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Transportation Modernization Act (Bill C-49)

Exhibits for the Submissions to the Standing Senate Committee on Transport and Communications

by *Air Passenger Rights*

March 2018

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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.

Government of Canada announces Flight Rights Canada for air travellers

OTTAWA, Sept. 5 /CNW Telbec/ - The Honourable Lawrence Cannon, Minister of Transport, Infrastructure and Communities, today launched Flight Rights Canada, strengthening consumer protection for air travellers. Flight Rights Canada will benefit Canadians by increasing awareness of their rights when travelling by air, and by ensuring transparency and accountability of air carriers. The foundation for Flight Rights Canada already exists in Canadian legislation.

"Through Flight Rights Canada, air travellers will be reassured that options are available to them if they are inconvenienced. Consumer protection is important to our government and that's why we are taking further action," said Minister Cannon. "The introduction of Flight Rights Canada will help make sure that air travellers know their rights as consumers, and that obligations of air carriers are reflected in how they provide services."

In 2007, An Act to Amend the Canada Transportation Act was passed that included measures to better inform the travelling public of their rights as consumers. Domestic air carriers are now required to prominently display their terms and conditions of carriage at their business offices and to post this information on their websites. Regulations are being developed to require international carriers selling air transportation to and from Canada to also post their terms and conditions of carriage on their websites. In addition, an informal complaints process within the Canadian Transportation Agency was also made available.

Passengers who are not satisfied with the level of protection provided by an air carrier also have options available to them, including the purchase of additional insurance. Flight Rights Canada will make information available to air travellers in several ways. It will inform Canadians of their rights through prominent signage at key airports. Flight Rights Canada reminds air travellers that they are entitled to ask for and receive a carrier's terms and conditions of carriage, and explains the complaints mechanism in place that ensures carriers are held to account for their commitments.

The Flight Rights Canada initiative is another important step in ensuring our air travel system delivers for Canadians.

Backgrounders with the Flight Rights Canada statement of principles and the Code of Conduct of Canada's Airlines are attached.

Backgrounder

FLIGHT RIGHTS

- Air passengers in Canada are entitled to easy access to information regarding their rights with respect to air transportation services, including but not limited to such things as denied boardings, cancellations, and long delays. Passengers are also entitled to information about services for air travellers with various disabilities.
- Carriers are obligated to make their terms and conditions of carriage easily available to passengers.
- Air transportation regulations specify what elements must be addressed in a carrier's terms and conditions of carriage.
- Carriers are required to address matters such as compensation for denied boarding as a result of overbooking, delays, cancellations, passenger re-routing, and lost and damaged baggage.
- The terms and conditions of carriage are legally binding on carriers.
- Passengers have recourse to a complaints resolution process that begins with the air carrier. Under this process, passengers should seek direct redress or remedy first from the carrier for any breach of service commitments or obligations.
- Passengers may seek corrective measures or a refund of direct expenses incurred, if they believe an air carrier has not lived up to the commitments in its published tariffs.
- If a complaint is not resolved between a passenger and the air carrier, the passenger can contact the Canadian Transportation Agency at 1-888-222-2592 or by e-mail at . The Agency is an administrative tribunal with quasi-judicial powers. It is responsible for a wide range of adjudicative and economic matters pertaining to federally regulated air transportation.
- The Agency initially uses an informal approach to manage complaints. If passengers are unsatisfied with the informal process, they can launch a formal complaint to the Agency.

September 2008

Backgrounder

CODE OF CONDUCT OF CANADA'S AIRLINES

1) Passengers have a right to information on flight times and schedule changes. Airlines must make reasonable efforts to inform passengers of

delays and schedule changes and to the extent possible, the reason for the delay or change.

2) Passengers have a right to take the flight they paid for. If the plane is over-booked or cancelled, the airline must:
   a) find the passenger a seat on another flight operated by that airline;
   b) buy the passenger a seat on another carrier with whom it has a mutual interline traffic agreement; or
   c) refund the unused portion of the passenger's ticket.
3) Passengers have a right to punctuality.
   a) If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the airline will provide the passenger with a meal voucher.
   b) If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the airline will pay for overnight hotel stay and airport transfers for passengers who did not start their travel at that airport.
   c) If the passenger is already on the aircraft when a delay occurs, the airline will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the airline will offer passengers the option of disembarking from the aircraft until it is time to depart.
4) Passengers have a right to retrieve their luggage quickly. If the luggage does not arrive on the same flight as the passenger, the airline will take steps to deliver the luggage to the passenger's residence/hotel as soon as possible. The airline will take steps to inform the passenger on the status of the luggage and will provide the passenger with an over-night kit as required. Compensation will be provided as per their tariffs.
5) Nothing in Flight Rights Canada would make the airline responsible for acts of nature or the acts of third parties. Airlines are legally obligated to maintain the highest standards of aviation safety and cannot be encouraged to fly when it is not safe to do so. Similarly, airlines cannot be held responsible for inclement weather or the actions of third parties such as acts of government or air traffic control, airport authorities, security agencies, law enforcement or Customs and Immigration officials.
6) Flight Rights Canada does not exclude additional rights you may have under the tariffs filed by your airline with the Canadian Transportation Agency, or legal rights that international and trans-border passengers have pursuant to international conventions (e.g., the Warsaw Convention) and related treaties.

September 2008

For further information:

For further information: Catherine Loubier, Director of Communications, Office of the Minister of Transport, Infrastructure and Communities, Ottawa, (613) 991-0700; Media Relations, Transport Canada, Ottawa, (613) 993-0055; Transport Canada is online at www.tc.gc.ca. Subscribe to news releases and speeches at www.tc.gc.ca/e-news and keep up to date on the latest from Transport Canada. This news release may be made available in alternative formats for persons with visual disabilities.

CTA(A) No. 3

AIR CANADA

DOMESTIC TARIFF

GENERAL RULES

APPLICABLE TO

THE TRANSPORTATION OF

PASSENGERS AND BAGGAGE

Issue Nov 10, 2017

f) For cancellations within the Carrier's control, if passenger provides credible verbal assurance to the Carrier of certain circumstances that require his/her arrival at destination earlier than options set out in subparagraph (a) above, or, for On My Way customers, for cancellations within or outside the Carrier's control, Air Canada will, if it is reasonable to do so, taking all circumstances known to it into account, and subject to availability, buy passenger a seat on another carrier whose flight is schedule to arrive appreciably earlier than the options proposed in a), b), c) or d) above. Nothing in the above shall limit or reduce the passenger's right, if any, to claim damages, if any, under the applicable Convention, or under the law when neither convention applies.

Note: additional services are provided to On My Way customers, as detailed below in RULE 80 – SCHEDULE IRREGULARITIES (E):

(5) Except as otherwise provided in applicable local law, in addition to the provisions of this rule, in case of scheduled irregularity within its control (and outside its control, for On My Way customers) Air Canada will offer:

a) For a schedule irregularity lasting longer than 4 hours, a meal voucher for use, where available, at an airport restaurant or our on board cafe, of an amount dependent on the length of the delay.

b) For a schedule irregularity lasting overnight or over 8 hours, hotel accommodation subject to availability and ground transportation between the airport and the hotel. This service is only available for out of town passengers.

c) If passengers are already on the aircraft when a delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart.

D. Free baggage allowance

An involuntarily rerouted passenger shall be entitled to retain the free baggage allowance applicable for the type of service originally paid for. This provision shall apply even though the passenger may be transferred from one fare class to another.

E. On My Way service

In addition to the services set out herein, Air Canada will provide additional services to customers who purchase the On My Way service.

(1) The On My Way service may be purchased on Air Canada's website for flights operated by Air Canada, Air Canada Rouge and Air Canada Express within Canada booked more than 96 hours prior to travel.

TARIFF CONTAINING RULES

APPLICABLE TO SCHEDULED SERVICES

FOR THE TRANSPORTATION OF

PASSENGERS AND BAGGAGE OR GOODS

BETWEEN

POINTS IN CANADA ON THE ONE HAND

AND

POINTS OUTSIDE CANADA (EXCEPT THE UNITED STATES) ON THE OTHER HAND

Note: General Rules applicable to Scheduled Services between Canada and the United States are published by Airline Tariff Publishing Company in Tariff number NTA (A) No. 241.

(v) The rights of a passenger against the Carrier in the event of overbooking or cancellation are, in most cases of international carriage, governed by an international convention known as the Montreal Convention, 1999. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it did everything it could be reasonably expected to do to avoid the damage. There are some exceptional cases of international carriage in which the rights of the passengers are not governed by an international convention. In such cases only, a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

3. **(C)**Given that passengers have a right to punctuality, the Carrier will do the following:

   a) If a flight is delayed/advanced and the difference between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the Carrier will provide the passenger with a meal voucher;

   b) If a flight is delayed/advanced by more than 8 hours and the delay/advancement involves an overnight stay, the Carrier will pay for an overnight hotel stay and airport transfers for passengers who did not start their travel at that airport;

   c) If the passenger is already on the aircraft when a delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and the aircraft commander permits, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart.

