia is a language difficulty that can affect a person's understanding of spoken and/or written language as well as verbal and/or written expression. Mr. DeBruyn continues to make paraphasic speech errors occasionally; that is, he sometimes uses an unintended word related in meaning or form to the intended word.
>
> Feeling stressed or nervous and being presented with questions verbally in a courtroom situation may exacerbate Mr. DeBruyn's communication difficulties during his cross examination. He may hence make aphasic speaking errors. Therefore, it is recommended that Mr. DeBruyn be given questions in writing instead of being questioned in a court room. It would also be helpful, if Mr. DeBruyn could write down his responses and review them several times before being asked to submit his answers. This will allow him to confirm their accuracy and correct any potential language errors.

46 After reviewing the letter and asking counsel about the process for communicating information to include in the affidavit, the trial judge questioned whether Mr. DeBruyn was even a necessary witness. When counsel for the Yukon explained that Mr. DeBruyn was in charge of education facilities and could testify about how decisions concerning the school's facilities were made, including the Board's role in such decisions, the trial judge continued to express skepticism about the necessity of having Mr. DeBruyn testify:

> [TRANSLATION]
>
> THE COURT: So you're telling me, as an officer of the court, that Mr. DeBruyn is the only person at the Department of Education who has knowledge of this information?
>
> MR. FAILLE: I think I've told you, Your Honour, to the best of my knowledge and as an officer of the court, what the information is, what sharing there is, what the responsibility

> is for the information. I did say that Mr. DeBruyn was, as far as I know, the primary person involved, that he wasn't the only person involved. So it's a matter of knowing what — will it be helpful for the Court to receive that information without it being the only information? We also intended to call Mr. Callas anyway to add to Mr. DeBruyn's evidence and also so Mr. Lepage could cross-examine a witness on that question.

47 The trial judge then noted that in seeking an adjournment at the beginning of the trial, counsel had stated that Mr. DeBruyn was not only an essential witness in the trial itself, he was a necessary advisor to the government during the proceedings. When counsel told the trial judge that Mr. DeBruyn was in the courtroom and advising him, the trial judge expressed surprise that counsel had not informed him of Mr. DeBruyn's presence.

48 The trial judge then returned to the letter and asked counsel about the other steps he had taken earlier to ascertain Mr. DeBruyn's medical condition and ability to testify:

> [TRANSLATION]
>
> THE COURT: ... So this letter is dated January 17, 2011. It had been known since May, or at least the end of June, that we were coming back here on January 17. What other steps were taken before that date, the first day of the trial, to obtain reports concerning Mr. DeBruyn's ability or inability to testify?
>
> MR. FAILLE: No other steps were taken, Your Honour. We wanted to wait and see what his state of health was. And at that time, if it turned out that he wasn't able to testify, to bring the motion that — that we've said we might bring.
>
> THE COURT: You didn't make any preparations to find out which witnesses you'd have to call, knowing that he was the main witness, before January 17, the first day of this trial? To find out whether he could testify?
>
> MR. FAILLE: Well, it's that we were expecting it to be, to be Mr. DeBruyn, if he was able to testify. Or, of course, if he couldn't, that we'd sort it out and that it would be Mr. Chic Callas or a combination of the two.
>
> THE COURT: Knowing that this witness is an essential witness, you didn't even take steps to find out whether he could testify to avoid the problem we have now, and the waste of time we have now, before January 17, the first day of the trial? That's what you're telling me?
>
> MR. FAILLE: No. I took — we took steps before the trial, but it wasn't until after getting the information we got about his state of health that we then asked, that we said, well, we'll have to get the medical report. If we want Mr. DeBruyn to testify by affidavit, then

> obviously we need supporting evidence, so we requested it and we took the steps. So during the two weeks before the trial, I'd say.
>
> THE COURT: If you wanted to make a motion to have him testify by affidavit, don't you think it would've been more appropriate to make that application before the trial started?
>
> MR. FAILLE: No, Your Honour, it didn't occur to me. And as you may know, Mr. Lepage and I were very involved in another case until mid-December, and we then returned to Yellowknife and came directly from Yellowknife to Whitehorse. But I —
>
> THE COURT: Are there three of you I see at the table as counsel for the government? I wonder whether Mr. DeBruyn's condition was better in October or September, when it was known that there was a trial date in January, that is, whether he was going to testify?
>
> MR. FAILLE: I don't know, Your Honour, but I would have — in my mind, it was necessary to wait, in fact, to find out what his state of health was at the time of the trial, not a few months before, since his health — obviously, his state of health has changed a lot in the past few months.

49 The trial judge asked about Mr. DeBruyn's return to work and then heard submissions from the Board's counsel. He concluded the discussion by noting that the speech pathologist's letter did not suggest that Mr. DeBruyn was incapable of testifying, only that he could experience difficulties in expressing himself on cross-examination. He proceeded to tell counsel for the Yukon that he could still make the application, but warned him that he could be ordered to pay costs personally:

> [TRANSLATION]
>
> THE COURT: ... So I — if you still want to make your motion, you can. But at some point, my dear colleague, you're going to realize that, if someone tries to delay proceedings with letters saying that a person can testify, then that maybe they'll have problems on cross-examination, that that kind of motion could be seen as obstruction and quite simply to cause delays. And maybe it won't even be — and sometimes this is dealt with through costs. And sometimes, if it's obviously an act, not necessarily of the client, but of counsel, costs might awarded be against counsel.

50 Counsel decided not to submit the evidence by affidavit and Mr. DeBruyn did not testify. In his costs ruling, the trial judge, in a part of the judgment entitled "Bad faith — at trial", suggested that the incident amounted to bad faith on the part of the government, stating:

> It seemed that Mr. DeBruyn was able to testify. He had been back at work since the fall of 2010 and the Speech-Language Pathologist's letter simply indicated that he "may" have difficulty expressing himself in "cross-examination". However, the Court gave counsel for the [Yukon] the opportunity to bring his application... . It is interesting to note that the [Yukon] presented

> Mr. Charles George Callas as a witness in place of Mr. DeBruyn, as suggested by the [Board] in May 2010. Indeed, Mr. Callas and Mr. DeBruyn shared the responsibility for 29 school buildings. The Court finds that Mr. DeBruyn's testimony was neither essential nor unique. In fact, the [Yukon] relied on Mr. Callas' evidence. Putting over part of the trial resulted in a much longer trial and the Court was required to render a decision on an interim injunction application presented at the end of the first part of the trial.

51 In analyzing this incident, the Court of Appeal, reasonably in my view, concluded that the trial judge's treatment of the matter was inappropriate. There was no basis for accusing counsel of trying to delay the trial, criticizing him for waiting to make the application, or threatening him with an order for costs. When viewed in the context of the rest of the trial, this incident provides further support for a finding of a reasonable apprehension of bias.

52 Moreover, the Court of Appeal was rightly troubled by the trial judge's disparaging remarks directed at counsel for the Yukon on several other occasions, which it found to be disrespectful. On one occasion, for example, the trial judge, in chastising counsel, accused him of making submissions that [TRANSLATION] "lack[ed] conviction and/or sincerity". The Court of Appeal noted that there were several other occasions during the trial where the trial judge was discourteous towards counsel without apparent reason.

53 In addition, the trial judge's refusal to allow the Yukon to file a reply on costs is highly problematic in the overall context of the trial. The Court of Appeal concluded that there were sufficient other indicia of a reasonable apprehension of bias in respect of the trial, so it was unnecessary to determine whether the trial judge's conduct with regard to the costs proceedings could also support the finding of bias at trial. But in my view some comment on the costs proceedings in this case is warranted. The trial judge's refusal to allow the Yukon to file a reply factum, particularly in light of the fact that it could not have known the quantum of costs sought by the Board at the time it filed its factum, is questionable, made more so by his decision to award a [TRANSLATION] "lump sum" payment to the Board, in addition to solicitor-client costs going back to 2002.

54 Appellate courts are rightfully reluctant to intervene on the grounds that a trial judge's conduct crossed the line from permissibly managing the trial to improperly interfering with the case. Reprimands of counsel, for example, may well be appropriate to ensure that proceedings occur in an orderly and efficient manner and that the court's process is not abused. But as the Canadian Judicial Council's *Ethical Principles for Judges* suggest:

> ... [u]njustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality... . A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of

> a reasonable, fair minded and informed person any impression of a lack of impartiality. [Emphasis added; *Ethical Principles for Judges* (1998), at p. 32.]

55 While the threshold for a reasonable apprehension of bias is high, in my respectful view, the "fine balance" was inappropriately tipped in this case. The trial judge's actions in relation to the confidentiality of student files, the request to have Mr. DeBruyn testify by affidavit, the disparaging remarks, and the unusual costs award and procedure, taken together and viewed in their context, would lead a reasonable and informed person to see the trial judge's conduct as giving rise to a reasonable apprehension of bias.

56 That said, I respectfully part company with the Court of Appeal when it concluded that the trial judge's current service as a governor of the Fondation franco-albertaine substantially contributed to a reasonable apprehension of bias. The trial judge had been appointed to the Alberta Court of Queen's Bench in 2002 and the Supreme Court of Yukon in 2005. Before being appointed to the bench, the trial judge played a key role in the creation of École du Sommet in St. Paul, Alberta and served as a school trustee on the Conseil scolaire Centre-Est de l'Alberta from 1994 until 1998. From 1999 to 2001, he served as a member of the executive of the Association canadienne-française de l'Alberta, an organization that lobbies on behalf of and promotes the francophone community in Alberta. He was a governor of the Fondation franco-albertaine while he was a judge. Its "mission" is to [TRANSLATION] "[e]stablish charitable activities to enhance the vitality of Alberta's francophone community", and its "vision" is for "[a] francophone community in Alberta that is autonomous, dynamic and valued". It is this latter affiliation that triggered the Court of Appeal's admonition.

57 While the Court of Appeal acknowledged that the Fondation franco-albertaine was not directly involved with the community whose rights were being determined in the litigation and had no affiliation with any organization implicated in the trial, it concluded that

> [t]he parallels between the situations of s. 23 rights-holders in Alberta and those in Yukon are direct and obvious. Further, the expressed visions of the [Fondation franco-albertaine] would clearly align it with some of the positions taken by the [Board] in this case. We are unable, therefore, to accept that the judge's position as governor of the [Fondation franco-albertaine] was innocuous. [para. 199]

58 It also acknowledged, however, that the Fondation franco-albertaine "appears to be largely a philanthropic organization rather than a political group", and that its goals are primarily charitable, not partisan. Nevertheless, it was of the view that

> the organization's mission statement and philosophy shows that it has a particular vision of the francophone community. In continuing to be a governor of the organization, the judge was, in effect, publicly declaring his support for that vision. [para. 193]

59 While I fully acknowledge the importance of judges avoiding affiliations with certain organizations, such as advocacy or political groups, judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest. Judges, as Benjamin Cardozo said, do not stand on "chill and distant heights": *The Nature of the Judicial Process* (1921), at p. 168. They should not and *cannot* be expected to leave their identities at the courtroom door. What they *can* be expected to do, however, is remain, in fact and in appearance, open in spite of them. I find the following observations by Lord Bingham of Cornhill C.J., Lord Woolf M.R. and Sir Richard Scott V.-C. in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* (1999), [2000] Q.B. 451 (Eng. C.A.), to provide a persuasive instructional template on how to view the relationship between a judge's identity, organizational affiliation, and impartiality:

> We cannot ... conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers ... . By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind ... . or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. [Citations omitted; para. 25.]

(See also *S. (R.D.)*, at paras. 38-39, per L'Heureux-Dubé and McLachlin JJ.)

60 The *Ethical Principles for Judges* provide guidance to federally appointed judges. They advise that while judges should clearly exercise common sense about joining organizations, they are not prohibited from continuing to serve their communities outside their judicial role:

> A judge is appointed to serve the public. Many persons appointed to the bench have been and wish to continue to be active in other forms of public service. This is good for the community and for the judge, but carries certain risks. For that reason, it is important to address the question of the limits that judicial appointment places upon the judge's community activities.
>
> The judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments. The Right Honourable Gerald Fauteux put the matter succinctly and eloquently in *Le livre du magistrat* (translation):
>
> > [there is no intention] to place the judiciary in an ivory tower and to require it to cut off all relationship with organizations which serve society. Judges are not expected to live on the fringe of society of which they are an important part. To do so would be contrary to the effective exercise of judicial power which requires exactly the opposite approach.
>
> The precise constraints under which judges should conduct themselves as regards civic and charitable activity are controversial inside and outside the judiciary. This is not surprising given that the question involves balancing competing considerations. On one hand, there are the beneficial aspects, both for the community and the judiciary, of the judge being active in other forms of public service. This needs to be assessed in light of the expectations and circumstances of the particular community. On the other hand, the judge's involvement may, in some cases, jeopardize the perception of impartiality or lead to an undue number of recusals. If this is the case, the judge should ... avoid the activity. [*Ethical Principles for Judges*, at p. 33]

61 Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.

62 In this case, the Court of Appeal found that the trial judge's involvement as a governor of the Fondation franco-albertaine was problematic. There is, however, little in the record about the organization. In particular, it is difficult to see how, based on the evidence, one could conclude that its vision "would clearly align" with certain positions taken by the Board in this case or that the trial judge's involvement in the organization foreclosed his ability to approach this case with an open mind. Standing alone, vague statements about the organization's mission and vision do not displace the presumption of impartiality. While I agree that consideration of the trial judge's current role as a governor of the organization was a valid part of the contextual bias inquiry in this case, I am not persuaded that his involvement with an organization whose functions are largely

undefined on the evidence, can be said to rise to the level of a contributing factor such that the judge, as the Court of Appeal said, "should not have sat on [this case]" (at para. 200).

63 This brings us to the two legal issues which were appealed to this Court and which the Court of Appeal did not send back for a new trial. The first is whether the Board can unilaterally decide whom to admit to the French school.