4. Given that passengers have a right to retrieve their luggage quickly, if the luggage does not arrive on the same flight as the passenger, the Carrier will take steps to deliver the luggage to the passenger's residence/hotel as soon as possible. The Carrier will take steps to inform the passenger on the status of the luggage and will provide the passenger with an over-night kit as required. Compensation will be provided as per the provisions of this tariff.

5. Given that nothing in this tariff would make the Carrier responsible for acts of force majeure per Rule 5.3 or for the acts of third parties that are not deemed servants and/or agents of the Carrier per applicable law or international conventions, the Carrier will not be held responsible for inclement weather or for the actions of such third parties including governments, air traffic control service providers, airport authorities, security and law enforcement agencies, or border control management authorities.

6. In the event of a conflict between the provisions of this Rule and those of any other rule in this tariff, the provisions of this Rule shall prevail except with respect to Rule 5.3.

TARIFF CONTAINING RULES

APPLICABLE TO SCHEDULED SERVICES

FOR THE TRANSPORTATION OF

PASSENGERS AND BAGGAGE OR GOODS

BETWEEN

POINTS IN CANADA

ISSUE DATE	ISSUED BY	EFFECTIVE DATE
November 29, 2016	Mark Williams President Sunwing Airlines Inc. 27 Fasken Drive Toronto, Ontario M9W 1K6, Canada	November 30, 2016

(5) Cut-off Times

Check-in counters are open 3 hours prior to the scheduled departure, and will close 60 minutes before scheduled departure. Passenger(s) arriving for check-in after 60 minutes prior to the scheduled departure will not be accepted for travel.

After Passenger(s) have checked in for their flight, they should be available at the gate not later than 30 minutes prior to the scheduled departure for boarding the aircraft. Passengers who arrive at the boarding gate after the gate has closed will not be accepted for travel.

Passenger(s) who arrive later than the times referred to above for check-in or at the boarding gate will not be eligible for any denied boarding compensation or refund.

(6) Missed Connections

Carrier will not be liable for missed connections unless it is with respect to a missed connection on another flight of Carrier.

RULE 15A. TRAVELLER'S RIGHTS

(a) If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the Carrier will provided the Passenger with a meal voucher.

(b) If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the Carrier will pay for overnight hotel stay and airport transfers for Passengers who did not start their travel at that airport.

(c) If the Passenger is already on the aircraft when a delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the Carrier will offer Passengers the option of disembarking from the aircraft until it is time to depart if safe and practical to do so.

(d) The Carrier will endeavor to transport the Passenger and Baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract.

(e) The agreed stopping places are those places shown in the Carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter, add, and/ or omit stopping places shown in the timetable.

International and transborder (US) tariff

International and transborder (US) tariff

NTA (A) No. 518 ,C..A.B. No. 874

Revised February 22, 2018

Hide all

Rule 1 - Definitions

IN THIS TARIFF, THE FOLLOWING WORDS SHALL HAVE MEANINGS SET OUT BELOW:

AIR CREW MEANS THE FLIGHT CREW AND ONE (1) OR MORE PERSONS WHO, UNDER THE AUTHORITY OF THE CARRIER, PERFORM IN-FLIGHT DUTIES IN THE PASSENGER CABIN OF AND AIRCRAFT OF THE CARRIER;

AIR SERVICE INCLUDES A LIVE FLIGHT AND A FERRY FLIGHT;

AIR TRANSPORTATION CONTRACT MEANS WITH RESPECT TO INTERNATIONAL SERVICE, A CONTRACT ENTERED INTO BETWEEN THE PASSENGER AND THE CARRIER FOR THE PROVISION OF AIR SERVICE TO THE PASSENGER AND ITS GOODS

VALIDITY SHOWN ON THE TICKET(S).

D. RIGHT TO CARE

EXCEPT AS OTHERWISE PROVIDED IN OTHER APPLICABLE FOREIGN LEGISLATION, IN ADDITION TO THE PROVISIONS OF THIS RULE, IN CASE OF SCHEDULED IRREGULARITY WITHIN THE CARRIER'S CONTROL A PASSENGER WILL BE OFFERED THE FOLLOWING:

1. FOR A SCHEDULE IRREGULARITY LASTING LONGER THAN 4 HOURS, THE CARRIER WILL PROVIDE THE PASSENGER WITH A MEAL VOUCHER.
2. FOR A SCHEDULE IRREGULARITY LASTING MORE THAN 8 HOURS OR OVERNIGHT, THE CARRIER WILL PROVIDE OVERNIGHT HOTEL ACCOMMODATION AND AIRPORT TRANSFERS FOR THE PASSENGER. THE CARRIER IS NOT OBLIGATED TO PROVIDE OVERNIGHT ACCOMMODATION FOR PASSENGERS AT THE FIRST AIRPORT OF DEPARTURE ON THE TICKET.
3. IF PASSENGERS ARE ALREADY ON THE AIRCRAFT WHEN A DELAY OCCURS, THE CARRIER WILL OFFER DRINKS AND SNACKS IF IT IS SAFE, PRACTICAL AND TIMELY TO DO SO. IF THE DELAY EXCEEDS NINETY (90) MINUTES AND CIRCUMSTANCES PERMIT, THE CARRIER WILL OFFER THE PASSENGER THE OPTION OF DISEMBARKING FROM THE AIRCRAFT UNTIL IT IS TIME TO DEPART.

Rule 80 - Application of fares and routings

A. GENERAL

THE PRICE OF TRANSPORTATION SHALL BE DISCLOSED AT THE TIME OF CONFIRMATION, HOWEVER FARES ARE SUBJECT TO CHANGE WITHOUT NOTICE.

B. CURRENCY

ALL FARES AND CHARGES ARE STATED IN THE CURRENCY OF THE COUNTRY FROM WHICH THE PASSENGER WILL INITIATE TRAVEL.

C. FARE CHANGES

THE CARRIER'S FARES ARE CHANGED FROM TIME TO TIME.

D. CONNECTING FLIGHTS

WHEN AN AREA IS SERVED BY MORE THAN ONE AIRPORT AND A PASSENGER ARRIVES AT ONE AIRPORT AND DEPARTS FROM

Determination No. A-2017-194

November 30, 2017

DETERMINATION by the Canadian Transportation Agency (Agency) as to whether Air Transat failed to properly apply the terms and conditions of carriage set out in its International Scheduled Services Tariff, CTA (A) No. 4 (Tariff) and whether Air Transat's applicable Tariff provisions are reasonable, pursuant to subsections 110(4) and 111(1) of the *Air Transportation Regulations*, SOR/88-50, as amended (ATR (Air Transportation Regulations)).

Case number: 17-03788

Summary

[1] In the late afternoon of July 31, 2017, Air Transat Flight Nos. 157 and 507, along with 18 other commercial aircraft, were diverted to the Ottawa MacDonald-Cartier International Airport (Ottawa Airport). The extraordinary presence of 20 diverted aircraft during peak hours in addition to the regularly scheduled arrivals and departures placed considerable pressure on the operational capacity of the Ottawa Airport. All diverted flights were delayed on the tarmac for periods ranging from one hour to six hours. The flights subject to this inquiry experienced delays lasting 5 hours and 51 minutes (Flight No. 157) and 4 hours and 47 minutes (Flight No. 507).

[2] Passengers on Flight Nos. 157 and 507 reported challenging onboard conditions on social media and the news media reported on the events. In addition, the Agency received 48 complaints from passengers of Flight No. 157 and 24 complaints from passengers of Flight No. 507. The media reports and passengers' complaints referred to limited water and food services, high temperatures, limited ventilation, passengers becoming physically ill, and the fact that passengers of Flight No. 157 called emergency responders (911) to seek assistance.

[3] In light of these events, the Agency provided Air Transat with the opportunity to explain why the Agency should not conclude that it had failed to properly apply the terms and conditions set out in its Tariff. This Determination provides a resolution to all complaints made by passengers in respect of Flight Nos. 157 and 507 that have been filed with the Agency pursuant to subsection 110(4) and section 111 of the ATR (Air Transportation Regulations).

[4] Based on Air Transat's response, the Agency convened an oral hearing to address the following issues:

- Did Air Transat properly apply its Tariff during these incidents, pursuant to subsection 110(4) of the ATR (Air Transportation Regulations)?
- Are Air Transat's applicable Tariff provisions reasonable, pursuant to subsection 111(1) of the ATR (Air Transportation Regulations)?

[5] For the reasons set out below, the Agency finds that with respect to both Flight No. 157 and Flight No. 507:

- Air Transat did not properly apply Rules 5.2d) and 21.3c) of its Tariff relating to drinks and snacks;
- Air Transat did not properly apply Rules 5.2d) and 21.3c) of its Tariff relating to disembarking.

[6] Furthermore, the Agency finds that:

- The Tariff provisions relating to drinks and snacks are reasonable;
- The Tariff provisions relating to disembarking are unreasonable;
- Rule 5.3.1 of the Tariff is unreasonable;
- Air Transat is not exempted from liability in respect of its non-application of Rules 5.2d) and 21.3c) of its Tariff on the basis that the diversion resulted from a Force Majeure event or on the basis that its contracted service provider allegedly failed to perform its obligations.

[7] Therefore, the Agency orders Air Transat to:

- Compensate all passengers of Flight Nos. 157 and 507 for expenses incurred as a result of its failure to properly apply its Tariff; and,
- Take the following corrective measure to ensure future compliance with Tariff obligations:
    - Ensure that proper training is provided to all Air Transat employees, including aircraft commanders, flight crew, and operations staff, and to any servant or agent engaged in delivering services during onboard delays so that they have knowledge of applicable Tariff provisions, policies and procedures. Such training should emphasize that these provisions and policies are set out in the Tariff and are therefore legal obligations that Air Transat is bound to respect. Air Transat is to provide information on the required training, once it has been developed and delivered, and no later than May 24, 2018.

[8] Based on the Agency's finding that elements of Rules 5.2d) and 21.3c) of the Tariff are unreasonable, the Agency orders Air Transat to revise these Rules and all corresponding rules of its other international tariffs so that the existing text in respect of food and water distribution and disembarking with the commander's permission after 90 minutes is supplemented with the terms and conditions that incorporate the provisions of Air Transat's Contingency Plan for Lengthy Tarmac Delays at US Airports (Revised April 2016). Those terms and conditions create a positive obligation to disembark passengers if a tarmac delay reaches four hours – unless there are safety, security, or air traffic control issues that prevent it – and require that during the delay, the carrier provide passengers with updates every 30 minutes, working lavatories, and medical assistance if needed. These amendments are to be filed with the Agency as soon as possible, and no later than February 27, 2018.

[9] Based on the Agency's finding that Rule 5.3.1 of the Tariff is unreasonable, the Agency orders Air

Transat to revise Rule 5.3.1 and all corresponding rules of its other international tariffs to reflect the definition of Force Majeure found in the Agency's sample tariff for domestic and international scheduled flights. This revision is to be filed with the Agency as soon as possible, and no later than February 27, 2018.

Background

[10] This section provides an overview of the events of July 31, 2017 and procedural information about the inquiry.

Factual Background

[11] In the late afternoon of July 31, 2017, 20 commercial aircraft were diverted to the Ottawa Airport due to adverse weather conditions that halted operations at the Montréal Pierre Elliott Trudeau International Airport (Montréal Airport) and the Toronto Pearson International Airport (Toronto Airport). The diverted flights included Air Transat Flight Nos. 157 and 507, which were inbound from Brussels and Rome, respectively. There were 340 passengers on Flight No. 157 and 250 passengers on Flight No. 507.

[12] The extraordinary presence of 20 diverted aircraft during peak hours in addition to the regularly scheduled arrivals and departures placed considerable pressure on the operational capacity and physical space of the Ottawa Airport. All diverted flights were delayed on the tarmac for periods ranging from approximately one hour to six hours. Flight No. 157 was delayed for 5 hours and 51 minutes and Flight No. 507 was delayed for 4 hours and 47 minutes.

[13] Flight No. 157 landed at the Ottawa Airport at approximately 4:45 p.m. and Flight No. 507 landed at approximately 5:15 p.m. These aircraft were initially positioned in an area south of the terminal building, with Flight No. 157 parked on Runway 7 and Flight No. 507 parked on Taxiway C. Upon their arrival, the aircraft commanders of both flights requested fuel from First Air Operations, Air Transat's contracted ground services handler, and both commanders had the intention of refuelling and departing as soon as possible. These types of refuelling operations are colloquially referred to as "gas and go".

[14] At around 6:45 p.m., the aircraft commanders of Flight Nos. 157 and 507 received instructions from NAV CANADA to move to an area northwest of the Terminal (north of the de-icing area and adjacent to Hangar 14).

[15] The aircraft commanders of both flights repeatedly contacted First Air Operations in an effort to obtain fuel. Air Transat submits that, once the aircraft were located near Hangar 14, its commanders were told on multiple occasions that they would be refuelled within 30 minutes.

[16] At approximately 9:00 p.m., the auxiliary power unit of the aircraft servicing Flight No. 157 stopped working because of a shortage of fuel. This caused the forced air ventilation to shut down and the cabin to darken as only emergency lights were functioning. This situation lasted for approximately 10 minutes. Passengers on this flight called emergency services (911). The aircraft

doors were opened when the police and emergency response teams arrived.

[17] Following refuelling, Flight No. 157 departed at 10:59 p.m. and Flight No. 507 departed at 10:07 p.m.

[18] Passengers on Flight Nos. 157 and 507 reported the challenging circumstances on social media and media reports followed. In addition, the Agency received 48 complaints from passengers of Flight No. 157 and 24 complaints from passengers of Flight No. 507. Passengers described their experience with words including “inhumane”, “horrendous”, “unsustainable”, “stifling”, “tensions mounting”, “general discontent and disgust are palpable”, “we are being treated like animals”, and “unacceptable”.

[19] Passengers testified that they vigorously complained to the flight crew about the inadequacy and lack of drinks and snacks being offered in relation to the time in which they were confined to the aircraft and asked to disembark. In addition, passengers testified about the deteriorating conditions in the aircraft, including high temperatures, limited ventilation, limited air conditioning, poor lighting, and passengers becoming physically ill. Finally, numerous passengers stated that Air Transat did not provide timely or accurate information regarding the delay.

Procedural Background

Show Cause

[20] On August 2, 2017, the Agency issued Decision No. LET-A-47-2017 providing Air Transat with the opportunity to show cause why the Agency should not find that Air Transat did not properly apply the terms and conditions set out in its Tariff, as required by subsection 110(4) of the ATR (Air Transportation Regulations). Decision No. LET-A-47-2017 states that complaints filed with the Agency by individual passengers regarding the incidents would be addressed through this proceeding.

Air Transat’s Response to Show Cause

[21] On August 4, 2017, Air Transat responded to Decision No. LET-A-47-2017. Air Transat provided a chronology of the events of July 31, 2017 and stated that “there were a number of parties involved in this matter whose actions had a direct impact on the management of the unfolding events.”

[22] Air Transat argued that its ability to manage the events was affected by a “confluence of factors beyond its control” which “led directly to the inability to minimize the weather-related diversion delays of the affected flights, deplane passengers safely from stranded aircraft and provide minimal levels of comfort to [its] passengers onboard.”

[23] Air Transat added that the requirements of the Tariff had been satisfied, arguing that its “crews exercised their duties and satisfied the requirements…to the fullest extent that was physically and reasonably possible and in the interests of passenger safety and comfort.”

Oral Hearing and Appointment of Inquiry Officer

[24] After reviewing Air Transat's response to Decision No. LET-A-47-2017, and given that the Agency had received complaints, the Agency issued Decision No. LET-A-49-2017 on August 9, 2017, pursuant to section 37 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), indicating that it would convene an oral hearing in order to better understand Air Transat's actions and the "confluence of factors" that the carrier asserted had caused the events in question.

[25] The scope of the oral hearing was limited to investigating the tarmac delays experienced by passengers of Air Transat Flight Nos. 157 and 507 on July 31, 2017. The Agency considered two issues in this proceeding:

- Did Air Transat properly apply its Tariff during these incidents, pursuant to subsection 110(4) of the ATR (Air Transportation Regulations)?
- Are Air Transat's applicable Tariff provisions reasonable, pursuant to subsection 111(1) of the ATR (Air Transportation Regulations)?

[26] To provide for an efficient hearing, the Agency appointed an Inquiry Officer, Jean-Michel Gagnon, an employee of the Agency and an enforcement officer designated as such pursuant to subsection 178(1)(a) of the CTA, to collect evidence and report his findings to the Agency, pursuant to subsection 38(1) of the CTA. The Inquiry Officer was authorized to exercise all powers described in section 39 of the CTA, including conducting onsite visits, interviewing witnesses and requiring the production of evidence.

Acceptance and Adoption of Inquiry Officer's Report

[27] On August 25, 2017, the Agency examined the Inquiry Officer's Report and, pursuant to subsection 38(2) of the CTA, adopted the Report. The Agency used the Report to inform the subsequent oral hearing and it forms part of this Determination. Additional detailed background information is appended to that Report.

Oral Hearing

[28] The oral hearing was held on August 30 and 31, 2017 in Ottawa. The Agency heard testimony from passengers of both Flight No. 157 and Flight No. 507, and from witnesses for Air Transat, the Ottawa International Airport Authority (OIAA), the Aircraft Service International Group (ASIG), First Air Operations, and the Airline Pilots Association (ALPA). After the oral hearing was completed, written submissions were received from Air Transat and passengers. The Agency also permitted OIAA, ASIG, First Air Operations, the Canadian Union of Public Employees and ALPA to provide written position statements; however, only OIAA and ALPA submitted such statements. All final written submissions were received by October 11, 2017.