64 The admission criteria to the French school in the Yukon are set out in the *French Language Instruction Regulation*, Y.O.I.C. 1996/99. The *Regulation* states that only "eligible students" are entitled to receive French-language instruction at a school in the Yukon: s. 9. "[E]ligible student" is defined in the *Regulation* to mean:

> ... a student whose parent or parents are citizens of Canada who have the right under section 23 of the Charter to have their children educated in the French language and include those students whose parents or siblings would have the right under section 23 if they were citizens of Canada or if the instruction referred to in section 23 was not limited to Canada; [s. 2]

65 Notwithstanding the *Regulation*, from the time of the Board's creation in 1996 until the trial, the Board had decided which students could be admitted to its school, whether or not they were the children of s. 23 rights holders. On the first day of the trial, however, the Yukon sent a letter to the Board's president notifying him of its intention henceforth to enforce the *Regulation*:

> [TRANSLATION] [T]he *Regulation* specifies the eligibility requirements for students in Education Area #23. The *Regulation* also states that residents must file a declaration with the Yukon Francophone School Board so the Minister of Education can make the final determination on the eligibility of a citizen to be a resident of Education Area #23... .
>
> This is an important step ... . That is why I am asking you to ensure that the Department of Education receives ... the declarations filed with the Board for all students registered at École Émilie-Tremblay.

66 The issue, therefore, is whether s. 23 grants the Board the unilateral power to admit students other than those who are "eligible" according to the *Regulation*. This raises questions about the allocation of constitutional powers.

67 Section 23 of the *Charter* establishes the general framework for the minority language educational rights of Canadian citizens: *Mahe v. Alberta*, [1990] 1 S.C.R. 342 (S.C.C.); see also *Ha.-N. (H.) c. Québec (Tribunal administratif)*, [2009] 3 S.C.R. 208 (S.C.C.), at para. 23; *Quebec Assn. of Protestant School Boards v. Quebec (Attorney General) (No. 2)*, [1984] 2 S.C.R. 66 (S.C.C.), at p. 82; and *Solski c. Québec (Procureure générale)*, [2005] 1 S.C.R. 201 (S.C.C.), at paras. 5-10. Where numbers warrant, ss. 23(1) and 23(2) give certain Canadian citizens the

right to have their children receive education in a province or territory's minority language at the government's expense. [1]

68 That said, this Court recently reaffirmed that while "the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces": *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2013] 2 S.C.R. 774 (S.C.C.), at para. 56. Pursuant to s. 93 of the *Constitution Act, 1867*, provincial legislatures have authority to make laws in relation to education. [2] Federalism remains a notable feature in matters of minority language rights. As this Court stated in *Solski*, a case upholding Quebec legislation requiring a student to have received the "major part" of his or her education in English in order to qualify for access to publicly funded English-language schools:

> As education falls within the purview of provincial power, each province has a legitimate interest in the provision and regulation of minority language education... .
>
> . . . . .
>
> ... The latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23. As noted by Lamer C.J. in *Reference re Public Schools Act (Man.)*, at p. 851, "different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province". [Citation omitted; paras. 10, 34.]

69 There is no doubt that a province or territory can delegate the function of setting admission criteria for children of non-rights holders to a school board. This delegation can include granting a minority language school board wide discretion to admit the children of non-rights holders.

70 There is also no doubt that a province or territory may pass legislation which offers protections higher than those protected by the *Charter*. Section 23 establishes a constitutional minimum: *Mahe*, at p. 379. Two important corollaries flow from this. First, because the *Charter* sets out minimum standards with which legislation must comply, any legislation which falls below these standards contravenes the *Charter* and is presumptively unconstitutional. Second, because the *Charter* sets out only *minimum* standards, it does not preclude legislation from going beyond the basic rights recognized in the *Charter* to offer additional protections. This fact was recognized by Dickson C.J. in *Mahe*, where he explained that s. 23 establishes "a minimum level of management and control in a given situation; it does not set a ceiling": p. 379. Provincial and territorial governments are permitted to "give minority groups a greater degree of management and control" than that set out in the provision: p. 379.

71 Some provinces have accepted this invitation and granted school boards wide discretion to admit the children of non-rights holders. In Ontario, for example, s. 293 of the *Education Act*, R.S.O. 1990, c. E.2, provides in part that a French-language school board may admit the child of

a non-rights holder if the admission is approved by a majority vote of an admissions committee. In Manitoba, s. 21.15(5) of the *Public Schools Act*, R.S.M. 1987, c. P250 allows the francophone school board to admit any other child beyond those entitled to admission under the act upon written request for admission to the board.

72 Other provinces have given minority language school boards generous authority over admissions, but imposed specific limitations on the exercise of the power. In Prince Edward Island, for example, the French-language school board may admit children whose parents are not s. 23 rights holders, but any such child must first be released by the English-language board: *French First Language Instruction Regulations*, P.E.I. Reg. EC480/98, s. 10. A similar regime exists in Saskatchewan: *The Education Act, 1995*, S.S. 1995, c. E-0.2, s. 144.

73 Still other provinces have given limited authority to minority language school boards to admit the children of non-rights holders. In British Columbia, the French-language school board has the discretion to admit the child of an immigrant who, if the parent were a Canadian citizen, would be a s. 23 rights holder: *School Act*, R.S.B.C. 1996, c. 412, s. 166.24.

74 In this case, however, the Yukon has not delegated the function of setting admission criteria for children of non-rights holders to the Board. In the absence of any such delegation, there is no authority for the Board to unilaterally set admission criteria which are different from what is set out in the *Regulation*. This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose: see *Mahe*, at pp. 362-65. But that is a different issue from whether the Board has, in the absence of delegation from the Yukon, the unilateral right to decide to admit children other than those who are covered by s. 23 or the *Regulation*.

75 This bring us to the second issue decided by the Court of Appeal, namely, whether the Yukon is required, by virtue of s. 6(1) of the *Languages Act*, to communicate with and provide services to the Board and its employees in French. Section 6(1) provides:

> **6(1)** Any member of the public in the Yukon has the right to communicate with, and to receive available services from, any head or central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French, and has the same right with respect to any other office of any such institution if
>
> (a) there is a significant demand for communications with and services from that office in both English and French; or
>
> (b) due to the nature of the office, it is reasonable that communications with and services from that office be in both English and French.

76 The Court of Appeal decided that this case was not a suitable vehicle for the determination of rights under s. 6 of the *Languages Act*. In my respectful view, it is unclear to me why this should be so. The Board's *Languages Act* claims raise significant factual issues that may well lead to a finding that parts of the claims were justified. Whether a particular communication is covered by s. 6(1) may depend both on the nature of the communication and the capacity in which it is communicated. As the Court of Appeal observed, it is unlikely that the question has a simple answer given that the Board and its personnel engage in various types of communications with the government. This argues, it seems to me, for a determination at the new trial with the benefit of a full evidentiary record, not for a dismissal of the claims.

77 The appeal from the Court of Appeal's conclusion that there was a reasonable apprehension of bias requiring a new trial is accordingly dismissed, but the *Languages Act* claims are to be joined with the other issues remitted by the Court of Appeal for determination at the new trial.

78 In the circumstances, I would make no order for costs.

Order accordingly.

Ordonnance rendue en conséquence.

Footnotes

1 Section 59 of the *Constitution Act, 1982* provides that s. 23(1)(*a*) does not apply in Quebec. It may come into force only with the authorization of the legislative assembly or government of Quebec. Such authorization has not yet been given.

2 Section 93 applies directly to Ontario, Nova Scotia, New Brunswick, British Columbia and Prince Edward Island. Section 93 also applies to Quebec, but not ss. 93(1) to 93(4): *Constitution Amendment, 1997 (Quebec)*, SI/97-141, s. 1; s. 93A of the *Constitution Act, 1867*. Modified versions of s. 93 apply in the other provinces and the territories: *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 22; *Saskatchewan Act*, S.C. 1905, c. 42, s. 17; *Alberta Act*, S.C. 1905, c. 3, s. 17; *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25, s. 1(2); *Northwest Territories Act*, S.C. 2014, c. 2 [as en. by the *Northwest Territories Devolution Act*], s. 18(1)(*o*); *Yukon Act*, S.C. 2002, c. 7, s. 18(1)(*o*); *Nunavut Act*, S.C. 1993, c. 28, s. 23(1)(*m*).

2006 FC 786, 2006 CF 786
Federal Court

Western Canada Wilderness Committee v. Canada (Minister of the Environment)

2006 CarswellNat 1787, 2006 CarswellNat 3062, 2006 FC 786, 2006 CF 786, [2006] F.C.J. No. 1006, 149 A.C.W.S. (3d) 597, 23 C.E.L.R. (3d) 290, 55 Admin. L.R. (4th) 166

Western Canada Wilderness Committee, David Suzuki Foundation, Forestethics and Environmental Defence Canada (Applicants) and Minister of the Environment (Respondent)

R.R. Lafrenière Prothonotary

Judgment: June 20, 2006
Docket: T-2150-05

Counsel: Mr. Devon Page for Applicants
Mr. Lorne Lachance for Respondent

***R.R. Lafrenière Prothonotary*:**

1 On December 5, 2005, the Applicants applied for judicial review in respect of the failure of the Minister of the Environment (the Minister) to exercise his statutory duty to recommend that the Governor-in-Council make an Emergency Order to provide for the protection of the Northern Spotted Owl, a listed endangered wildlife species pursuant to the *Species at Risk Act*, S.C. 2002, c.29 (the Act).

2 The Applicants subsequently made a request pursuant to Rule 317 of the *Federal Courts Rules* for production of the following documents:

> i. The record of materials before the Minister and the Department of the Environment to the date of this Application concerning the Minister's duty under section 80 of the *Species at Risk Act* regarding the Spotted Owl;
>
> ii. Such further and other material that may be in the possession, power or control of the Minister or the Department of the Environment and which may be relevant to these proceedings.

3 The Respondent objected to the Applicants' request for documents on the grounds that Rule 317, which provides a means for parties to obtain material in the possession of the decision-maker, does not apply because there is no actual decision or order which is the subject of the proceeding.

4 The issue on this motion is whether the Minister's objection to production of documents under Rule 317 should be sustained. The specific questions to be addressed are whether Rule 317 is applicable where no actual order or decision has been made and, if so, what extent of production is required in this case and on what terms.

5 The Applicants say that, at the time of issuance of the Notice of Application, over 18 months had passed since the Minister wrote to the Premier of British Columbia to advise that he planned to finalize an opinion by May 22, 2004 on whether to recommend issuance of an Emergency Order pursuant to section 80 of the Act. The Minister concluded his letter by stating that he looked forward to hearing from the Premier before May 22 regarding the BC government's plans to address Northern Spotted Owl protection and recovery needs, as well as its plans for announcing measures it would be taking. The Applicants indicate that they are not aware of any concrete measures having been proposed by the BC government, or of any other impediments to the Minister making a recommendation to issue an Emergency Order.

6 The Applicants submit that they are entitled to production of the requested documents on the basis that they are relevant to the issue of unreasonable delay, one of the grounds of review in the application. They argue that it would be unjust to allow the Minister to avoid review of his conduct by the fact of the complete record before him not being before the Court. They also say that there is no practical means of obtaining the documents other than through an order pursuant to Rule 317.

7 Although some of the documents requested by the Applicants may ultimately prove relevant in this proceeding, I am not satisfied that they are compellable at this stage pursuant to Rule 317.

8 It is settled law that Rule 317 is only intended to result in production of materials that were available to the decision-maker at the time of rendering a decision: *Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455 (Fed. C.A.). While the courts have acknowledged exceptions to this fundamental rule, the exceptions are fairly narrow, such as where it is alleged that the decision-maker breached procedural fairness, or where there is an allegation of a reasonable apprehension of bias on the part of the decision-maker: *Deh Cho First Nations v. Canada (Minister of Environment)*, 13 C.E.L.R. (3d) 27, 2005 FC 374 (F.C.).

9 The Applicants rely on the decision of Justice Edmond P. Blanchard in *Van Vlymen v. Canada (Solicitor General)*, [2001] F.C.J. No. 288 (Fed. T.D.) as authority for a more liberal interpretation of Rule 317. However, *Van Vlymen* is of little assistance since the objection by the Respondent to production of documents in that case was based on privilege, privacy interests, and lack of

materiality. In addition, the tribunal had rendered a decision at the time the request was made, which is distinguishable from the facts in the present proceeding.

10 The burden is on a moving party to justify the demand for documents that were not in front of the decision-maker. Moreover, special circumstances must be established to compel a decision-maker, who has not rendered a decision, to produce documents that may or may not be considered in ultimately reaching a decision.

11 The mere fact that the application is based on delay is not sufficient to justify departure from the general rule. To the contrary, there are valid policy reasons to reject the Applicants' contention that an exception should be made for applications based solely on the passage of time. Unlike actual decisions, "non-decisions" based on delay do not involve an easily identifiable and concise record. There is therefore much greater potential for expansive disclosure requests. Expanding the application of Rule 317 to non-decisions would encourage putative applicants to seek document disclosure from anyone who may have been involved in the decision-making process during the period of delay.

12 The exception would then become the norm. Government respondents would routinely be asked to produce potentially thousands of documents, going back years and covering numerous individuals who may have somehow been involved during the relevant time period in order to produce all documents relevant to the "nature of the duty", or the entire history of involvement with the applicant, thereby slowing down the judicial review process and subverting its summary nature.

13 Moreover, allowing document disclosure for non-decisions could promote frivolous applications based on minimal delay for the purpose of obtaining government records. For example, a person could conceivably bring an application for *mandamus* based on a government official's "non-decision" after a short one-day delay in the exercise of his or her statutory authority, demanding documents under Rule 317. There is further potential for mischief where an applicant claims an on-going statutory duty, as he or she could initially refrain from bringing a judicial review from the first refusal and instead, choose to wait for delay in the making of subsequent decisions in the hope for more extensive document disclosure.

14 Finally, exhaustive searches are not necessary to secure justice when an applicant is applying for *mandamus* based on delay. The onus is on the applicant to bring to the Court the evidence necessary to establish its case, and the applicant cannot use Rule 317 as a fishing expedition to unearth further grounds for review. As noted by Justice Judith A. Snider in *Gaudes v. Canada (Attorney General)*, 137 A.C.W.S. (3d) 1082, 2005 FC 351 (F.C.) where no decision has been rendered, the content of any requested material can only be the subject of speculation.

15 The Applicants in the present case should be intimately familiar with the subject matter, including why they believe the delay is unreasonable. In fact, the Applicants acknowledge in their

written representations that they can demonstrate a *prima facie* case of unreasonable delay on the part of the Minister based on the facts already known to them. The onus would then be on the Minister to provide a satisfactory justification for the alleged delay. If the Minister does not do so, she may face a judgment based on evidence brought exclusively by the Applicants. Either way, the Court will have the information necessary to determine the issues before it.