The Law

[29] The statutory and Tariff extracts relevant to this matter are set out in Appendix A and Appendix B.

Preliminary Matter

[30] Air Transat's submissions and testimony raise a preliminary issue: whether Air Transat is absolved of its liability as a result of the Force Majeure provisions in its Tariff, which are found in Rules 5.3.1 and 21.5.

Positions of the Parties

Position of Air Transat

[31] Air Transat submits that the events of July 31, 2017 were the result of a confluence of factors beyond its control and comparable to a Force Majeure event. Consequently, pursuant to Rules 5.3.1 and 21.5 of its Tariff, Air Transat states that it cannot be held liable for any alleged failure to perform the obligations outlined in its Tariff, including the obligations outlined in Rules 5.2d) and 21.3c).

[32] Air Transat states that Flight Nos. 157 and 507 were diverted to the Ottawa Airport as a result of poor weather conditions that caused the temporary closure of two major airports. It further states that these events could not have been reasonably predicted.

[33] Air Transat adds that the duration of the delays is attributable to the presence of an exceptionally high number of wide-body aircraft that had been diverted to the Ottawa Airport during peak hours, the positioning of aircraft, the non-availability of fuel, a shortage of labour and equipment failure.

[34] Air Transat submits that these factors are specifically addressed in Rule 5.3.1 of its Tariff.

[35] In addition, Air Transat points out that pursuant to Rule 21.5 of its Tariff, it cannot be held responsible for the impacts of inclement weather or actions of third parties, including the OIAA, NAV CANADA, First Air Operations and ASIG.

[36] Air Transat submits that the third parties over which it had no control were also dealing with a chaotic, exceptional and unusual situation comparable to a Force Majeure event. In this respect, Air Transat stresses that in addition to the 20 commercial flights that were diverted during peak hours, regular operations at the Ottawa Airport had to accommodate 44 arrivals and departures of aircraft carrying over 4,000 passengers. In addition, the OIAA had to deal with the unexpected presence of an Emirates Airline Airbus A-380. Air Transat states that the Ottawa Airport did not have adequate infrastructure to accommodate such an aircraft and had to deploy considerable efforts to ensure its quick departure. According to Air Transat, the presence of the Airbus A-380 caused additional delays as it slowed down and complicated positioning operations and delayed service delivery to other aircraft.

[37] Air Transat points out that in all airports around the world, the fueling order for aircraft during a diversion is usually on a first-come, first-served basis, depending on the positioning of the aircraft. Air Transat submits that the usual first-come, first-served basis was not used, as the OIAA intervened directly in order to prioritize the refueling of some aircraft, including the Emirates Airline Airbus A-380, an Air Canada aircraft and a KLM aircraft. According to Air Transat, the OIAA proceeded in this manner to avoid the expiration of the maximum hours on duty of personnel, which would have

resulted in a massive disembarking of passengers. Air Transat submits that the OIAA's decisions regarding the positioning of aircraft had a significant impact on the waiting period on the ground.

[38] Air Transat submits that the testimonies of the OIAA representatives indicate that disembarking the passengers of the diverted aircraft would have put untenable pressure on the space and operational capacity of the Ottawa Airport. Consequently, it was imperative for the OIAA to avoid the expiration of the maximum hours on duty of various crews, which would have led to the disembarking of over 6,000 passengers, 5,000 of which originated from international destinations.

[39] According to Air Transat, the movement to the area next to Hangar 14 took place in a disorganized manner and lasted 22 minutes. Air Transat submits that the commanders initially received instructions to move and then were ordered to stop to allow the Emirates Airbus A-380 to take off. According to Air Transat, that caused unnecessary consumption of fuel and had a noticeable impact on the aircraft operating Flight No. 157.

[40] Air Transat submits that once the aircraft was parked near Hangar 14, the commanders were told every 30 minutes that they would be refueled shortly. Air Transat states that as a result, [translation] "considering, on the one hand, that they could be refueled at any time in the next 30 minutes, and, on the other hand, the considerable amount of time needed to disembark wide body aircraft with 250 passengers on board Flight No. TS507 and 340 passengers on board Flight No. TS157, the Air Transat commanders were never really able to plan to proceed with disembarking the passengers while waiting for the aircraft's departure."

[41] Air Transat adds that the commanders of Flight Nos. 157 and 507 were never informed, either by the OIAA or by First Air Operations, that the waiting period could be abnormally long. It submits that their decisions would have been different had they been informed.

[42] Air Transat submits that the Tariff provisions on which it is relying to conclude that it was a Force Majeure event list events that are generally qualified as Force Majeure events under civil law, common law and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention).

[43] As a result, Air Transat maintains that it is consistent with the principles of exemption of liability under civil law, common law and the Montreal Convention that it cannot be held liable for any alleged failure to perform its obligations in a Force Majeure situation.

[44] In any case, Air Transat submits that it correctly performed the obligations set out in its Tariff with respect to the incidents of July 31, 2017.

Position of the OIAA

[45] In its position statement, the OIAA describes "the complexity of a diversion event at an airport" in order to explain the roles and responsibilities of air carriers, airport authorities, service providers and other parties during irregular operations such as those that occurred on July 31, 2017.

[46] The OIAA states that air carriers have direct service contracts with service providers (i.e. ground handlers, aircraft catering and fuel providers, etc.) which specify the service standards required for

handling the aircraft, priority for fuelling, procedures and protocols during regular and irregular operations, and so on. The OIAA states that it is not responsible for passenger care, including the provision of drinks and snacks to passengers.

[47] The OIAA states that airports maintain “operating licenses” with air carriers to permit such companies to operate on airport property. The terms of these licences address safety, security, insurance, and liability in the event of damage to property or injury to persons. The OIAA indicates that these contracts do not cover service standards or any other specific matters required by airlines in handling aircraft, such as catering needs, fuelling protocols, or equipment requirements. Rather, air carriers enter into contracts with their chosen ground handlers to provide these services.

[48] The OIAA emphasizes that it is not involved in any way in the contract between air carriers and fuel service providers. It further explains that most commercial carriers, including Air Transat, use the same fuel consortium, which is owned and managed by airlines, to provide refuelling services.

[49] Finally, the OIAA states that it must always respect NAV CANADA’s decision to divert aircraft to the Ottawa Airport and work with NAV CANADA to facilitate aircraft landing. The OIAA further states that given the number of aircraft and space availability, it positions aircraft in the best way possible to meet carriers’ needs. Once an aircraft is safely on the ground at the airport, the responsibility lies with the carrier and its handlers to ensure proper passenger care while the aircraft is serviced.

[50] With respect to the events at the heart of this inquiry, the OIAA maintains that under the terms of Air Transat’s Tariff, the aircraft commander has sole control of the aircraft and therefore it is they who have sole discretion to make all decisions and make any requests necessary in order to properly manage the needs of their flight and passengers. Moreover, the OIAA argues that it is the aircraft commander who is aware of “the protocols for diversions, the contractual relationships with the airline’s service providers and the normal time frame in which an aircraft could be refuelled given the number of other diverted aircraft on the ground at the time of the event.” The OIAA further states that the aircraft commander would have knowledge that significant time may be required for refuelling given the aircraft’s position and that a request for priority refuelling should be made if required.

[51] The OIAA argues that the fundamental cause of the events of July 31, 2017 was a communication breakdown. Accordingly, it recommends that “air crews be obligated to provide precise and up to date information to passengers as events unfold.” In addition, the OIAA suggests that carriers often provide imprecise information, which leads passengers to believe that airport authorities are responsible for services such as marshalling, ground handling, catering, and fueling. The OIAA submits that passengers should be made aware of who is responsible for their care while on an aircraft and whether those who are servicing the aircraft are employed or contracted by the carrier. In this regard, the OIAA recommends that carriers and aircraft commanders be more transparent and precise in their communication with passengers.

[52] The OIAA further recommends that industry stakeholders such as airport authorities, NAV CANADA, and carriers coordinate to ensure that no one airport is unduly burdened in a diversion event. OIAA contends that, if possible, it would be preferable to divert aircraft across several airports in a coordinated manner rather than diverting aircraft to a single airport.

Analysis and Findings

[53] It is clear that the diversion of Flight Nos. 157 and 507 to the Ottawa Airport was caused by adverse weather conditions, the closure of the Montréal Airport and the Toronto Airport and the re-direction of the flights by NAV CANADA, and was not within the control of Air Transat.

[54] The Agency also recognizes that the extraordinary presence of 20 diverted aircraft in addition to the scheduled arrivals and departures placed considerable pressure on the operational capacity of the Ottawa Airport and ground handlers. Difficulties were experienced in refuelling the flights due to the positioning of the aircraft by the OIAA, the fact that the normal order of refuelling was not followed, and the unplanned presence of an Airbus A-380. It is not surprising that multiple flights, including Flight Nos. 157 and 507, experienced delays in these circumstances.

[55] There is no basis, however, for any argument that the carrier is not responsible for non-performance of its obligations when that failure is related to the acts of its agents, with which it has contracts to perform all or part of those very obligations. Air Transat is responsible for the actions of parties with which it has contracted for services, including First Air Operations, and if it faces liability for actions related to their failure to deliver contracted services, that is a civil matter between them. First Air Operations is in a contractual relationship with Air Transat for the purposes of performing ground handling services such as passenger handling and ramp services. The service contract between Air Transat and First Air Operations contains a number of service standards, including standards relating to the number of employees required to complete various tasks.

[56] That said, it is evident that the duration of the post-diversion tarmac delays experienced by the passengers of Flight Nos. 157 and 507 resulted from a variety of causes, some of which were not within Air Transat's control. Accordingly, the Agency finds that Air Transat cannot be found solely responsible for those delays.

[57] Given that Air Transat was not responsible for the diversions and not solely responsible for the length of the tarmac delays, the question is whether, as the carrier submits, this relieves it of the requirement to comply with Rules 5.2d) and 21.3c) of its Tariff; namely, the obligation, during the course of the delay, to "offer drinks and snacks if it is safe, practical, and timely to do so" and to "offer passengers the option of disembarking until it is time to depart if the delay exceeds 90 minutes and if the aircraft commander permits".

[58] In order for a Force Majeure situation to exempt a carrier from liability for non-performance of an obligation, it must have some connection to the non-performance of that obligation. This interpretation stems in part from the language of the Tariff itself: Rule 5.3.1 states that "… the Carrier shall not be held liable for failure in the performance of any of its obligations due to […]" and then lists the types of events that are considered Force Majeure under the Tariff. The words "due to" suggest that there must be some connection between the "failure in the performance" of a Tariff obligation and the Force Majeure event in question.

[59] Air Transat's Force Majeure provision may relieve it from liability where events beyond its control occur and prevent it from performing its obligations. However, providing drinks and snacks and considering whether or not to disembark were within its control. In addition, the tariff provisions

related to snacks and drinks and disembarking by their very nature apply and respond to passengers' needs during service disruptions, including Force Majeure events. Therefore, the Force Majeure provisions cannot be read to relieve the carrier of those very obligations.

[60] The Agency finds that the circumstances that caused the July 31, 2017 diversions and, to some degree, the length of the subsequent tarmac delays did not prevent Air Transat from being able to perform its obligations under Rules 5.2d) and 21.3c) of its Tariff.

[61] Further, the Agency finds that Rule 5.3.1 of the Tariff is overly broad and unreasonable because it includes events that have not been determined to constitute “Force Majeure”. This conclusion is consistent with a series of decisions rendered by the Agency regarding Porter Airline’s Force Majeure provisions (Decision No. 16-C-A-2013, Decision No. 344-C-A-2013, and Decision No. 31-C-A-2014). In these decisions, the Agency found that the Force Majeure provisions were unreasonable and inconsistent with the principles of the Montreal Convention. The provisions at issue in these decisions were very similar to Rule 5.3.1. Of particular note is the fact that the provision at issue in Decision No. 344-C-A-2013 relieved the carrier of liability for the non-performance of its obligations due to “others upon whom the Carrier relies for the performance of the whole or any part of any charter contract or flight.”

[62] In addition, Rule 5.3.1 constitutes a blanket exclusion of liability. The Agency finds that it is unreasonable as it relieves a carrier of liability for non-performance regardless of whether it took all reasonable measures to perform the obligations set out in its Tariff.

[63] For these reasons, the Agency finds that Rule 5.3.1 is unreasonable and does not balance the right of passengers to be subject to reasonable terms and conditions of carriage and Air Transat’s statutory, commercial and operational obligations.

Issues

[64] The Agency will now address the following issues:

1. Did Air Transat properly apply the terms and conditions set out in its Tariff, as required by subsection 110(4) of the ATR (Air Transportation Regulations):
    1. in respect of drinks and snacks?
    2. in respect of disembarking?
2. Are Air Transat’s applicable Tariff provisions reasonable, pursuant to subsection 111(1) of the ATR (Air Transportation Regulations)?

Did Air Transat properly apply the terms and conditions set out in its Tariff in respect of drinks and snacks?

Positions of the Parties

Positions of the Passengers – Flight No. 157

[65] Passengers state that they repeatedly requested food and water from flight crew, with little or no success.

[66] Passengers claim that the amount of water that they received during the water services that did take place was inadequate, with some stating that they did not receive any water at all. Passengers state that they assumed that no water remained on the aircraft. Brice de Schietere and Pascal de Decker indicate that approximately four hours into the delay an announcement was made by flight crew that there would be a distribution of the last of the soft drinks, coffee and fruit juice (which were not served) and that some snacks remained and would be distributed on a priority basis to the children on board. Most of the complainants state that the adults received no food. Some cite repeated requests to flight crew that food and water be served, requests that produced no results. Several passengers maintain that the flight crew said that “all food is sealed” (for customs purposes) and therefore could not be served. Maryanne Zehil maintains that panic was mounting on the flight due to the lack of supplies.

[67] Passengers state that they felt dehydrated, extremely hungry, and physically ill. One passenger, Lauren Straw, states that “our patience was running thin as we were dehydrated, starving and extremely confused.” Nathalie Vanderstappen complains that the following day “I felt sick and this was due to dehydration.”

[68] Passengers indicate that approximately four hours into the delay emergency services were called, and first responders distributed water bottles to all passengers.

Positions of the Passengers – Flight No. 507

[69] Passengers on Flight No. 507 testified that they only received half a glass of water during the tarmac delay, and that this only occurred several hours after the aircraft landed at the Ottawa Airport. They stated that they did not receive any food or snacks.

[70] Chris Couture indicates that after approximately three hours, passengers began asking for drinks and snacks and were told that Air Transat could not offer anything. He submits that some passengers began panicking and some vomited. He contends that it was at this point that passengers were offered a single glass of water each, and only because passengers demanded it. Mr. Couture also alleges that three Air Transat employees or friends of employees who were sitting directly in front of him were given various refreshments including beer, bottled wine, and salad.

[71] Mr. and Mrs. Abraham state that they received no food and maintain that flight attendants were hiding from their responsibilities at the back of the aircraft and were not interacting with passengers. Mrs. Abraham states that “as far as I am concerned, Air Transat should have contacted the airport and said, ‘We have all of these people onboard, can you bring them some sandwiches’ or something along those lines, or have food onboard that they can serve to people and make sure they have plenty of water.”

[72] Three pregnant passengers submit that Air Transat did not show concern or regard for their health or the particular needs that they may have as a result of pregnancy. Each states that she felt dehydrated as a result of not receiving adequate drinks.

[73] Ms. Tremblay, who was seated in Club Class, communicated to cabin crew that her 13-month old daughter needed food and potentially some milk. Ms. Tremblay states that the cabin crew informed her that they would only be able to provide powdered milk from outside the aircraft if her daughter was in danger. Ms. Tremblay submits that as a result of her persistence, her daughter was provided some yogurt and cheese during the delay. Ms. Tremblay also indicates that Club Class passengers received the remaining food on board.

[74] In response to Air Transat's submission, passengers state that no announcement was made that the remaining food and drinks were available on request, with Chris Couture stating that "It's a complete fabrication on the part of Air Transat". The passengers also express frustration that there were drinks and snacks remaining on board when the aircraft landed in Montréal.

Air Transat's Position in Respect of Both Flights

[75] Air Transat submits that it correctly performed the Tariff obligations related to the offer of drinks and snacks during a delay. Air Transat submits that it is clear from the evidence that it correctly performed its obligations by:

- Distributing drinks and snacks as soon as it was safe, practical and timely to do so;
- Offering all food available while prioritizing children;
- Completing water services and serving water as requested;
- Not exhausting the food or water supplies on either flight.

[76] Air Transat emphasizes that, although the food and water supplies on board were limited, they were not depleted. There were remaining drinks and snacks on board both flights upon returning to Montréal. Air Transat adds that given the repeated assurances that refueling would occur within 30 minutes, the flight directors did not believe that it was necessary to order additional food and water.

[77] In addition, Air Transat submits that the flight directors announced that water and snacks would be made available.

Air Transat's Position – Flight No. 157

[78] According to Air Transat, approximately 30 minutes after it landed at the Ottawa Airport, while the aircraft was still on secondary Runway 7, the flight director determined that it was safe, practical and timely to proceed with an initial water service. For safety reasons, a flight attendant had to stay close to every door because they were armed. The water service was carried out by hand.

[79] Air Transat submits that a second water service was carried out in the same manner sometime after the aircraft's arrival near Hangar 14.