16 All of the above accentuates the need to distinguish between the right to *mandamus* and the right to document disclosure under Rule 317. Equating the two would render meaningless the language used in Rule 317. It would result in a document production burden that would be unduly onerous, disproportionate to the alleged wrong, and contrary to the summary nature of applications for judicial review.

17 In the event I am wrong with respect to the non-applicability of Rule 317 in *mandamus* applications where no decision has been rendered, I would nonetheless decline to grant the relief requested based on paragraphs 50 to 52 of the Respondent's written representations. I conclude that the Applicants' request for documents is simply too broad, encompassing a substantial volume of documents that are irrelevant, immaterial or privileged.

18 It is well-established that production under Rule 317 is not intended to be as broad and encompassing as documentary discovery in an action. The Applicants' are essentially requesting production of the Minister's entire file without any temporal or relevance constraints.

19 For the above reasons, I would dismiss the motion, with costs in favour of the Respondent.

Order

THIS COURT ORDERS that the motion is dismissed with costs payable to the Respondent.

Application dismissed.

2003 SCC 45
Supreme Court of Canada

Roberts v. R.

2003 CarswellNat 2822, 2003 CarswellNat 2823, 2003 SCC 45, [2003] 2 S.C.R. 259, [2003] S.C.J. No. 50, [2004] 1 C.N.L.R. 342, [2004] 2 W.W.R. 1, 19 B.C.L.R. (4th) 195, 231 D.L.R. (4th) 1, 309 N.R. 201, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, J.E. 2003-1819, REJB 2003-47809

Roy Anthony Roberts, C. Aubrey Roberts and John Henderson, suing on their own behalf and on behalf of all other members of the Wewaykum Indian Band (also known as the Campbell River Indian Band), Appellants v. Her Majesty The Queen, Respondent and Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu and James D. Wilson, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band), Respondents/Appellants

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu, Godfrey Price, Allen Chickite and Lloyd Chickite, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band), Appellants v. Her Majesty The Queen, Respondent and Attorney General of Ontario, Attorney General of British Columbia, Gitanmaax Indian Band, Kispiox Indian Band and Glen Vowell Indian Band, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel, Deschamps JJ.

Heard: June 23, 2003
Judgment: September 26, 2003
Docket: 27641

Counsel: Michael P. Carroll, Q.C., and Malcolm Maclean for appellants Roy Anthony Roberts et al.
John D. McAlpine, Q.C., and Allan Donovan for respondents/appellants Ralph Dick et al.
J. Vincent O'Donnell, Q.C., and Jean Bélanger for respondent Her Majesty the Queen
Patrick G. Foy, Q.C., and Angus M. Gunn, Jr. (written submissions only), for intervener Attorney General of British Columbia
Peter Grant and David Schulze (written submissions only) for interveners Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band

***Per curiam*:**

I. Introduction

1 The Wewaykum or Campbell River Indian Band ("Campbell River") and the Wewaikai or Cape Mudge Indian Band ("Cape Mudge") allege that the unanimous judgment of this Court in *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), with reasons written by Justice Binnie, is tainted by a reasonable apprehension of bias and should be set aside. The alleged reasonable apprehension of bias is said to arise from Binnie J.'s involvement in this matter in his capacity as federal Associate Deputy Minister of Justice over 15 years prior to the hearing of the bands' appeals by this Court.

2 An allegation that a judgment may be tainted by bias or by a reasonable apprehension of bias is most serious. That allegation calls into question the impartiality of the Court and its members and raises doubt on the public's perception of the Court's ability to render justice according to law. Consequently, the submissions in support of the applicant bands and the other parties have been examined in detail as reflected in the following reasons.

3 After an analysis of the allegations and the record upon which they are based, all of which is attached as Appendix A to these reasons, we have concluded that no reasonable apprehension of bias is established and hence that Binnie J. was not disqualified. The involvement of Binnie J. in this dispute was confined to a limited supervisory and administrative role, over 15 years prior to the hearing of the appeals. In his written statement filed as part of the record, Binnie J. has stated that he has no recollection of any involvement in this litigation, and no party disputes that fact. In light of this and for the reasons which follow, we are of the view that a reasonable person could not conclude that Binnie J. was suffering from a conscious or unconscious bias when he heard these appeals, and that, in any event, the unanimous judgment of this Court should not be disturbed. Accordingly, the motions to set aside this Court's judgment of December 6, 2002, are dismissed.

II. Factual Background

4 The bands have each presented motions to set aside the unanimous judgment of this Court, dated December 6, 2002, with reasons written by Binnie J. The judgment dismissed their appeals from an order of the Federal Court of Appeal. The motions to set aside allege that Binnie J.'s involvement as federal Associate Deputy Minister of Justice in the early stages of Campbell River's claim in 1985 and 1986 gives rise to a reasonable apprehension of bias by properly informed and right-thinking members of the public. These motions were brought following an application by the Crown in right of Canada for directions and were heard on June 23, 2003. Binnie J. had recused himself from any participation in this process after filing a statement as part of this record

indicating that he had no recollection of participating in the litigation process involving these claims while serving in the Department of Justice.

5 Prior to his appointment to the Supreme Court of Canada in 1998, Binnie J. had a long and varied career as a practising lawyer. Called to the Ontario Bar in 1967, Binnie J. practised litigation with Wright & McTaggart and successor firms until 1982. Between 1982 and 1986, and of most relevance to these motions, Binnie J. served as Associate Deputy Minister of Justice for Canada, having joined the federal civil service on a secondment. As Associate Deputy Minister of Justice, Binnie J. was responsible for all litigation involving the government of Canada, except cases originating from the province of Quebec and tax litigation. He also had special responsibilities for aboriginal matters. Upon leaving the Department of Justice on July 31, 1986, Binnie J. joined the firm of McCarthy Tétrault, where he remained until his appointment to this Court. Understandably, when Binnie J. left the Department of Justice, the files he worked on, in accordance with usual practice, remained with the Department of Justice. As a result, in the absence of recollection, judges who leave their firms or institutions do not have the ability to examine their previous files in order to verify whether there has been any prior involvement in a matter coming before them.

6 To distinguish between his role as judge and as Associate Deputy Minister, Justice Binnie is referred to in these reasons as Binnie J. and Binnie respectively.

A. The Original Appeals

7 To understand the allegations of reasonable apprehension of bias, it is necessary to examine the factual and procedural background of this case. Campbell River and Cape Mudge are sister bands of the Laich-kwil-tach First Nation. Since the end of the 19th century, members of each band have inhabited two reserves located a few miles from each other on the east coast of Vancouver Island. In particular, members of Campbell River inhabit Reserve No. 11 (Campbell River) and members of Cape Mudge inhabit Reserve No. 12 (Quinsam). In 1985 and 1989 respectively, Campbell River and Cape Mudge instituted legal proceedings against each other and the Crown. In these proceedings, each band claimed exclusive entitlement to both Reserves Nos. 11 and 12.

8 The bands' claims rely on a historical review of the process that led to the creation of the two reserves. In 1888, Mr. Ashdown Green, a federal government surveyor, recommended the creation of these reserves. In his report, however, he did not allocate the reserves to a particular band but rather to the Laich-kwil-tach Indians. The first Schedule of Indian Reserves, published in 1892 by the Department of Indian Affairs, listed Reserves Nos. 11 and 12 as belonging to Laich-kwil-tach Indians without any indication of how the reserves were to be distributed between the bands of the Laich-kwil-tach Indians. By 1902, the Schedule indicated that both reserves were allocated to the "Wewayakay" (Cape Mudge) Band. The Schedule allocated Reserves Nos. 7 through 12 to Cape Mudge. The name of the Cape Mudge Band ("Wewayakay") was written in the entry

corresponding to Reserve No. 7. Ditto marks were used to reproduce the same reference for entries corresponding to Reserves Nos. 8 through 12.

9 The allocation of Reserve No. 11 to Cape Mudge created difficulties. Cape Mudge was not and had never been in possession of Reserve No. 11. Members of Campbell River had occupied the reserve for several years to the exclusion of Cape Mudge. In 1905, a disagreement between the two bands over fishing rights in the Campbell River led to a dispute over possession of Reserve No. 11. In 1907, this dispute was settled by a resolution in which Cape Mudge ceded to Campbell River any claim to Reserve No. 11, subject to retaining fishing rights in the area. This resulted in the Department of Indian Affairs modifying the 1902 Schedule of Indian Reserves by marking "We-way-akum band" (Campbell River) in the entry corresponding to Reserve No. 11. By inadvertence, the "ditto marks" in the subsequent entry corresponding to Reserve No. 12 were not altered creating the erroneous appearance that Reserve No. 12 was also allocated to Campbell River. However, the alteration of the Schedule was intended to refer only to Reserve No. 11 and there was no intention to make any change to Reserve No. 12.

10 In 1912, the McKenna McBride Commission was established to address continuing disagreements between the federal and provincial governments about the size and number of reserves in British Columbia. The Commission acknowledged that Reserve No. 11 was properly allocated to Campbell River but noted the irregularity that was the source of the confusion with respect to Reserve No. 12. Nevertheless, the Commission made no alteration to the Schedule so that matters remained with Cape Mudge occupying Reserve No. 12 and Campbell River occupying Reserve No. 11 subject to the fishing rights in the waters of the Campbell River given to Cape Mudge.

11 The McKenna McBride Report did not receive approval by the province. Both the provincial and federal governments then established the Ditchburn Clark Commission to resolve the outstanding federal-provincial disagreements. In its 1923 report, the Ditchburn Clark Commission restated the position proposed in the McKenna McBride Report concerning Reserves Nos. 11 and 12. In 1924, both levels of government adopted the McKenna McBride recommendations as modified by the Ditchburn Clark Commission. In 1938, a provincial Order-in-Council was issued, transferring administration and control of the reserve lands to the federal Crown.

12 In the 1970s, a dispute between the bands resurfaced. Eventually, in December 1985, Campbell River started an action against the Crown and Cape Mudge in the Federal Court. It claimed that the Crown had acted in breach of its fiduciary duty, had acted negligently, had committed fraud, equitable fraud and deceit, and had breached and continued to breach statutory duties owed to Campbell River. Campbell River further claimed that Cape Mudge had trespassed and continued to trespass on Reserve No. 12. In 1989, Cape Mudge counterclaimed against Campbell River and brought its own claim against the Crown. Cape Mudge claimed that the Crown had breached its fiduciary duty, duty of trust and statutory duties under the *Indian Act*, R.S.C. 1985,

c. I-5. Each band thus claimed both reserves for itself, but sought compensation from the Crown as relief rather than dispossession of either band from their respective Reserves Nos. 11 and 12.

13 The two joined actions were heard together in the Federal Court - Trial Division by Teitelbaum J. The trial lasted 80 days and the actions were dismissed on September 19, 1995 (99 F.T.R. 1 (Fed. T.D.)). The bands appealed to the Federal Court of Appeal. By unanimous judgment the appeals were dismissed on October 12, 1999 (247 N.R. 350 (Fed. C.A.)).

14 The bands applied for and were granted leave to appeal on October 12, 2000, [2000] 2 S.C.R. xii (S.C.C.). The appeals were heard by the full Court on December 6, 2001. On December 6, 2002, in reasons written by Binnie J. and concurred in unanimously, the appeals were dismissed. The Court held that the Crown had not breached its fiduciary duty to either band. In any event, it found that the equitable defences of laches and acquiescence were available to the Crown. As well, the Court concluded that the bands' claims were statute-barred under the applicable statutes of limitations.

B. The Access to Information Request

15 In February 2003, a request under the *Access to Information Act*, R.S.C. 1985, c. A-1, made by Campbell River was received by the Department of Justice. The request sought:

> . . . copies of all records, including letters, correspondence and internal memoranda to, from or which make reference to Mr. William Binnie (Ian Binnie) [now Justice Binnie] in the matter of the claim against Canada by the Wewaykum (or Campbell River) Indian Band and the Wewaikai (or Cape Mudge) Indian Band for Quinsam IR 12 and Campbell River IR 11 between the years 1982 and 1986.

16 During the hearing of these motions, counsel for Campbell River explained the origin of the access to information request. Subsequent to the release of the Court's reasons, the band's solicitor, Mr. Robert T. Banno, reviewed the reasons with the band and, as stated by its counsel, the band was upset both by the tone and the result of the appeal. Counsel for Campbell River stated that:

> They were upset, quite frankly, with the tenor of the reasons in the sense that the claim had been dismissed; some of the words used were "a paper claim". And in effect they thought, as parties sometimes feel when they lose cases, that their arguments had not been properly addressed.

17 Counsel for Campbell River offered the following explanation as to why an unsuccessful litigant would be unusually inclined to present an access to information request about one of the authors of the reasons of the Court:

> Now, one could look at the FOI [freedom of information] request and could sort of infer something from it other than perhaps a proper - well, something improper about doing it. In my submission, what happens if a client is upset, an FOI request may be the very thing to satisfy that client or that litigant that everything is fine. I mean that may be the type of situation that comes back - the FOI request comes back with nothing and the client is satisfied. Well, the chips fall where they fall . . . .
>
> . . . in something like this, in sitting down with a client and - a litigant and explaining what has happened, this is the kind of thing that helps explain what has happened. You say, look, there is nothing untoward here, everything is above board.
>
> . . . in my submission, there should be no improper motive at all attributed to the filing of that information. That sometimes helps lawyers explain to litigants, helps quell those kinds of concerns.

18 Counsel for Campbell River offered this explanation as a rejection of any suggestion that Binnie J.'s involvement in the band's claim as Associate Deputy Minister in the Department of Justice many years previous was suspected prior to or during the hearing before this Court but only investigated subsequently when a negative decision was rendered.

C. Results of the Access to Information Request

19 Pursuant to the access to information request, the Department of Justice found a number of internal memoranda to, from or making reference to Binnie and related to Campbell River's claim. These memoranda show that in late 1985 and early 1986. Binnie, in his capacity at that time as Associate Deputy Minister of Justice, received some information and attended a meeting in the early stages of Campbell River's claim. On May 23, 2003, the Assistant Deputy Attorney General, James D. Bissell, Q.C., wrote the Registrar of the Supreme Court of Canada to inform her that, as a result of the preparation of the Department's response to the access to information request, it appeared "that Mr. W.I.C. Binnie in 1985 and early 1986, in the course of his duties as Associate Deputy Minister of Justice, participated in discussions with Department of Justice counsel in the *Wewaykum* [Campbell River] *Indian Band* case."