[80] According to Air Transat, approximately one hour and 30 minutes after the aircraft's arrival near Hangar 14, the flight director retrieved the sealed food and juice that were still available. The available food and juice were offered in priority to children and families.

Air Transat's Position – Flight No. 507

[81] Air Transat states that the director of Flight No. 507 did not believe that it was safe, practical or timely to proceed with an initial water service when the aircraft was on taxiway “C.” The flight director based her decision on the following factors:

- The reserve water was at a level of 20% at the time;
- The passengers had received drinks and snacks approximately one hour and 30 minutes prior to landing at the Ottawa Airport; and,
- No passenger had requested water.

[82] According to Air Transat, once the aircraft was positioned near Hangar 14, the flight director played a film, lowered the lights in the cabin and completed a water service. The water service was carried out by hand for the safety reasons mentioned above.

[83] During the wait near Hangar 14, and following requests from passengers, the flight director asked that the remaining food be distributed with priority given to children. Air Transat stresses that it was impossible to offer food to everyone. The remaining food was therefore offered discretely to passengers who requested it.

Analysis and Findings

[84] Subsection 110(4) of the ATR (Air Transportation Regulations) requires that a carrier operating an international service apply the terms and conditions of carriage set out in its tariff.

[85] For issue 1(a), the applicable Tariff provisions are as follows:

- Rule 5.2d) provides that “If the delay occurs while onboard, the Carrier will offer drinks and snacks, where it is safe to do so.”
- Rule 21.3c) provides that “If the passenger is already on the aircraft when the delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so.”

[86] The evidence shows that the flight directors and flight attendants of both flights were unaware of the Tariff’s provisions, Captain Lussier was unfamiliar with the Tariff, and Captain Saint-Laurent was familiar with the Tariff but never received training on its application. Air Transat’s failure to ensure that its employees were aware of the content of the Tariff and were trained on its application contributed to the Tariff not being properly applied.

[87] The Agency accepts the testimony of passengers of both flights that they received minimal drinks and snacks, and far less than was appropriate, particularly given the length of the delay and the conditions in the aircraft.

[88] With respect to Flight No. 157, the evidence shows that the water provided in two services was insufficient, especially given the high temperature in the cabin, and that snacks were not provided or offered to all passengers, though a few who asked for a snack received one.

[89] On Flight No. 507, while water was provided while the aircraft was positioned at Hangar 14, the evidence shows that the quantities were inadequate. Although some snacks were offered to passengers in the Club Class section, this was not extended to all passengers.

[90] Air Transat's contention that no one asked for snacks or drinks despite announcements offering them is, on the evidence, questionable. In any event, the obligation set out in the Tariff is independent of passenger requests: it suggests proactive steps, stating that "the carrier will offer drinks and snacks".

[91] With respect to whether it was "safe, practical and timely to do so" – the wording of Rule 21.3c) – there is nothing in the evidence to show that the circumstances prevented Air Transat from offering more drinks and snacks than were in fact distributed. Air Transat submits that because of the location of the aircraft on the ground, flight crew had to position themselves at the exits to adhere to safety protocols. While safety is always paramount, reasonable approaches such as allocating different tasks among crew members could have allowed for passengers to be offered drinks and snacks without imperiling safety. In this regard, the Agency notes that flight crew of Flight No. 157 were able to serve water once when the aircraft was on Runway 7 and once when it was located near Hangar 14. This supports the conclusion that more water and food could have been offered without compromising safety.

[92] Air Transat confirms that both flights had food and drinks remaining at their final destination. Additionally, in her testimony, Carol Clark of First Air Operations stated that First Air Operations could have requested food such as donuts for Air Transat's flights, and that permission from CBSA (Canada Border Services Agency) to provide water would definitely have been granted. First Air Operations states that the only record of a water or food request from either of the flights was a request from Flight No. 157 at 9:25 p.m. for potable water. Therefore, there were drinks and snacks on both aircraft that could have been offered to passengers and there was an option of requesting additional supplies from Air Transat's ground handlers.

[93] Based on the foregoing, the Agency concludes that passengers on Flight Nos. 157 and 507 were either not offered snacks and drinks at all or not offered snacks and drinks to a reasonable degree, and that there were no safety or other mitigating factors (such as a scarcity of supplies) that would justify this failing. The Agency therefore finds that Air Transat failed to properly apply the terms and conditions set out in Rule 5.2d) and Rule 21.3c) of its Tariff on both flights in respect of offering drinks and snacks, and has contravened subsection 110(4) of the ATR (Air Transportation Regulations).

Did Air Transat properly apply the terms and conditions set out in its Tariff in respect of disembarking?

Positions of the Parties

Positions of the Passengers – Flight No. 157

[94] Passengers of Flight No. 157 vigorously complain that they were confined to the aircraft for almost six hours without the opportunity to disembark. They also provide information about the deteriorating conditions on the aircraft during the time they remained on board, including conditions related to heat, ventilation, lighting and poor communications. The situation on Flight No. 157 worsened to the point where passengers felt compelled to call emergency services (911) in order to

obtain relief and to draw attention to the passengers' plight.

[95] Passengers report that the very hot cabin temperatures prompted demands to disembark the aircraft, with some passengers shouting "Open the doors".

[96] Many passengers indicate that they made specific and repeated requests to flight crew to disembark the aircraft. Most passengers simply wanted a means to escape the conditions on the aircraft.

[97] Mr. de Schietere filed a submission with the Agency on behalf of the passengers of Flight No. 157. He claims that nothing in the evidence demonstrates that the pilot of Flight No. 157 could not access a gate at the Ottawa Airport or that buses could not have transported the passengers from Hangar 14 to the terminal. He adds that, in any event, the pilot did not make the request.

[98] Mr. de Shietere submits that the majority of passengers on a commercial flight would find it perfectly acceptable, given the circumstances, not to disembark immediately upon the expiry of 90 minutes. However, given the promise set out in the Tariff, their expectation is that once 90 minutes have passed, the aircraft commander would do all that was possible to allow disembarking in adequate and safe conditions. This is particularly the case when the aircraft has no functioning air conditioning.

Positions of the Passengers – Flight No. 507

[99] Passengers of Flight No. 507 complain that they were confined to the aircraft for almost five hours without the opportunity to disembark. Passengers of Flight No. 507 echo many of the same claims as the passengers of Flight No. 157.

[100] Some passengers indicate that they made specific requests to flight crew to disembark the aircraft. Mr. and Mrs. Abraham state that they asked a flight attendant about the possibility of disembarking well over 90 minutes into the delay and overheard another passenger make a similar request. The Abrahams maintain that the flight attendant advised that "customs will NOT allow it". They testified that to the best of their knowledge, these requests were not communicated to the aircraft commander.

[101] The Abrahams add that the air conditioning on Flight No. 507 was working properly but was set at approximately 24 degrees. They report that the temperature in the cabin was so hot that passengers were becoming ill and some started to vomit due to the air quality and heat. The Abrahams state that "the stench in the plane was unbearable. One young boy running to the bathroom didn't make it and vomited all over a number of passengers two rows behind us".

[102] Ms. Tremblay also testified that she asked on several occasions about the option of disembarking. Ms. Tremblay was concerned about her young daughter because she did not have enough food supplies and as a result, she wanted to be able to disembark and to rent a car or take a train back to Montréal. She indicates that the delay was too long for her daughter, who absolutely needed to eat. Ms. Tremblay maintains that the crew advised that it would not be possible to leave the aircraft because they did not have the equipment required for disembarking via stairs and there was not a gate available at the Ottawa Airport for their flight.

[103] During her testimony, Ms. Tremblay also stated that she heard other passengers ask to disembark and that they were told by the cabin crew that it was impossible. When asked whether, to her knowledge, those demands were communicated to the aircraft commander, Ms. Tremblay stated that, in her honest opinion, [translation] “the answer is definitely yes, because cabin crew members were in constant communication with the commander.”

[104] Mazen El Bawab states that “it seems to me that this is a game of pointing fingers.” Mr. El Bawab concedes that he understands that the commanders may be outstanding pilots, but it is clear to him that some mistakes were made. He states that “the moment the commanders were told, for the second or third time, that the delays for re-fueling will exceed 30 to 45 minutes, it would be common sense for such leaders to start looking into a Plan B course of action (for example allowing supplies to come into the aircraft)”. This was clearly not the case. Mr. El Bawab points out that a four-hour period contains eight sequences of 30 minutes, therefore the commanders were informed at least six or seven times of potential delays. He suggests that “by the third 30 minutes period, a Plan B should have been in motion already.”

Air Transat’s Position

[105] Air Transat submits that it correctly performed the obligations respecting disembarking set out in its Tariff by transporting its passengers to their final destination and by not offering passengers the option of disembarking, based on the reasonable judgment of its commanders.

[106] Air Transat states that the commanders’ decision to not offer the passengers the option of disembarking after 90 minutes is provided for in the Tariff and meets the criterion of a reasonable commander under the same circumstances. In this regard, Air Transat emphasizes that disembarking would have made departure to the final destination impossible given the restrictions imposed on the maximum hours on duty for in-flight personnel and the fact that disembarking would have resulted in a complete customs clearance. Air Transat submits that [translation] “the commanders’ decision was intended to allow the passengers to depart for their final destination” and that “ensuring that the passengers arrived at their final destination remained the commanders’ main concern.”

[107] In addition, Air Transat submits that the reasonableness of the commanders’ decision must be considered in terms of the information available at the time the decision was made. According to Air Transat, it is clear from the evidence that the information available indicated that fueling would take place within 30 minute intervals. Air Transat stresses that the commanders clearly testified that they would have proceeded with disembarking if they had been informed ahead of time of the delay that they would eventually experience. In addition, two other commanders confirmed that they would have made the same decision under the same circumstances.

[108] Finally, Air Transat emphasizes that none of the 20 aircraft diverted to the Ottawa Airport had their passengers disembark. It adds that, given the brief deadline, it would have been difficult, or even impossible, to reserve hotel rooms for over 500 passengers and/or rent buses to transport all of these passengers to Montréal.

[109] In short, Air Transat submits that the commanders [translation] “were never really in a position to seriously consider proceeding with disembarking while waiting for the aircraft to depart” considering

the information that was communicated to them and the consequences of disembarking.

Position of ALPA

[110] ALPA's submission focuses on the obligation of the Air Transat aircraft commanders to comply with the Tariff. Accordingly, ALPA addresses the reasonableness of the exercise of discretion by the two commanders, Commander Yves Saint-Laurent (Flight No. 507) and Commander Denis Lussier (Flight No. 157) in not providing passengers with the option of disembarking when the delays exceeded 90 minutes. It also touches on the deference that should be afforded those commanders in the exercise of that discretion.

[111] ALPA maintains that the two aircraft commanders made the correct decision in not offering their passengers the option to disembark given the information that they were provided by First Air Operations, ASIG, and the OIAA. It argues that the conveyance of improper or inaccurate information by the former parties essentially exacerbated the situation faced by the Air Transat passengers of the flights in question.

[112] ALPA indicates that had the aircraft commanders of the two flights known from the outset that the tarmac delays at the Ottawa Airport would be as long as they were on July 31, 2017, they would have taken measures to allow their respective passengers the option to disembark. ALPA argues that Air Transat's ground handler, First Air Operations, the refuelling contractor ASIG, and the OIAA should have informed the Air Transat aircraft commanders in advance that the tarmac delays at the Ottawa Airport could possibly exceed 90 minutes. With this information, the aircraft commanders would have been in a position to make informed decisions as to whether it was advisable to permit such a delay without affording passengers the option of disembarking.

[113] ALPA reiterates the August 31 testimony of the two aircraft commanders who stated that they repeatedly inquired (at 30 minute intervals) as to how long it would be before their respective aircraft would be refuelled, and that they were repeatedly told that fuel would arrive within 30 to 45 minutes. Further, ALPA states the two aircraft commanders considered whether it would even be feasible for their passengers to disembark given that their aircraft were surrounded by other aircraft and unable to move, and determined that even if the aircraft could move, "there would have been a lengthy delay of approximately five to six hours because of the need for passengers to go through customs and the need to charter buses for the passengers, as the pilots would have exceeded their maximum hours on duty that is permitted by law."

[114] ALPA submits that the Air Transat aircraft commanders made the correct decision to not afford their passengers the option to disembark their aircraft. ALPA places fault on First Air Operations for not giving them a clear idea of the total length of delay when they landed; ASIG, the refuelling contractor upon whom First Air Operations relied; and the OIAA in not advising the commanders of the extent of the situation.

Analysis and Findings

[115] With respect to issue 1(b), the applicable Tariff provisions are Rule 5.2(d) and Rule 21(3)(c),

which state as follows:

> If the delay exceeds 90 minutes and if the aircraft commander permits, the Carrier will offer passengers the option of disembarking until it is time to depart.

[116] The Agency finds that the most reasonable interpretation of this provision is that the aircraft commander will consider whether to permit disembarking when a delay exceeds 90 minutes. Air Transat and ALPA correctly noted that these provisions grant Air Transat's aircraft commanders broad discretion to determine whether or not to permit disembarking. However, broad discretion cannot equate ignorance or inaction. Discretion to decide requires that the individual be aware that they have the discretion and that the individual actually exercise it. While proper application of the Tariff does not require that permission to disembark be granted, it does require that the option be weighed, taking into account relevant considerations such as the expected timing of refuelling and conditions on the aircraft. If the aircraft commanders do not realize that they have a choice to make or they never actually make it, the very logic of the provision – offering disembarking with the commander's permission - is negated. There is no evidence on record that either aircraft commander actively considered disembarking in accordance with the Tariff.

[117] Commander Lussier stated that he was unfamiliar with Air Transat's Tariff and Commander Saint-Laurent submitted that he was somewhat familiar with the Tariff, but it was clear that his understanding of the onboard delay provision was not accurate. Neither commander received training from Air Transat on the Tariff's application.

[118] The aircraft commanders indicated that had they known that the delays would have lasted as long as they did, they would have considered disembarking. The Agency finds the aircraft commanders' reliance on repeated 30-minute time estimates for refuelling to be unreasonable. The fact that these estimates were provided multiple times, combined with the fact that the commanders could see that multiple aircraft were simultaneously waiting for refuelling, should have led them to conclude at some point that refuelling would take longer than originally anticipated and to actively consider disembarking.

[119] The evidence shows that while disembarking would have been impossible, or feasible only with extraordinary authorizations, on Runway 7 and Taxiway C, it could have occurred subsequently, including while the aircraft were parked at Hangar 14. The OIAA stated that gates were available and customs were able to process one or more flights. However, nothing in the record indicates that there was any attempt on the part of the aircraft commanders to explore disembarking options with the OIAA, CBSA (Canada Border Services Agency), ground handlers, or Air Transat's own Operations Centre in Montréal.

[120] Air Transat correctly submitted that, in the event of an involuntary re-routing of a flight, the Tariff does require the air carrier to ensure that the passengers are brought to their ultimate destination. However, as per Rule 5.2(e), it does not require that this obligation be satisfied in one specific way. The air carrier can ensure that the passengers reach their destination on the same flight, another flight by another commercial carrier or by other modes of transportation, or by terminating the flight

and providing a refund to the passengers.

[121] Although disembarking would have significantly delayed the passengers' arrival at their destination, the conditions on the flights also needed to be taken into account when considering whether or not to disembark. Passengers' accounts, as described above and in the Inquiry Officer's Report, show that those conditions were poor. For Flight No. 157, these accounts are corroborated by the flight report prepared by the flight director, Igor Mazalica, which states that the situation on board reached the point where it was "close to a riot breaking out". Mr. Mazalica downplayed the difficulties experienced by the passengers in subsequent testimony before the Agency, but that testimony lacks credibility, given that it was marked by internal inconsistencies and the fact that the flight report was prepared immediately following the events in question.

[122] In light of the foregoing, the Agency finds that Air Transat failed to properly apply the terms and conditions set out in Rules 5.2(d) and Rule 21(3)(c) of its Tariff on both flights in respect of disembarking, and has contravened subsection 110(4) of the ATR (Air Transportation Regulations).

Are Air Transat's applicable tariff provisions reasonable?

Positions of the Parties

Positions of the Passengers

[123] Passengers made limited submissions directly addressing the reasonableness of Rules 5.2d) and 21.3c) of the Tariff.

[124] Some passengers argue that it was not reasonable for the aircraft commander to have absolute discretion and that factors beyond financial cost should be taken into account when considering whether to disembark. Some passengers state that they were surprised that no other entities had the authority to compel the aircraft commander to allow passengers to disembark. For example, Isabelle Archambault, a passenger on Flight No. 157 stated the following:

> [translation]
>
> To my amazement, no one seemed to have the authority to order the aircraft commander to allow us to leave. As stated above, the response from the police officer, firefighters and airport personnel was to systematically deny any responsibility, exclusively deferring responsibility to the aircraft commander. The same response was found in certain public statements made following the incident… We were true hostages with minimal humanitarian visitation and under the sole authority of the airline and its subordinate, the aircraft commander.

[125] Passengers' negative comments regarding conditions in the aircraft during the tarmac delays suggest that they may be of the view that Rules 5.2d) and 21.3c) are unreasonable to the extent that they do not address passengers' needs beyond drinks and snacks.

[126] Passengers state that lavatories were not consistently functional and that not all lavatories had sufficient supplies to ensure adequate comfort and hygiene. In addition, passengers of both flights submitted that they endured very high temperatures and poor ventilation in the aircraft.