20 Accompanying Assistant Deputy Attorney General Bissell's letter to the Registrar were several documents, dated between 1985 and 1988, referring to Mr. Binnie and the Campbell River claim against Canada in regard to Reserves Nos. 11 and 12. Assistant Deputy Attorney General Bissell advised the Registrar that, in view of its duty as an officer of the Court, the Department was waiving solicitor-client privilege to these documents and that they would be provided to the requester under the *Access to Information Act*. He also advised that the Department intended to file a motion for directions, pursuant to R. 3 of the *Rules of the Supreme Court*, as to what steps,

if any, should be taken by reason of the information found in his letter. Attached to the letter was a Statement setting forth the following factual information that is part of the motion record:

> 1. The case of *Roberts v. R.*, [2002] SCC 79, file no. 27641 was heard in the Supreme Court of Canada in December 6, 2001 and judgment was rendered December 6, 2002.
>
> 2. The original claim in the case was filed in December 1985 and the original Defense on behalf of the Crown was filed on February 28, 1986.
>
> 3. The trial judgment was released by the Federal Court Trial Division on September 19, 1995 and the appeal judgment was released on October 12, 1999 by the Federal Court of Appeal.
>
> 4. Mr. W.I.C. Binnie was Associate Deputy Minister of Justice from September 2nd, 1982 until July 31st, 1986; at that time he left the Department of Justice and entered private practice.
>
> 5. As Associate Deputy Minister, Mr. Binnie's duties included responsibility for all litigation, civil as well as criminal matters, involving the Government of Canada as a party, arising in the common law provinces and territories of Canada; in that context he would have had under his general supervisory authority thousands of cases. In addition to his responsibilities for litigation, Mr. Binnie was also responsible for Native Law in the Department.
>
> 6. In the course of the preparation of a response to a request for information under the *Access to Information Act* received in February 2003, it has come to light that Mr. Binnie had occasion to discuss the case with Department counsel, in late 1985 and early 1986.
>
> 7. In the course of preparing for the hearing of the case before the Supreme Court of Canada, Department of Justice counsel noted the fact of Mr. Binnie's position as Associate Deputy Minister in 1985 and 1986, and asked themselves whether Mr. Binnie had had any specific involvement in the case.
>
> 8. Counsel did not conduct a thorough examination of the files. Consequently, Mr. Binnie's involvement was not discovered by counsel at that time.

21 Copies of Assistant Deputy Attorney General Bissell's letter, the Statement and the documents were provided to counsel for the other parties and the interveners.

D. The Motion for Directions

22 The Crown served and filed a motion for directions on May 26, 2003, on the following grounds:

> 1. Judgment in this appeal was handed down on December 6, 2002. The appeal from the Federal Court of Appeal was unanimously dismissed (9:0). The Honourable Mr. Justice Binnie wrote the decision;
>
> 2. It has recently come to the attention of counsel for the Respondent, Her Majesty the Queen, that in 1985 and 1986, when Mr. Justice Binnie was Associate Deputy Minister of Justice (Litigation), he had been involved in some of the early discussions within the Department of Justice regarding the proceeding that eventually came before the Court as this appeal;
>
> 3. The Respondent therefore brings this motion in order to formally place this fact before the Court, and to ask this Court for directions as to any steps to be taken.

23 Produced with the motion for directions were the documents referring to Mr. Binnie while in the employ of the Department of Justice and Campbell River's claim in relation to Reserves Nos. 11 and 12. Upon receipt of the motion by the Court, Binnie J. recused himself from any further proceedings on this matter and, on May 27, 2003, filed the following statement with the Registrar of the Supreme Court:

> With respect to the Motion for Directions filed yesterday by the Crown, would you please place this note on the Court file and communicate its contents to counsel for the parties.
>
> It is a matter of public record that between September 1982 and July 1986 I was Associate Deputy Minister of Justice responsible for all litigation for and against the federal Crown except tax matters and cases in Quebec. This included Indian claims. At any given time, the responsibility covered several thousand cases.
>
> When this appeal was pending before the Court in 2002, I had no recollection of personal involvement 17 years earlier at the commencement of this particular file, which was handled by departmental counsel in the Vancouver Regional Office.
>
> I do not recall anything about any involvement in this case to add to what is set out in the departmental file.
>
> I recuse myself from consideration of the pending motion.

24 The Court invited further submissions by the parties with respect to the Crown's motion for directions. The Crown filed a memorandum in which it submitted that there was no reasonable apprehension of bias affecting the Court's judgment as a result of Binnie J.'s employment in the Department of Justice and involvement in this matter some 17 years earlier and for which he had no recollection. In response, Cape Mudge sought an order setting aside the Court's judgment of December 6, 2002, and requesting that the Court recommend that the parties enter into a negotiation and reconciliation process. In the alternative, Cape Mudge sought an order suspending

the operation of the judgment for a period of four months to permit negotiation and reconciliation between the parties with further submissions to the Court, if required.

25 Campbell River, for its part, sought an order vacating the Court's judgment of December 6, 2002, and the reasons for judgment, as well as an order permitting a further application for relief in the event the Supreme Court's decision was vacated. The Crown opposed both motions. It also opposed Cape Mudge's submission that further negotiation would be an appropriate remedy in this matter.

26 The Attorney General of British Columbia, an intervener, submitted that there was no reasonable apprehension of bias and that the motions to vacate should be dismissed.

27 Several other interveners, being the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band, submitted that the Court's judgment should be vacated.

E. Details of Binnie J.'s Involvement in the Appellants' Litigation 1985-86

28 We turn now to the documents produced by the Crown in order to determine the nature and extent of Binnie's involvement in the Campbell River claim in 1985-1986. Seventeen documents were produced by the Crown. As noted previously, the documents are reproduced in their entirety in the *Appendix*. All documents were shown to or seen by Binnie in his official capacity as Associate Deputy Minister of Justice. Where relevant, the documents relate to the Campbell River claim. Cape Mudge's claim was commenced in 1989, several years after Binnie left the Department of Justice. As can be seen, the 17 documents include one letter and 16 internal memoranda. The letter, dated May 23, 1985, is from Binnie to Chief Sol Sanderson of the Federation of Saskatchewan Indian Nations and is obviously not relevant to these motions. Of the remaining 16 documents, two were produced twice; they are the memorandum dated December 13, 1985, and the memorandum dated February 25, 1986, from Ms Mary Temple to Binnie. Consequently, 14 documents require examination, which will be done in chronological order.

29 Memorandum No. 1, dated June 19, 1985, is a memo to file written by Ms Temple, Acting Senior Counsel, Office of Native Claims. The memorandum refers to Binnie by reason of the fact that it includes a reference to his letter of May 23, 1985, to Chief Sanderson. The memorandum does not detail any involvement of Binnie in the Campbell River claim and is of no relevance to these motions.

30 Memorandum No. 2, dated August 9, 1985, is from Ms Temple to Binnie. The memo predates Campbell River's statement of claim. It indicates that an issue raised by the Campbell River claim and another matter known as the Port Simpson claim were referred to Mr. Tom Marsh of the Vancouver Office for his opinion. The memo further states that Mr. Marsh's opinion would not be ready before the middle of September. It concludes with a request to be informed of any further communications with respect to the Port Simpson opinion from Band representatives.

31 Memorandum No. 3 also predates Campbell River's statement of claim. It is from Mr. R. Green, General Counsel in the Department of Indian Affairs and Northern Development, to Binnie and is dated October 11, 1985. This memo, which relates to the Campbell River and Port Simpson claims, was prepared for a meeting between Binnie and Mr. Green to discuss a legal issue "which potentially touches on all claims from B.C. bands, or at least all involving a determination of rights and liabilities arising out of the pre-McKenna/McBride period." The memo addresses the gazetting of notices and reserve creation in British Columbia. In his memo, Mr. Green refers to the work of Mr. Marsh and sets out three likely interpretations of the B.C. legislation:

> 1. no reserve is legally established until the notice is Gazetted;
>
> 2. the Gazetting provision is for the purpose of land banking;
>
> 3. the Gazetting process is a condition precedent to transferring administration and control of reserves to the federal government but not to the creation of the Indian interest.

32 A handwritten note on the margin, presumably from Mr. Green to Binnie, reads: "On the surface argument 3 seems to be the least damaging way to go."

33 Memorandum No. 4, dated December 12, 1985, is from Mr. Duff Friesen, General Counsel, Civil Litigation Section, to Binnie. In it, Mr. Friesen proposes that Campbell River's statement of claim, filed on December 2, 1985, be referred to the Vancouver Regional Office of the Department of Justice. In a handwritten note on the memo, Binnie wrote "I agree."

34 Memorandum No. 5, dated December 13, 1985, is from Ms Temple to Mr. G. Donegan, General Counsel - Vancouver Regional Office, and copied to Binnie. The memo indicates that Campbell River had filed a statement of claim and intended to proceed by way of litigation rather than negotiation under the Department of Indian Affairs policy. The memo also indicates that certain aspects of the claim were the subject of correspondence with Mr. Marsh of the Vancouver Regional Office and were also discussed with Binnie in Ottawa. With respect to these discussions, Ms Temple wrote that:

> In particular, Ian Binnie formed the opinion that the McKenna McBride report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's Reserve, should be taken at its face value notwithstanding the apparent fact that the designation of the Reserve for this band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information.

35 Memorandum No. 6, dated January 14, 1986, is from Binnie to Ms Temple. It acknowledges receipt of Memorandum No. 5 and sets out the above-quoted passage from that memorandum. Binnie then wrote:

> I recall some discussion about this, but not in the raw terms you have stated it. Could you let me have a note setting out the factual circumstances of the case and the legal points addressed in our discussion and any other relevant legal points you think should be considered?

36 Memorandum No. 7, dated January 15, 1986, is from Binnie to Mr. Harry Wruck of the Vancouver Regional Office. In it Binnie wrote that he is delighted with the assignment of this matter to Mr. Bill Scarth (now Scarth J.). He further asks to be informed of anything that the Minister should be made aware of.

37 Memorandum No. 8, dated January 20, 1986, is from Ms Temple to Binnie in response to Memorandum No. 6. In this memo, Ms Temple describes the factual background of Campbell River's claim. She concludes the memo with the following description of their discussions in relation to the claim:

> In our discussion of this claim in October 1985, we spent most of the time on another legal issue. However, when we turned to the issue of the effect of the McKenna McBride Commission report vis a vis Reserves No.'s 11 and 12, you indicated that such a qualification of the apparent terms of the McKenna McBride Report, as suggested by me, should not be supported and that a report should be accepted on its face so as to result in the legal vesting of an interest for the Campbell River Band only in these two reserves. My understanding of your reasons for such a position was that if we started to qualify the face of the record in any way, we would call into question other aspects of the McKenna McBride exercise.
>
> The other issue on which we spent most of our time during the October discussion was in relation to the question of the effect of the B.C. Land Act Legislation on the establishment of Reserves during the time of the nineteen [*sic*] century reserve commissions. In particular, one interpretation of this legislation would have confirmed the necessity of publishing in the B.C. Gazette the decision of the B.C. Government or officials authorized by it to establish reserves for bands before a band could be considered to have a vested interest in such a reserve. We concluded that notwithstanding the basis for such an interpretation, we should maintain the position that at least with respect to the Campbell River and Quinsam Reserves there was no requirement to gazette notices of those reserves before they could be considered to have been established. The legislation in question was somewhat ambiguous and our decision reflected an attempt to support an interpretation which was, of course, reasonably arguable but which also was reflective of the treatment of these reserves during the period preceeding [*sic*] the McKenna McBride report implementation.

As indicated in the above-quoted passage, the discussions referred to by Ms Temple occurred in October 1985, before Campbell River filed its statement of claim and while the parties were still in the negotiation process.

38 Memorandum No. 9 is dated February 25, 1986, and is also from Ms Temple to Binnie. The memo transmits to Binnie a copy of Campbell River's statement of claim. The memo clarifies that when Binnie participated in discussions in this case "it was still in the ONC [Office of Native Claims] claims process and before the Campbell River Band decided to proceed with litigation." The memo further advises that Mr. Scarth, who had earlier been retained and had carriage of the action, had been instructed to file a full defence. Ms Temple also indicates in her memo that:

> I would just like to note for your information that a full defense of the action by the Crown might involve the Crown in arguing some qualification or interpretation of the implementation of the McKenna McBride Report which was a position which in our discussions respecting negotiation of the claim you advised against. It seemed to Bob Green and I [*sic*] and to the Departmental officials that such a defense in the context of this court action was, nevertheless, justified.

39 Memorandum No. 10 is also dated February 25, 1986, and is from Ms Temple to Mr. Scarth. The memo conveys instructions to file a full statement of defence. The following passage from this memo relates to Binnie's involvement in discussions relating to the claim:

> Since such a defense might result in legal arguments which involve "going behind" the face of the McKenna McBride decisions as implemented by the legislation and Orders in Council, these instructions are being communicated to Ian Binnie because when the Government position respecting the claim was initially discussed with him, he advised that, at least, in the claims process we should not challenge the McKenna McBride report itself.

40 Memos 8, 9 and 10 establish that any advice given by Binnie in relation to the preferred treatment of the McKenna McBride Report was offered in the context of the negotiation process not litigation. Indeed, Binnie's advice, in the context of the negotiation towards a settlement of Campbell River's claim, is what led to acceptance of the claim as valid for the purposes of negotiation. In Memorandum No. 9, Ms Temple wrote:

> When we discussed the position the Crown should take for the purpose of negotiating a settlement under the claims process, we decided to recommend acceptance of the Campbell River Band's claim for negotiation since to do otherwise would suggest that the implementation of the McKenna McBride Report was ineffective to vest Reserve No. 12 in the Campbell River Indian Band. At the time, this position was understood to be justified since although both on legal issues and factual issues the claim was debatable, there seem to be sufficiently reasonable arguments to support it so as to justify settlement, at least on a pro-rated basis, especially since it would presumably have involved a surrender by the Campbell River Band and therefore a clarification of the interest of the Cape Mudge Band in the Reserve.

41 Memorandum No. 11, dated February 27, 1986, is from Ms Temple to Ms Carol Pepper, Legal Counsel - Specific Claims Branch Vancouver. The memo transmits to Ms Pepper a number of opinions culled from the Campbell River claim file. In this memo, Ms Temple writes that her opinions eventually reflected Ian Binnie's preferred position "to not 'go behind' the McKenna McBride Report."

42 Memorandum No. 12, dated March 3, 1986, is from Mr. Scarth to Binnie. The memo transmits to Binnie a copy of the statement of defence presumably prepared by Mr. Scarth and filed on behalf of the Crown on February 28, 1986. In this memo, Mr. Scarth indicates that he believes that the defence reflects the positions of both Justice and Indian Affairs. He further indicates that he has attempted not to repudiate the McKenna McBride Commission Report.

43 Memorandum No. 13, dated March 5, 1986, is from Binnie to Ms Temple and is in response to Memorandum No. 9. In this memo, Binnie wrote:

> With respect to the treatment of the McKenna McBride Report, I suggest that we all await the advice of Bill Scarth as to how this aspect of our possible defence should be dealt with. So far as I am concerned Bill Scarth is in charge of the file. I am sure he will take note of the view expressed by you and Bob Green and "departmental officials" that it would be appropriate in the Crown's defence to argue some qualification or interpretation of the implementation of the McKenna McBride Report.
>
> I look forward to hearing Bill Scarth's views on this aspect of the matter in due course. We will then decide what to do.

44 Memorandum No. 13 is the last document evidencing Binnie's involvement in this matter. As conceded by the parties, the Court's determination of the extent of Binnie's involvement in the Campbell River claim is limited by the documentary record produced by the Crown. The record does not disclose any further involvement on Binnie's part and, in particular, no involvement in this matter between March 5, 1986, and his departure from the Department of Justice on July 31, 1986.

45 Finally, Memorandum No. 14 is dated February 3, 1988, after Binnie left the Department of Justice, and is from Mr. Scarth to Mr. E.A. Bowie, Q.C., Assistant Deputy Attorney General (now Bowie J.). In this memo, Mr. Scarth provides a summary of the Campbell River case to Mr. Bowie. In the body of his memo, Mr. Scarth writes:

> I point out, parenthetically, that Ian Binnie, during his time as Associate Deputy Minister, suggested, because of its wider impact, that we not challenge the validity of what was done by the Royal Commission. With respect, I continue to concur with that advice, and suggest it is a question of defining more narrowly what the Commission did, at least insofar as the Reserves in question are concerned.

III. The Parties' Arguments

A. Cape Mudge, Campbell River and the Interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band

46 Campbell River and Cape Mudge both agree that actual bias is not at issue. Neither band makes any submission that actual bias affected Binnie J., the reasons for judgment or the judgment of the Court. Both bands unreservedly accept Binnie J.'s statement that he had no recollection of personal involvement in the case. The bands submit, however, that the material disclosed by the Crown gives rise to a reasonable apprehension of bias.

47 Cape Mudge submitted that Binnie J.'s involvement in Campbell River's claim was so significant that he effectively acted as a senior counsel for the Crown and that he was disqualified on account of the principle that no judge should sit in a case in which he or she acted as counsel at any stage of the proceeding. According to Cape Mudge, the disclosed documents reveal that Binnie J. was actively involved in risk analysis and the development of litigation strategy on behalf of the defendant Crown. Cape Mudge submitted that Binnie J.'s involvement in the litigation while he was Associate Deputy Minister of Justice raises legitimate questions as to whether the positions he formulated and recommended and the various memoranda and documents he read would have had an influence on his approach to the same case as a judge. In Cape Mudge's submission, such influence could well be unconscious and Binnie J.'s lack of recollection does not change the fact that he was involved in a significant and material way. According to Cape Mudge, the fact that Binnie J. was involved as a lawyer for the defendant Crown, combined with the fact that some 15 years later he wrote a judgment in the same litigation that freed the Crown of potential liability, gives rise to a reasonable apprehension of bias. Cape Mudge submitted that had the documents disclosed by the Crown come to light prior to the hearing before the Court, Binnie J. would have recused himself from the hearing of the appeals.

48 Campbell River submitted that the test for reasonable apprehension of bias is met where a judge sits in a case in which he or she has had any prior involvement. In Campbell River's view, the documents disclosed by the Crown indicate that Binnie J.'s prior involvement in the band's claim was substantial. Like Cape Mudge, Campbell River submitted that had Binnie J.'s earlier involvement in these matters come to light prior to the hearing he would have had no choice but to recuse himself absent the consent of all the parties. According to Campbell River, subjective evidence of a judge's state of mind, and thus Binnie J.'s absence of recollection, is legally irrelevant to a determination of whether there is a reasonable apprehension of bias. Moreover, Campbell River submitted that, owing to Binnie J.'s special interest in aboriginal matters, the unique "ditto mark error" at issue in this case and his involvement as counsel in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), common sense would indicate that some contaminating knowledge would have survived the passage of time, albeit unconsciously.

49 With respect to remedy, both bands submitted that a judgment affected by a reasonable apprehension of bias is void and must be set aside. According to Campbell River, the concurrence of the eight other judges of this Court does not remove the taint of bias. Campbell River submitted that in law a reasonable apprehension of bias taints the entire proceeding and is presumed to be transmitted among decision-makers.

50 As indicated previously, Cape Mudge submitted that this Court should also recommend that the parties enter into a negotiation and reconciliation process or, in the alternative, suspend operation of the judgment for four months so that discussions between the parties could take place. For its part, Campbell River requested an order permitting it to bring an application for further relief following a decision to set aside the judgment. During oral argument, counsel for both bands indicated that a rehearing of the appeals may ultimately become necessary should the decision be set aside and agreement between the parties prove impossible.

51 The interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band presented written arguments in support of the motions to vacate the Court's judgment. In their submission, the facts of this case give rise to a reasonable apprehension of bias and a legal finding of bias must result. Binnie J.'s lack of actual recollection is, in their view, irrelevant. The interveners go further suggesting that actual bias may have existed on Binnie J.'s part even if he neither intended it nor recalled his involvement in the case. Like Campbell River and Cape Mudge, the interveners submitted that Binnie J. would have recused himself had he recalled his participation in this case before the hearing.

B. The Crown and the Intervener the Attorney General of British Columbia

52 The Crown submitted that the Court's judgment should not be set aside and that no other remedy was required. In the Crown's view, the rule that a judge is disqualified if he or she previously acted as counsel in the case is subject to the general principle that disqualification results only where there is a reasonable apprehension of bias. Accordingly, the Crown submitted that the general test set out by de Grandpré J. in dissent in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), and approved in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), should be applied to the particular circumstances of this case.

53 The Crown submitted that since Binnie J. had no recollection, he brought no knowledge of his prior participation by way of discussions about Campbell River's claim. As a result, there was neither actual bias nor any reasonable apprehension of bias on his part. Relying on the English Court of Appeal's decision in *Locabail (U.K.) v. Bayfield Properties Ltd.*, [2000] Q.B. 451 (Eng. C.A.), the Crown submitted that Binnie J.'s lack of recollection dispels any appearance of possible bias. According to the Crown, the fact that Binnie J.'s prior involvement occurred 17 years earlier reinforces the conclusion that there can be no reasonable apprehension of bias. On this point, the bands concede that the passage of time is a relevant factor. Finally, the Crown submitted that since

the judgment of the Court was unanimous in dismissing the appeals, and since Binnie J. had no recollection of his earlier involvement, no reasonable person could conclude that he somehow influenced the minds of the other eight judges who heard the case.

54 The Attorney General of British Columbia also submitted that the Court's judgment should not be disturbed. He submitted that the information disclosed by the Crown would not have necessitated Binnie J.'s recusal had an application been made before the hearing. *A fortiori*, the disclosed information does not establish a reasonable apprehension of bias nor require that the judgment be set aside. The Attorney General of British Columbia further submitted that, although evidence of a judge's subjective state of mind is not determinative as to the issue of whether a reasonable apprehension of bias arises, it remains relevant and of assistance to the reasonable and right-minded observer.

55 The Attorney General of British Columbia submitted that Binnie J. did not act as counsel for the Crown in this case. His involvement was in a general administrative and supervisory capacity, which does not give rise to a reasonable apprehension of bias. It was submitted that a reasonable person would not consider that the tentative views on a general issue expressed by Binnie J. 15 years earlier, in his capacity as Associate Deputy Minister, would prevent him from deciding the case impartially.

56 The Attorney General of British Columbia further submitted that since the decision-maker was the Court as a whole, a reasonable apprehension of bias in respect of Binnie J. is not legally significant unless it also establishes a reasonable apprehension of bias in respect of the judgment of the Court as a whole. In this case, the judgment of the Court as a whole is not tainted by any apprehension of bias. Moreover, the presumption of impartiality has a practical force in respect of appellate tribunals. The fact that appellate courts normally evaluate a written record and the collegial nature of an appellate bench reduces the leeway within which the personal attributes, traits and dispositions of each judge can operate. Finally, the Attorney General submitted that if there was a disqualifying bias in respect of the Court as a whole, the remedy would be to vacate the judgment and for the Court to reconsider the appeals in the absence of Binnie J. under the doctrine of necessity.

IV. Analysis

A. The Importance of the Principle of Impartiality

57 The motions brought by the parties require that we examine the circumstances of this case in light of the well-settled, foundational principle of impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

58 The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

> . . . a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

(*R. v. Bertram*, [1989] O.J. No. 2123 (Ont. H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), at para. 106)

59 Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: The Council, 1998), at p. 30). It is the key to our judicial process and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 394, is the reasonable apprehension of bias:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

61 We will return shortly to this standard, as it applies to the circumstances outlined in the factual background. Before doing that, it is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias; and the notion of automatic disqualification re-emerging in recent English decisions.

B. Reasonable Apprehension of Bias and Actual Bias

62 Determining whether the judge brought or would bring prejudice into consideration as a matter of fact is rarely an issue. Of course, where this can be established, it will inevitably lead to the disqualification of the judge. But this said, most arguments for disqualification typically begin with an acknowledgment by all parties that there was no actual bias and move on to a consideration of the reasonable apprehension of bias. Here, as in many cases, it is conceded by the parties that there was no actual bias on Binnie J.'s part, and his statement that he had no recollection of involvement is similarly accepted by all concerned. As submitted by the parties, his personal integrity is not in doubt, either in these appeals or in any appeal in which he has sat as a member of this Court. Nevertheless, it is said, the circumstances of the present case are such as to create a reasonable apprehension of bias on his part. Since the two propositions go hand in hand, to understand what is meant by reasonable apprehension of bias, it is helpful to consider what it means to say that disqualification is not argued on the basis of actual bias.

63 Saying that there was "no actual bias" can mean one of three things: that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it, that unconscious bias can exist, even where the judge is in good faith, or that the presence or absence of actual bias is not the relevant inquiry. We take each in turn.

64 First, when parties say that there was no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the "reasonable apprehension of bias" can be seen as a surrogate for actual bias on the assumption that it may be unwise or unrealistic to require that kind of evidence. It is obviously impossible to determine the precise state of mind of an adjudicator (Cory J. in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.), at p. 636). As stated by the English Court of Appeal in *Locabail (U.K.)*, *supra*, at p. 472:

> The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

Again, in the present instance, no one suggests that Binnie J. was consciously allowing extraneous influences to affect his mind. Consequently, it would appear that reasonable apprehension of bias is not invoked here as a surrogate for actual bias.

65 Second, when parties say that there was no actual bias on the part of the judge, they may be conceding that the judge was acting in good faith and was not consciously relying on inappropriate preconceptions, but was nevertheless unconsciously biased. In *R. v. Gough*, [1993] A.C. 646 (Eng. C.A.), at p. 665, quoting Devlin L.J. in *R. v. Justices of Barnsley*, [1960] 2 Q.B. 167 (Eng. C.A.), Lord Goff reminded us that:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.

As framed, some of the arguments presented by the parties suggest that they are preoccupied that Binnie J. may have been unconsciously biased despite his good faith.

66 Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 (Eng. K.B.), at p. 259). To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was *in fact* either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, *supra*, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice."

67 Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done - that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances. In that sense, the oft-stated idea that "justice must be seen to be done," which was invoked by counsel for the bands, cannot be severed from the standard of reasonable apprehension of bias.

68 We emphasize this aspect of the criterion of disqualification in Canadian law because another strand of this area of the law in the Commonwealth suggests that some circumstances of conflict of interest may be enough to justify disqualification, whether or not, from the perspective of the reasonable person, they could have any impact on the judge's mind. As we conclude in the next section, this line of argument is not helpful to counsel for the bands in the present case.

C. Reasonable Apprehension of Bias and Automatic Disqualification

69 At the opposite end from claims of actual bias, it has been suggested that it is wrong to be a judge in one's own cause, whether or not one knows this to be the case. The idea has been linked to the early decision of *Dimes v. Grand Junction Canal Co.* (1852), 3 H.L.C. 759, 10 E.R. 301 (U.K. H.L.). More recently, in *Gough*, *supra*, at p. 661, Lord Goff stated that

> . . . there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand . . . . These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings . . . . In such a case, . . . not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

70 This has been described as "automatic disqualification" and was recently revisited by the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate*, [1999] 2 W.L.R. 272 (U.K. H.L.). There, the House of Lords dealt with a situation in which Lord Hoffman had participated in a decision in which Amnesty International was an intervener, while sitting as a director and chairperson of a charity closely allied with Amnesty International and sharing its objects. In that context, it was found that the rule of "automatic disqualification" extended to a limited class of non-financial interests, where the judge has such a relevant interest in the subject matter of the case that he or she is effectively in the position of a party to the cause. As a result, Lord Hoffman was disqualified, and the decision of the House of Lords was set aside, in a judgment that drew much attention around the world.

71 A more recent decision of the English Court of Appeal suggests that this extension of the rule of automatic disqualification, beyond cases of financial interests, is likely to remain exceptional (*Locabail (U.K.)*, *supra*). Even so extended, the rule of automatic disqualification does not apply to the situation in which the decision-maker was somehow involved in the litigation or linked to counsel at an earlier stage, as is argued here.

72 Whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person. In any event, even on the assumption that the line of reasoning developed in *Bow Street*, *supra*, is authoritative in Canada, it is of no relevance in the present case. On the facts before us, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.

73 To sum up, if disqualification is to be argued here, it can only be argued on the basis of a reasonable apprehension of bias. It can only succeed if it is established that reasonable, right-minded and properly informed persons would think that Binnie J. was consciously or unconsciously influenced in an inappropriate manner by his participation in this case over 15 years before he heard it here in the Supreme Court of Canada. We now move to this aspect of the matter.

D. Reasonable Apprehension of Bias and Its Application in this Case

74 The question, once more, is as follows: What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

75 Three preliminary remarks are in order.

76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

> The grounds for this apprehension must, however, be substantial, and I . . . refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

(*Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 395)

77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd v. Auckland City Council*, [2002] 3 N.Z.L.R. 577 (New Zealand P.C.), at para. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

78 Third, in circumstances such as the present one, where the issue of disqualification arises after judgment has been rendered, rather than at an earlier time in the proceedings, it is neither helpful nor necessary to determine whether the judge would have recused himself or herself if the matter had come to light earlier. There is no doubt that the standard remains the same, whenever the issue of disqualification is raised. But hypotheses about how judges react where the issue of recusal is raised early cannot be severed from the abundance of caution that guides many, if not

most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this respect, it may well be that judges have recused themselves in cases where it was, strictly speaking, not legally necessary to do so. Put another way, the fact that a judge would have recused himself or herself *ex ante* cannot be taken to be determinative of a reasonable apprehension of bias *ex post*.

79 As the parties acknowledged, Binnie J.'s past status as Associate Deputy Minister is, by itself, insufficient to justify his disqualification. The same can be said of his long-standing interest in matters involving First Nations. The source of concern, for the bands in these motions to vacate the judgment, is Binnie J.'s involvement in this case, as opposed to his general duties as head of litigation for the Department of Justice in the mid-1980s.

80 In this respect, the bands relied, among other arguments, on the following statement of Laskin C.J., in *Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 388:

> Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. *A fortiori*, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example, even if they had drawn up or had a hand in the statement of claim or statement of defence and nothing else.

81 This dictum must be understood in the context of the principle of which it is but an illustration. It does not suggest that any degree of earlier participation in a case is cause for automatic disqualification. This statement provides sensible guidance for individuals to consider *ex ante*. It suggests that a reasonable and right-minded person would likely view unfavourably the fact that the judge acted as counsel in a case over which he or she is presiding and could take this fact as the foundation of a reasonable apprehension of bias.

82 However, contrary to what has been argued, it cannot realistically be held that Binnie J. acted as counsel in the present case, and the limited extent of his participation does not support a reasonable apprehension of bias. To repeat, what is germane is the nature and extent of Binnie J.'s role. The details of Binnie J.'s involvement in this case, as outlined in the earlier part of these reasons and which should be viewed in the context of his broad duties in the Department of Justice, would convince a reasonable person that his role was of a limited supervisory and administrative nature.

83 Admittedly, Binnie J.'s link to this litigation exceeded *pro forma* management of the files. On the other hand, it should be noted that he was never counsel of record and played no active role in the dispute after the claim was filed. Memorandum No. 4, dated December 12, 1985, shows that the case was referred to the Vancouver Regional Office within a few days after filing of the Campbell River Claim. Although subsequent memoranda indicate that Binnie was kept informed of some developments in relation to this claim, carriage of the action was in the hands of Mr.

Bill Scarth in Vancouver. The facts do not support the proposition that Binnie planned litigation strategy for this case, as is suggested by the bands. For example, in their submissions, the Cape Mudge Band seemed to imply that the handwritten note in the margin of Memorandum No. 3 was written by Binnie in that "[he] was part of the Crown's early tactical considerations in this case; considering which approach would create the lowest risk for the Crown; which approach would constitute the 'least damaging way to go' " (see Cape Mudge's factum, at para. 12). However, upon examination of this note it would appear that it is addressed to "Ian [Binnie]" and signed "Bob" [Green]. Furthermore, and as indicated above, Memos 8, 9 and 10, in particular, establish that any views attributed to Binnie earlier on were offered in the context of wider implications of the negotiation process, and not in the context of litigation.

84 Furthermore, in assessing the potential for bias arising from a judge's earlier activities as counsel, the reasonable person would have to take into account the characteristics of legal practice within the Department of Justice, as compared to private practice in a law firm. See the Canadian Judicial Council's *Ethical Principles for Judges*, *supra*, at p. 47. In this respect, it bears repeating that all parties accepted that a reasonable apprehension of bias could not rest simply on Binnie J.'s years of service in the Department of Justice. In his capacity as Associate Deputy Minister, Binnie had responsibility for thousands of files at the relevant time. While his views were sought in the negotiations stage of the present dispute, it is relevant that he was consulted on strategic orientations in dozens of cases or classes of cases. In this regard, the matter on which he was involved in this file, principally the effect of the McKenna McBride Report, was not an issue unique to this case, but was an issue of general application to existing reserves in British Columbia. This was presumably the reason why he was approached in the first place.

85 To us, one significant factor stands out and must inform the perspective of the reasonable person assessing the impact of this involvement on Binnie J.'s impartiality in the appeals. That factor is the passage of time. Most arguments for disqualification rest on circumstances that are either contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making.

86 In *Locabail (U.K.)*, *supra*, at p. 480, the English Court of Appeal stated:

> . . . every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

87 Similarly, in *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33 (England P.C.), at para. 16, the Privy Council said:

> Another consideration which weighs against any idea of apparent or potential bias in the present case is the length of time which intervened between Rattray P.'s conduct in connection

> with the Act or indeed his holding of the office of Attorney General and the time when he sat as President in the Court of Appeal to hear the present case . . . . It appears that Rattray P. retired as Attorney General in 1993. The hearing of the appeal was in 1998. While that interval of time is not so great as to make the former connection with the Act one of remote history, it is nevertheless of some significance in diminishing to some degree the strength of any objection which could be made to his qualification to hear the case.

88 In the present instance, Binnie J.'s limited supervisory role in relation to this case dates back over 15 years. This lengthy period is obviously significant in relation to Binnie J.'s statement that when the appeals were heard and decided, he had no recollection of his involvement in this file from the 1980s. The lack of knowledge or recollection of the relevant facts was addressed by the English Court of Appeal in *Locabail (U.K.)*, *supra*. There, at p. 487, the Court of Appeal asked

> How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest?

89 The parties have not challenged Binnie J.'s statement, and we are of the view that they are not required to do so. The question is whether the reasonable person's assessment is affected by his statement, in light of the context - that is, in light of the amount of time that has passed, coupled with the limited administrative and supervisory role Binnie played in this file. In our view, it is a factor that the reasonable person would properly consider, and it makes bias or its apprehension improbable in the circumstances.

90 Binnie J.'s lack of recollection is thus relevant. Yet it is not decisive of the issue. This is not a case in which the judge never knew about the relevant conflict of interest, which would be much easier, but a case in which the judge no longer recalls it. Without questioning his recollection, the argument can be made that his earlier involvement in the file affected his perspective unconsciously. Nevertheless, we are convinced that the reasonable person, viewing the matter realistically, would not come to the conclusion that the limited administrative and supervisory role played by Binnie J. in this file, over 15 years ago, affected his ability, even unconsciously, to remain impartial in these appeals. This is true, quite apart from the multitude of events and experiences that have shaped him as a lawyer and judge in the interim and the significant transformations of the law as it relates to aboriginal issues, that we have all witnessed since 1985.

91 We thus conclude that no reasonable apprehension of bias is established and that Binnie J. was not disqualified in these appeals. The judgment of the Court and the reasons delivered by Binnie J. on December 6, 2002, must stand. It is unnecessary to examine the question whether, in the event that the Court had found that Binnie J. was disqualified, the judgment of the Court in these appeals would have been undermined. Nevertheless, because of the importance of the issue, we offer a few comments in this respect.

92 The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. Many Justices of the Court have spoken publicly on this matter, and a rather complete description of it can be found in an essay published in 1986 by Justice Bertha Wilson ("Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227). For present purposes, it is enough to say the following. Each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to "brief" the rest of the coram before the hearing. After the case is heard, each judge on the coram expresses his or her opinion independently. Discussions take place on who will prepare draft reasons and whether for the majority or the minority. Draft reasons are then prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all.

93 Here, the nine judges who sat on these appeals shared the same view as to the disposition of the appeals and the reasons for judgment. Cases where the tainted judge casts the deciding vote in a split decision are inapposite in this respect. In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.

V. Conclusion

94 We conclude that no reasonable apprehension of bias is established. Binnie J. was not disqualified to hear these appeals and to participate in the judgment. As a result, the motions to vacate the judgment rendered by this Court on December 6, 2002, are dismissed. The Crown's motion for directions is also dismissed. Although the bands requested costs, the Crown did not. Under the circumstances, each party will bear its own costs.

Motion dismissed.

APPENDIX

2000 CarswellNat 947
Federal Court of Canada — Appeal Division

Zündel v. Citron

2000 CarswellNat 3268, 2000 CarswellNat 947, [2000] 4 F.C. 225, [2000] F.C.J. No. 679, 183 F.T.R. 160 (note), 189 D.L.R. (4th) 131, 256 N.R. 201, 25 Admin. L.R. (3d) 113, 38 C.H.R.R. D/88, 97 A.C.W.S. (3d) 723

Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, The Attorney General of Canada, The Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'Nai Brith, Appellants and Ernst Zundel and Canadian Association for Free Expression Inc., Respondents

Isaac, Robertson, Sexton JJ.A.

Heard: April 4, 2000
Judgment: May 18, 2000 *
Docket: A-253-99

Proceedings: reversing (1999), 3 F.C. 409, 165 F.T.R. 113, (sub nom. Zündel v. Canada (Attorney General)(No. 9)) 35 C.H.R.R. D/354 (Federal Court of Canada — Appeal Division)

Counsel: *Jane S. Bailey*, for Appellants, Sabina Citron, Canadian Holocaust Remembrance Association.
Andrew A. Weretelnyk, for Appellant, Toronto Mayor's Committee on Community and Race Relations.
Richard Kramer, for Appellant, Attorney General of Canada.
René Duval, for Appellant, Canadian Human Rights Commission.
Robyn M. Bell, for Appellant, Simon Wiesenthal Centre.
Joel Richler and *Judy Chan*, for Appellant, Canadian Jewish Congress.
Marvin Kurz, for Appellant, League for Human Rights of B'Nai Brith.
Douglas Christie and *Barbara Kulaszka*, for Respondent, Ernst Zündel.
Gregory Rhone, for Respondent, Canadian Association for Free Expression Inc.

The judgment of the court was delivered by *Sexton J.A.*:

900

Introduction

1 Ms. Devins is a member of the Canadian Human Rights Tribunal (the "Tribunal") that is hearing a complaint brought against Ernst Zündel. At issue in this appeal is whether Ms. Devins is subject to a reasonable apprehension of bias, stemming from a now twelve-year old press release that was issued by the Ontario Human Rights Commission (the "Commission" or "Ontario Human Rights Commission") when Ms. Devins was a member of that Commission, in which the Commission, among other things, applauded a court ruling that found Mr. Zündel to be guilty of publishing false statements that denied the Holocaust.

Background Facts

2 On May 11, 1988, a jury found Mr. Zündel to be guilty of wilfully publishing a pamphlet called "Did Six Million Really Die?" that he knew was false and that causes or is likely to cause injury or mischief to a public interest, contrary to s. 177 of the *Criminal Code*. [1]

3 Two days after the jury had reached its verdict, the Ontario Human Rights Commission issued the following press release:

> TIME/DATE: 10:32 Eastern Time May 13, 1988
>
> SOURCE: Ontario Human Rights Commission
>
> HEADLINE: *** HUMAN RIGHTS COMMISSION COMMENDS RECENT ZÜNDEL RULING***
>
> PLACELINE: TORONTO
>
> The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust.
>
> "This decision lays to rest, once and for all, the position that is resurrected from time to time that the Holocaust did not happen and is, in fact, a hoax," said Chief Commissioner, Raj Anand. "We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."
>
> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [***sic***] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

4 Mr. Zündel's criminal conviction was eventually overturned by the Supreme Court of Canada, which held that s. 177 of the *Criminal Code* [2] was contrary to the right of free expression

guaranteed by s. 2(b) of the *Charter*, and that the infringement could not be saved by s. 1 of the *Charter*.[3]

5 Approximately four years after the Supreme Court overturned Mr. Zündel's conviction, two complainants laid complaints with the Canadian Human Rights Commission. The complainants said that they believed that an Internet website operated by Mr. Zündel would be "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination," contrary to subsection 13(1) of the *Canadian Human Rights Act*.[4] A panel of the Canadian Human Rights Tribunal was appointed to inquire into the complaints. Reva E. Devins was one of three persons appointed to determine the complaint.

6 At the inquiry, which commenced on May 26, 1997, the Canadian Human Rights Commission relied heavily on the "Did Six Million Really Die?" pamphlet that had been published on Mr. Zündel's website. This pamphlet was the same one that had led to the earlier criminal charges and to the press release issued by the Ontario Human Rights Commission.

7 After approximately forty days of hearings, Mr. Zündel requested that the Tribunal fax him the biographies of the three Tribunal members. Approximately one week after the biographies had been faxed to him, counsel for Mr. Zündel located the press release while searching Quicklaw Systems' databases. That same day, counsel for Mr. Zündel brought a motion before the Tribunal, seeking to dismiss the s. 13(1) complaints on the basis that Ms. Devins was subject to a reasonable apprehension of bias.

The Tribunal's Decision

8 The Tribunal rejected Mr. Zündel's motion. It concluded that the press release had been made by the then Chief Commissioner of the Ontario Human Rights Commission, not by the Commission or by Ms. Devins personally. Moreover, the Tribunal added, the statements was arguably within the Chief Commissioner's statutory mandate. These factors, the Tribunal held, made it difficult to understand how the press release could be said to create a reasonable apprehension of bias on the part of the Chief Commissioner, or that any bias could then be imputed to Ms. Devins. In any event, the Tribunal held that even if Mr. Zündel's submission had any merit, it held that it was "totally inappropriate at this late state for this matter to be advanced."[5] The Tribunal reasoned that because the statement had been made long before the hearing had commenced, Mr. Zündel could have raised the bias allegation at the outset of the proceedings. In so doing, the Tribunal implied that Mr. Zündel had waived his right to raise an allegation of reasonable apprehension of bias. Mr. Zündel sought judicial review of the Tribunal's decision to the Federal Court — Trial Division.

The Federal Court — Trial Division's Decision

9 In his decision, the Motions Judge held that the press release was a "gratuitous political statement" [6] that made "a specific damning statement" [7] against Mr. Zündel, which was "thoroughly inappropriate for the Chair of the Ontario Commission" [8] to do. He held that "an institution with adjudicative responsibilities has no legitimate purpose in engaging in such public condemnation." [9]

10 The Motions Judge reasoned that because the press release stated that "*the Ontario Human Rights Commission* commends the present court ruling," [10] and that "*we* applaud the jury's decision," [11] the Chair purported to speak on behalf of all members of the Commission, including Ms. Devins. The Motions Judge added that it would be a "reasonable conclusion to reach that at the time the statement was made, the members of the Ontario Commission held a strong actual bias" [12] against Mr. Zündel. Nevertheless, he concluded that by the time the Canadian Human Rights Tribunal was convened to inquire into the s. 13(1) complaint, there was "insufficient evidence to find present actual bias" [13] against Ms. Devins.

11 The Motions Judge concluded that even though the statement was released some ten years before Ms. Devins was called to inquire into the s. 13(1) complaint brought against Mr. Zündel, a reasonably informed bystander would apprehend that the "extreme impropriety" [14] of the press release would make her subject to a reasonable apprehension of bias.

12 The Motions Judge rejected the Tribunal's decision that Mr. Zündel had waived his right to bring the bias complaint by not bringing it at the outset of the Tribunal's proceedings. The Motions Judge accepted Mr. Zündel's evidence that he was not aware of the press release until shortly before the bias allegation was brought.

13 Even though he concluded that Ms. Devins was subject to a reasonable apprehension of bias, the Motions Judge declined to prohibit the remaining member of the Tribunal from continuing to hear and to ultimately determine the complaint. He held that because the *Canadian Human Rights Act* permits one Tribunal member to complete an already-commenced hearing where other appointed members are unable to continue, [15] the one remaining member of the panel could continue to hear and decide the complaint.

14 Ms. Citron and the other appellants now appeal the Motion Judge's decision that Ms. Devins was subject to a reasonable apprehension of bias. They have not appealed the Motion Judge's decision that Mr. Zündel did not waive his right to raise the bias allegation by not bringing it at the outset of the Tribunal's proceedings. Mr. Zündel has cross-appealed one aspect of the Motion Judge's decision, arguing that the Motions Judge should have quashed the Tribunal's proceedings in their entirety.

Issues

1. Was the finding of the Motions Judge that there was a reasonable apprehension of bias on the part of Ms. Devins unreasonable, based on erroneous considerations, reached on wrong principle, or reached as a result of insufficient weight having been given to relevant matters?

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

Analysis

1. The Reasonable Apprehension of Bias Test

15 In *R. v. S. (R.D.)*, [16] Cory J. stated the following manner in which the reasonable apprehension of bias test should be applied:

> The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. [...] [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter though — conclude [...] [17]

16 He held that the test contained a two-fold objective element: "the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case." [18]

Does the press release address the same issue as the complaint before the Canadian Human Rights Tribunal?

17 On appeal, Mr. Zündel submits that a reasonable bystander would conclude that the press release, which attributes certain statements directly to the Ontario Human Rights Commission, and not merely to the Chair of that Commission, would cause Ms. Devins (who was a member of the Ontario Human Rights Commission when the press release was issued) to be subject to a reasonable apprehension of bias. Mr. Zündel submits that the criminal charges upon which the press release was based were directly in relation to his publication "Did Six Million Really Die?", the very same pamphlet that Mr. Zündel had reproduced on his website and that led to the s. 13(1) human rights complaint that Ms. Devins and the other two members of the Tribunal were asked to determine.

18 In my view, the press release draws a distinction between statements made by the Ontario Human Rights Commission, and statements made by Mr. Anand, the Chair of the Ontario Human

Rights Commission. The only statements contained in the press release that are directly attributed to the Ontario Human Rights Commission are the following:

> (i) The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust;
>
> (ii) We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity.

19 The criminal charge that the Ontario Human Rights Commission addressed in the press release was s. 177 of the *Criminal Code*, later renumbered to s. 181. The section states:

> 181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

20 By contrast, s. 13(1) of the *Canadian Human Rights Act* states:

> 13 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

21 In *Canada (Human Rights Commission) v. Taylor*, [19] Dickson C.J. held that "s. 13(1) [of the *Canadian Human Rights Act*] provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements." [20] He concluded that "[...] the *Charter* does not mandate an exception for truthful statements in the context of s. 13(1) of the *Canadian Human Rights Act*." [21]

22 The press release was made in response to a criminal charge that did afford a defence of truthfulness ("[...] that he knows is false.") [22] The statements attributed to the Ontario Human Rights Commission simply criticize Mr. Zündel for denying the truthfulness of the Holocaust. By contrast, in a s. 13(1) complaint, the truth or non-truthfulness of statements is immaterial to whether the complaint is substantiated. Consequently, the issue faced by the jury in 1988 is different from the issue faced by the Canadian Human Rights Tribunal.

23 Shortly stated, the essence of the offence in section 177 of the *Criminal Code* was that the statement was false and that it could or would likely cause injury or mischief to a public interest. Thus, the truth of the statement would provide a complete defence. On the other hand, the essence

of the complaint before the Canadian Human Rights Tribunal is that certain people were exposed to hatred or contempt. The truth of the statement would provide no defence.

24 The only statement contained in the press release that might be material to the s. 13(1) complaint is the following:

> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [***sic***] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

25 It could be argued that the statement reproduced above states that the information disseminated by Mr. Zündel exposes Jews to hatred, the essence of a s. 13(1) complaint. However, in my view, an informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that the press release draws a distinction between statements made by the Ontario Human Rights Commission (*i.e.* "the *Ontario Human Rights Commission* commends [...]" or "*we* applaud [...]") and statements made by Raj Anand, the Chief Commissioner of the Ontario Human Rights Commission. The statement reproduced above is attributed to Mr. Anand, and not to the Commission as a whole. Accordingly, I do not think that a reasonable and informed observer would conclude that the above statement should be attributed to Ms. Devins.

26 Counsel for Mr. Zündel relied heavily on the Ontario Divisional Court's judgment in *Dulmage v. Ontario (Police Complaints Commissioner)*[23] to demonstrate that statements made by one member of an organization can be used to demonstrate that a different member of that organization is subject to a reasonable apprehension of bias.

27 In *Dulmage*, the president of the Mississauga chapter of the Congress of Black Women of Canada had been appointed to a Board of Inquiry pursuant to Ontario's *Police Services Act*.[24] The Board was appointed to investigate a complaint that a public strip search had taken place, contrary to the manner provided in the Metropolitan Toronto Police Force's regulations. Approximately one year before the president of the Mississauga chapter of the Congress of Black Women of Canada was appointed to the Board, the vice-president of the Toronto chapter of that organization was reported to have publicly stated that the strip search incident at issue was "not an 'isolated case' and reflects the 'sexual humiliation and abuse of black women.'"[25] In a different statement, the vice-president recommended "an RCMP investigation of [the] incident,"[26] and urged that the then-Chief of the Metropolitan Toronto Police Force resign, saying that "Chief McCormack has clearly demonstrated an inability to give effective leadership to the Police Force."[27]

28 In its decision, the Divisional Court concluded that the president who had been appointed to the Board of Inquiry was subject to a reasonable apprehension of bias. O'Brien J. held:

> [...] Inflammatory statements dealing with this very incident involved in this inquiry were made by an officer of the Congress of Black Women of Canada. Those statements were made in Toronto, closely adjacent to the City of Mississauga. They deal with an incident which received significant public attention. The statements referred to the incident as an "outrage" and called for the suspension of the officers involved. Those officers were the very ones involved in this hearing. Ms. Douglas was the president of the Mississauga chapter of the same organization. [28]

29 Similarly, in his dissenting reasons (although not on this point), Moldaver J. held that "the remarks themselves related, at least in part, to the critical issue which the board was required to decide." [29]

30 In my view, *Dulmage* is distinguishable because the statements at issue in *Dulmage* dealt with the very question at issue before the Board of Inquiry, whereas the statements made by the Ontario Human Rights Commission address an issue that is immaterial to the s. 13(1) Tribunal inquiry that Ms. Devins has been asked to determine.

31 I think the House of Lords' decision in *R. v. Bow Street Metropolitan Stipendiary Magistrate* [30] can be distinguished on a similar basis. In that appeal, the House of Lords vacated the earlier order it had made in *R. v. Bow Street Metropolitan Stipendiary Magistrate* [31] because Lord Hoffman, one of the members who heard the appeal, had links to an intervener (Amnesty International) that had argued on the appeal at the House of Lords.

32 When Lord Hoffman heard the appeal at issue in *R. v. Bow Street Metropolitan Stipendiary Magistrate*, he had been a Director and Chairperson of Amnesty International Charity Limited. That corporation was charged with undertaking charity work for Amnesty International, the entity that had intervened in *R. v. Bow Street Metropolitan Stipendiary Magistrate*.

33 The type of bias at issue in *R. v. Bow Street Metropolitan Stipendiary Magistrate* was characterized by Lord Browne-Wilkinson as "where the judge is disqualified because he is a judge in his own cause." [32] Lord Browne-Wilkinson then held that "if the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, *in promoting the same causes in the same organisation as is a party to the suit*." [33] Lord Browne-Wilkinson highlighted that "the facts of this present case are exceptional," [34] holding that "the critical elements are (1) that [Amnesty International] was a party to this appeal; [...] (3) the judge was a Director of a charity closely allied to [Amnesty International] and sharing, in this respect, [Amnesty International's] objects." [35] He concluded that "only in cases where a judge is taking an active role as trustee or Director of a

charity which is closely allied to *and acting with a party to the litigation* should a judge normally be concerned either to recuse himself or disclose the position to the parties." [36]

34 Accordingly, *R. v. Bow Street Metropolitan Stipendiary Magistrate* is not analogous to this appeal. It might be so if the Ontario Human Rights Commission was a party to the proceedings before the Tribunal. Since it was not, I do not think that *R. v. Bow Street Metropolitan Stipendiary Magistrate* demonstrates that Ms. Devins is subject to a reasonable apprehension of bias.

Other Errors Made by the Motions Judge

35 I now turn to other alleged errors made by the Motions Judge. In my view, he committed the following errors, each of which I address at greater length below:

1. He failed to address the presumption of impartiality;

2. He failed to consider whether the press release demonstrated an objectively justifiable disposition;

3. He failed to properly connect Ms. Devins to the press release;

4. He failed to give appropriate weight to the passage of time;

5. He erred in concluding that the Ontario Human Rights Commission was an adjudicative body and had no legitimate purpose in making the press release;

6. He erred in concluding that a doctrine of "corporate taint" exists.

Presumption of impartiality

36 In my view, the Motions Judge erred by failing to take into account the principle that a member of a Tribunal will act fairly and impartially, in the absence of evidence to the contrary. In *R. v. S. (R.D.)*, Cory J. held that "the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'." [37] He added that "the threshold for a finding of real or perceived bias is high," [38] and that "a real likelihood of probability of bias must be demonstrated, and that a mere suspicion is not enough." [39] Further, Cory J. held that "the onus of demonstrating bias lies with the person who is alleging its existence." [40]

37 In *Beno v. Canada (Somalia Inquiry Commission)*, [41] this Court held that there is a presumption that a decision-maker will act impartially. [42] Similarly, in *E.A. Manning Ltd. v. Ontario (Securities Commission)*, [43] the Ontario Court of Appeal held, in the context of a bias

allegation levelled against a securities commission, that "it must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case." [44] And in *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [45] the British Columbia Court of Appeal held that it must be assumed, "unless and until the contrary is shown, that every member of this committee will carry out his or her duties in an impartial manner and consider only the evidence in relation to the charges before the panel." [46]

Failure to consider whether the press release demonstrated an objectively justifiable disposition

38 In *R. v. S. (R.D.)*, Cory J. offered a useful definition of the word "bias." He held that "bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues." [47] He added that "not every favourable or unfavourable disposition attracts the label of prejudice." [48] He held that where particular unfavourable dispositions are "objectively justifiable," [49] such dispositions would not constitute impermissible bias. He offered "those who condemn Hitler" [50] as examples of objectively justifiable dispositions and, therefore, such comments do not give rise to a reasonable apprehension of bias on the part of the speaker.

39 In the Supreme Court's judgment that overturned Mr. Zündel's criminal conviction for publishing the "Did Six Million People Really Die?" pamphlet, McLachlin J. (as she then was) referred to Mr. Zündel's beliefs as "admittedly offensive," [51] while Cory and Iacobucci JJ. described the pamphlet as part of a "genre of anti-Semitic literature" [52] that "makes numerous false allegations of fact." [53] In light of these statements, how could it *not* be objectively justifiable for the Ontario Human Rights Commission and its Chair to have made similar statements regarding the same pamphlet in their press release?

Failure to connect Ms. Devins to the press release

40 The Motions Judge held that it would be a reasonable conclusion to think that at the time the press release was issued, both the Chair of the Ontario Human Rights Commission and its members held a strong actual bias (*i.e.* and not just a reasonable apprehension of bias) as against Mr. Zündel.

41 He later held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias." [54] However, from the Motion Judge's reasons, it appears that he took Ms. Devins' present denial of bias into account to conclude that at the time the Tribunal was appointed to inquire into the s. 13(1) complaint, there was "insufficient evidence to find present actual bias by Ms. Devins against the applicant." [55]

42 In my view, the Motions Judge's reasons confuse the passage of time with Ms. Devins' actual connection to the press release. There was no evidence that Ms. Devins was aware of the press release, let alone agreed with or was party to its issuance so as to demonstrate actual bias at the time the press release was issued. Similarly, there was no evidence of conduct of Ms. Devins from which one could infer a reasonable apprehension of bias later.

Failure to give appropriate weight to the passage of time

43 In the instant matter now on appeal, the Motions Judge attributed little or no weight to the time that had passed between the date the press release was issued and the date on which Ms. Devins was appointed to determine the complaint launched against Mr. Zündel. He held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias." [56]

44 In so doing, I think the Motions Judge failed to give appropriate weight to the amount of time that had passed between the date on which the press release was issued and the date Ms. Devins was asked to hear the s. 13(1) complaint. In *Dulmage*, referred to earlier in these reasons, Moldaver J. concluded that the impugned board member was subject to a reasonable apprehension of bias in part because the press conference during which the statements were made had only taken place one year before the board hearing, a period of time that he did not consider to be "sufficient to expunge the taint left in the wake of these remarks." [57]

45 In the instant appeal, the Tribunal at issue was appointed some nine years after the press release was issued: a much greater time lag than was at issue in *Dulmage*, and one that, along with the other factors considered in this judgment, I consider to be sufficient to expunge any taint of bias that might have existed by reason of the press release.

Error in concluding that a doctrine of "corporate taint" exists

46 By concluding that all members of the Ontario Human Rights Commission would be biased by reason of the press release, the Motions Judge appeared to conclude that there is a doctrine of corporate "taint," a taint that is said to paint all members of a decision-making body with bias in certain circumstances. In *Bennett v. British Columbia (Securities Commission)*, [58] the British Columbia Court of Appeal rejected the doctrine of corporate taint. It held:

> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless

> of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration. [59]

47 Similarly, in *Laws v. Australian Broadcasting Tribunal*, [60] Australia's High Court concluded that the doctrine of corporate taint did not exist, absent circumstances that permit an inference to be drawn that all members of an administrative tribunal authorized or approved statements or conduct that gave rise to a reasonable apprehension of bias on the part of one of its members. In *Laws*, three members of the Australian Broadcasting Tribunal conducted a preliminary investigation of Mr. Laws, and concluded that he had breached broadcasting standards. The Director of the Tribunal's Programs Division later gave an interview in which she repeated the conclusions made by the three Tribunal members. Mr. Laws sought an order prohibiting the entire Tribunal from later holding a formal hearing to determine whether it should exercise regulatory powers against Mr. Laws. His application was brought on the basis that the prejudgment expressed by the three members who had conducted the preliminary investigation and the statements made by the Director of the Programs Division served to taint the entire Tribunal.

48 Australia's High Court rejected Mr. Laws' application. It held:

> However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best, from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview. [61]

49 These decisions, I think, demonstrate that there is no doctrine of corporate taint. I prefer the reasoning in these decisions to the implication drawn by the majority in the *Dulmage* decision that such a taint could be said to exist. [62]

50 As I have previously explained in these reasons, I do not think that the proviso contained in the paragraph reproduced above from the *Laws* decision applies in the circumstances of this appeal: one cannot draw an inference that each of the individual members of the Ontario Human Rights Commission authorized the entire press release that was issued. To the extent that the members of the Commission could be said to have authorized certain statements contained in the press release, any such statements are immaterial to the complaint that Ms. Devins has been asked to determine.

The Supreme Court of Canada's Judgment in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

51 Counsel for the appellants relied on the Supreme Court of Canada's judgment in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [63] for the proposition that the Ontario Human Rights Commission was engaged in a policy-making function at the time the press release was issued and therefore the statements contained in the press release were subject to a much lower standard of impartiality.

52 In *Newfoundland Telephone*, Andy Wells was appointed to a Board that was responsible for the regulation of the Newfoundland Telephone Company Limited. After he was appointed to the Board, and after the Board had scheduled a public hearing to examine Newfoundland Telephone's costs, Mr. Wells made several strong statements against Newfoundland Telephone's executive pay policies. Mr. Wells was one of five who sat on that hearing. Counsel for Newfoundland Telephone objected to Mr. Wells' participation at the hearing, arguing that the strong statements Mr. Wells had made demonstrated that he was subject to a reasonable apprehension of bias.

53 In *Newfoundland Telephone*, Cory J. recognized that administrative decision-makers were subject to varying standards of impartiality. He held that "those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts," [64] while boards with popularly-elected members are subject to a "much more lenient" standard. [65] He added that administrative boards that deal with matters of policy should not be subject to a strict application of the reasonable apprehension of bias test, since to do so "might undermine the very role which has been entrusted to them by the legislature." [66] Accordingly, he held that "a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing." [67]

54 Accordingly, Cory J. held that, had the following statement been made before the Board's hearing date was set, it would not amount to impermissible bias: "[s]o I want the company hauled in here — all them fat cats with their big pensions — to justify (these expenses) under the public glare [...] I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant." He supported that conclusion in the following manner:

> That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change, this would indicate a closed mind. [68]

55 In *Newfoundland Telephone*, Cory J. held that once a board member charged with a policy-making function is then asked to sit on a hearing, "a greater degree of discretion is required

of a member."[69] Once a hearing date was set, Cory J. held that the board members at issue in *Newfoundland Telephone* had to "conduct themselves so that there could be no reasonable apprehension of bias."[70] In other words, a person who is subject to the "closed mind" standard can later be required to adhere to a stricter "reasonable apprehension of bias" standard.

56 Counsel for the appellants have seized on these aspects of Cory J.'s judgment in *Newfoundland Telephone*, to demonstrate that the Motions Judge erred by concluding that when the Ontario Human Rights Commission issued the press release, it was engaged in adjudicative functions, and was therefore required to abide by a high standard of impartiality. Instead, counsel for the appellants argue that the Ontario Human Rights Commission was engaged in a policy-making function when it issued the press release, and was therefore subject to a much lower standard of impartiality.

57 While I agree that the Motions Judge erred when he concluded that the Ontario Human Rights Commission was engaged in an adjudicative role when it issued the press release, I do not agree with the further implications sought to be drawn by the appellants.

58 When the press release was issued by the Ontario Human Rights Commission, it was charged with the following functions:

> 28. It is the function of the Commission,
>
> > (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
> >
> > (b) to promote an understanding and acceptance of and compliance with this Act; [...]
> >
> > (d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act; [...][71]

59 Subsections 28(a), (b) and (d) demonstrate that the Ontario Human Rights Commission is vested with policy-making functions and with an obligation to educate and to inform the public. Accordingly, I do not agree with the Motion Judge's conclusion that the press release issued by the Ontario Human Rights Commission was "thoroughly inappropriate." Rather, the statement was consistent with its statutory obligation, *inter alia*, "to forward the policy that the dignity and worth of every person be recognized."

60 However, I do not think that the *Newfoundland Telephone* case provides much assistance to the appellants. In my view, one should bear in mind that in *Newfoundland Telephone*, the Board

was specifically charged with dual functions: investigatory ones and adjudicative ones. Among its investigatory powers, the Board was permitted to "make all necessary examinations and enquiries to keep itself informed as to the compliance by public utilities with the provisions of law," [72] to "enquire into any violation of the laws or regulations in force," [73] to "summarily investigate [...] whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory [...]." [74] In the same breath, the Board was permitted to hold hearings "if, after any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing [...]." [75] Accordingly, the statute specifically envisaged that Board members who had acted in an investigatory capacity could later act as adjudicators. Indeed, in *Newfoundland Telephone*, Cory J. held that even when the Board at issue in that appeal was required to abide by the reasonable apprehension of bias standard, the standard "need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity."

61 By contrast, the Canadian Human Rights Tribunal is vested with no policy functions or with dual functions: it is simply charged with the adjudication of human rights complaints. Accordingly, unlike *Newfoundland Telephone*, there is no statutory authority for the proposition that Parliament specifically envisaged that members of the Canadian Human Rights Tribunal would have engaged in policy-making functions with regard to the very same issues that they would later be asked to adjudicate.

Conclusion on Bias

62 In my view, the Motions Judge erred when he concluded that Ms. Devins was subject to a reasonable apprehension of bias. I would set aside his decision, and remit the matter to the Canadian Human Rights Tribunal.

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

63 In the event I am wrong on the first issue it is necessary to deal with the second issue: namely, whether the Motions Judge erred by concluding that even though Ms. Devins was subject to a reasonable apprehension of bias, the remaining member of the Tribunal could continue to determine the as-yet undetermined complaint at issue before the Canadian Human Rights Tribunal.

64 In my view, the Motions Judge erred by concluding that where a reasonable apprehension of bias is proven, the remaining members of the Tribunal could continue to hear and determine the complaint. At the time the bias allegation was raised, the panel of which Ms. Devins was a member had sat for some fourty days, and had made approximately 53 rulings. Counsel for Mr. Zündel argued that each one of those rulings was contrary to the result for which he had argued.

65 Viewed in this light, I cannot see how the Tribunal's proceedings could somehow be remedied merely by virtue of there being one remaining member of the Tribunal who could determine the complaint. How could one ever know whether the Tribunal's ultimate decision was somehow affected by one or more of the Tribunal's rulings? How could one ever know whether the biased member had expressed her preliminary views on the merits of the complaint before she was ordered to be recused from the proceedings? And how could one ever know whether those consultations might have somehow affected the remaining member's decisions on the interlocutory rulings? These concerns, I think, demonstrate that where one member of an administrative tribunal is subject to a reasonable apprehension of bias and a number of serious interlocutory orders have been made over the course of a lengthy hearing, the tribunal's proceedings should be quashed in their entirety, even though a statutory provision on its face permits the tribunal to proceed with fewer members where a member is, for some reason, unable to proceed.

66 My conclusions are supported by Cory J.'s reasons in *R. v. S. (R.D.)*, where he held:

> If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone, supra*, at p. 645; see also *Curragh, supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances." [76]

Conclusion

67 I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999 and remit the matter back to the Tribunal for completion of the hearing.

Appeal allowed, cross-appeal dismissed, and matter remitted to tribunal.

Footnotes

* Leave to appeal refused (December 14, 2000), Doc. 28008 (S.C.C.).

1 R.S.C. 1985, c. C-46.

2 By the time the Supreme Court heard Mr. Zündel's appeal, s. 177 of the *Criminal Code* had been renumbered to s. 181.

3 [1992] 2 S.C.R. 731 (S.C.C.), at 778, *per* McLachlin J. (as she then was).

4 R.S.C. 1985, c. H-6.

5 Appeal Book, p. 74.

6 *Zündel v. Citron*, [1999] 3 F.C. 409 (Fed. T.D.) at 421.

7 *Zündel v. Citron*, *Ibid.*

8 *Zündel v. Citron*, *Ibid.*

9 *Zündel v. Citron*, *Ibid.*

10 *Zündel v. Citron*, *Ibid.* (emphasis in original).

11 *Zündel v. Citron*, *Ibid.* (emphasis in original).

12 *Zündel v. Citron*, *Ibid.*

13 *Zündel v. Citron*, *Ibid.*, p. 422.

14 *Zündel v. Citron*, *Ibid.*

15 The Motions Judge never specifically identified the provision of the *Canadian Human Rights Act* on which he relied.

16 [1997] 3 S.C.R. 484 (S.C.C.).

17 *Ibid.*, p. 530.

18 *R. v. S. (R.D.)*, *Ibid.*, p. 531.

19 [1990] 3 S.C.R. 892 (S.C.C.).

20 *Canada (Human Rights Commission) v. Taylor*, *Ibid.*, p. 934.

21 *Canada (Human Rights Commission) v. Taylor*, *Ibid.*, p. 935.

22 Subsection 177 (which was later renumbered to s. 181) stated that "every one who wilfully publishes a statement, tale or news that *he knows is false* and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years" (emphasis added).

23 (1994), 21 O.R. (3d) 356 (Ont. Div. Ct.).

24 R.S.O. 1990, c. P.15.

25 *Dulmage*, *supra* at p. 360.

26 *Dulmage*, *Ibid.*

27 *Dulmage*, *Ibid.*, p. 361.

28 *Ibid.*, p. 363 (emphasis added).

29 *Dulmage*, *Ibid.*, p. 365.

30 [1999] 2 W.L.R. 272 (U.K. H.L.).

31 [1998] 4 ALL E.R. 897 (U.K. H.L.).

32 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *supra* at para. 30.

33 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*, para. 37 (emphasis added).

34 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*, para. 40.

35 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*

36 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.* (emphasis added).

37 *R. v. S. (R.D.)*, *supra* at 531 (emphasis in original).

38 *R. v. S. (R.D.)*, *Ibid.*, p. 532.

39 *R. v. S. (R.D.)*, *Ibid.*, p. 531.

40 *R. v. S. (R.D.)*, *Ibid.*

41 [1997] 2 F.C. 527 (Fed. C.A.).

42 *Beno v. Canada (Somalia Inquiry Commission)*, *Ibid.*, p. 542.

43 (1995), 23 O.R. (3d) 257 (Ont. C.A.), application for leave to appeal to S.C.C. dismissed August 17, 1995 [reported:(1995), 8 C.C.L.S. 242n (S.C.C.)].

44 *E.A. Manning Ltd. v. Ontario (Securities Commission)*, *Ibid.*, p. 267.

45 [1996] 5 W.W.R. 690 (B.C. C.A.).

46 *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, *Ibid.*, p. 704.

47 *R. v. S. (R.D.)*, *supra* at p. 528.

48 *R. v. S. (R.D.)*, *Ibid.*

49 *R. v. S. (R.D.)*, *Ibid.*

50 *R. v. S. (R.D.)*, *Ibid.*

51 *R. v. Zündel*, *supra* at 743.

52 *R. v. Zündel*, *Ibid.*, p. 779.

53 *R. v. Zündel*, *Ibid.*, p. 781.

54 *Zündel*, *supra* at p. 422.

55 *Zündel*, *Ibid.*

56 *Zündel*, *Ibid.*

57 *Dulmage*, *supra* at p. 365.

58 (1992), 69 B.C.L.R. (2d) 171 (B.C. C.A.).

59 *Ibid.*, p. 181.

60 (1990), 93 A.L.R. 435 (Australian H.C.).

61 *Ibid.*, p. 445.

62 In his dissenting reasons, Moldaver J. appeared to recognize that no such doctrine exists. He held that "a member need not automatically withdraw solely because of statements made by a representative of an affiliated community organization about issues before the board" (at 363). Later in his judgment, he repeated the point, holding:
Lest there be any doubt about it, I wish to emphasize that mere association, either past or present, on the part of a board member with an organization, which, by its very nature, might be said to favour one side or the other, will not of itself satisfy the test for reasonable apprehension of bias (at 366).

63 [1992] 1 S.C.R. 623 (S.C.C.).

64 *Newfoundland Telephone*, *Ibid.*, p. 638.

65 *Newfoundland Telephone*, *Ibid.*

66 *Newfoundland Telephone*, *Ibid.*

67 *Newfoundland Telephone*, *Ibid.*, p. 639.

68 *Ibid.*, p. 642-643.

69 *Newfoundland Telephone*, *Ibid.*, p. 643.

70 *Newfoundland Telephone*, *Ibid.*, p. 644.

71 *Human Rights Code*, S.O. 1981, c. 53.

72 *The Public Utilities* Act, R.S.N. 1970, c. 322, as am. by S.N. 1979, c. 30, s. 1, s. 14.

73 *Ibid.*, s. 15.

74 *Ibid.*, s. 79.

75 *Ibid.*, s. 85.

76 *Ibid.*, p. 526.