[127] Numerous passengers also expressed concerns about the lack of information provided by Air Transat to its passengers and the limited accuracy of that information. These passengers stated that there was very limited communication with passengers by the flight crews and the aircraft commanders about the events. When asked during the hearing what recommendations she would make for improvements to communication, Mrs Tremblay replied as follows:

> [translation]
>
> […] it is not right to give us information that makes no sense at all. It is impossible that the commander is able to assess that it takes 45 minutes to refuel, while everyone in the aircraft who works for Air Transat says that it's not true that it will be 45 minutes, rather it will be two hours. I would rather get the truth from the beginning and be correctly informed of the situation.

[128] Finally, the Agency notes that some passengers submitted that the Tariff is unreasonable precisely because crew members are unaware of its content and/or of its existence.

Air Transat's Position

[129] Air Transat states that its Tariff is reasonable and that it establishes a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and its statutory, commercial and operational obligations. Air Transat does not, however, make specific submissions with respect to the reasonableness of the Tariff obligations respecting the offering of drinks and snack during a delay.

[130] Air Transat submits that the Tariff provisions that give the aircraft commander the discretion to determine whether they will allow passengers to disembark after 90 minutes are reasonable on the basis that the aircraft commander is in the best position to:

- Assess the risks that passengers could face during disembarking depending on the positioning of the aircraft; and,
- Determine whether the flight can be completed and arrive at its final destination in a timely manner given the information provided to them by the various interveners on the ground, the restrictions imposed on the maximum number of hours on duty and other relevant factors.

[131] According to Air Transat, the Tariff allows its commanders to exercise their reasonable judgment to assess the option of disembarking according to relevant factors such as: the safety of passengers, the availability of fuel, the timeframe in which they expect to be refueled, the location of the aircraft, the customs clearance delays and the possibility of eventually reaching the final destination.

[132] Air Transat submits that reasonable terms and conditions of carriage for passengers are in part achieved through the exercise of reasonable judgment by the aircraft commander. It adds that a contextualized reading of the Tariff requires the recognition of the important status of aircraft commanders under Canadian law: the aircraft commander has full charge and authority on the aircraft and has all the power of a peace officer on board, including the authority to arrest people. Air Transat submits that [translation] “it is completely reasonable to defer decision making in an aircraft to a person who has been given such authority by the law.”

[133] Air Transat adds that the aircraft commander’s discretion is “absolutely necessary” in order to give full meaning to Rules 5.2d) and 21.3c) of the Tariff. According to Air Transat, these Tariff provisions do not cover the possibility of the aircraft not having access to a gate when the 90-minute deadline expires. As a result, an application not based on the discretion of the aircraft commander would only be possible in cases where the aircraft is situated at, or has immediate access to, a boarding gate. In this respect, Air Transat stresses that one of its competitors’ tariffs specifies that the option of disembarking after 90 minutes will be offered if the aircraft is located at a gate.

[134] Finally, Air Transat argues that certain tariff provisions, including Rules 5 and 21, were adopted as a result of a “compromise” with Parliament promoted by certain Canadian carriers. Air Transat stresses that Bill C-310, tabled in the House of Commons by Jim Maloway in 2009, would have imposed significant obligations in the event of delays that lasted over one hour. As a compromise, several airlines incorporated into their respective tariffs certain provisions related to service in the event of the delay found in the Code of Conduct of Canada’s Airlines. Following this integration and the recommendation of the Standing Committee on Transport, Infrastructure and Communities, the House of Commons then ended its review of Bill C-310. Air Transat thus argues that the inclusion of Rules 5.2d) and 21.3c) in the Tariff resulted from a compromise that was found to be “reasonable” by Parliament.

Analysis and Findings

[135] In assessing whether a term or condition of carriage is reasonable as required by section 111 of the ATR (Air Transportation Regulations), the Agency has traditionally applied a balancing test. This test requires that the right of a passenger to be subject to reasonable terms and conditions of carriage be balanced with the particular carrier’s statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*).

[136] Under the current law, the terms and conditions of carriage are determined by the air carrier without any requirement to receive input from passengers, the Agency, or any other party. There is no presumption, one way or the other, regarding the reasonableness of a tariff. The Agency may rule on the reasonableness of tariff provisions upon complaint or, for tariffs covering international flights, on its own motion.

Reasonableness of the Tariff Provisions Addressing Drinks and Snacks

[137] Rules 5.2d) and 21.3c) of the Tariff provide that if passengers are on board the aircraft when a delay occurs, the carrier will offer drinks and snacks “if it is safe, practical and timely to do so.” The

Agency finds that these Tariff provisions strike an appropriate balance between the right of passengers to be subject to reasonable terms and conditions of carriage and the carrier's statutory, commercial and operational obligations, and are accordingly reasonable.

Reasonableness of the Tariff Provisions Addressing Disembarking

[138] Rules 5.2d) and 21.3c) state that the carrier will offer the passengers the option of disembarking until it is time to depart if the delay exceeds 90 minutes and the aircraft commander permits.

[139] The Agency finds that it is reasonable for the aircraft commander to have the broad discretion provided for by this provision at and for some time after the 90-minute mark, provided that this discretion is properly exercised, as described under issue 1(b) above.

[140] However, the Agency finds that it is unreasonable for the commander's discretion to remain so broad for an indefinite period of time. Generally, the length of a tarmac delay and the difficulties experienced by passengers will correlate and so, to respect the passengers' right to reasonable terms and conditions of carriage, the onus must eventually shift towards a stronger, less discretionary obligation to disembark passengers. At that point, the only restrictions on a positive obligation to disembark should be related to safety, security, and air traffic control.

[141] In this regard, the Agency notes that the United States of America has recognized that aircraft commanders should not have absolute discretion in the context of extended tarmac delays and has adopted a prescriptive regulatory framework that directs the actions of carriers. This means that carriers operating to, from, and within the United States of America – including Air Transat – must establish tarmac delay contingency plans. Air Transat's contingency plan addresses issues including, but not limited to, disembarking, communication with passengers, food and drinks, and measures that address passengers' other needs such as restroom facilities and medical care. It can be found in Appendix C.

[142] The Agency further finds that Rules 5.2d) and 21.3c) are unreasonable in that they do not take into account passengers' needs, beyond snacks and drinks, in the context of extended delays.

Corrective Measures and Orders

[143] Air travel is a complex system that relies on multiple parties and regulatory frameworks. The events of July 31, 2017 at the Ottawa Airport further underscore the need for all the parties involved in commercial air travel to establish strong partnerships, lines of communication, and accountabilities to address the common interests and needs of passengers. While the Agency does not have the authority to order that air carriers, airport authorities, ground handlers, NAV CANADA, CBSA (Canada Border Services Agency), and others in the air travel supply chain to work together to create contingency plans for irregular operations such as those that occurred on July 31, 2017 in Ottawa, it strongly encourages them to do so.

[144] Notwithstanding the fact that the diversion of Flight Nos. 157 and 507 was beyond Air Transat's control and the length of the subsequent tarmac delays was partly out of its control, the Agency has found, on the evidence, that the carrier failed to properly apply those provisions of its Tariff that set

out its obligations in the event of such a delay.

[145] Paragraphs 113.1 (a) and (b) of the ATR (Air Transportation Regulations) provide that if an air carrier fails to properly apply its tariff, the Agency may direct it to take the corrective measures that the Agency considers appropriate and pay compensation for any expense incurred by any person adversely affected by that failure. The Agency does not have the statutory authority to award compensation for the inconvenience that passengers experienced (though such compensation may be payable under European Union rules applicable to Flight Nos. 157 and 507), nor for pain and suffering.

[146] Based on the Agency's finding that Air Transat did not properly apply Rules 5.2d) and 21.3c) of its Tariff, the Agency orders Air Transat to compensate all passengers of Flight Nos. 157 and 507 for out-of-pocket expenses incurred as a consequence of failure to properly apply its Tariff. Air Transat is to pay any out of pocket expenses incurred by the passengers as soon as possible, and no later than May 24, 2018.

[147] Based on the evidence that the employees and agents of Air Transat are not properly informed of the carrier's obligations as set out in its Tariff, and the likelihood that this contributed to the failure to properly apply the Tariff, the Agency orders Air Transat to ensure that proper training is provided to all Air Transat employees, including aircraft commanders, flight crew, operations staff, and any servant or agent engaged in delivering services during onboard delays so that they have knowledge of applicable Tariff provisions, policies, and procedures. Such training should emphasize that these provisions and policies are legal obligations that Air Transat is bound to respect. Air Transat is to provide information on the required training, once it has been developed and delivered, and no later than May 24, 2018.

[148] Based on the Agency's finding that elements of Rules 5.2d) and 21.3c) of the Tariff are unreasonable, the Agency orders Air Transat to revise these Rules and all corresponding rules of its other international tariffs (Canadian General Rules Tariff No. CGR-1, NTA (National Transportation Agency)(A) 241 applicable to the transportation of passengers and baggage between points in the United States/Virgin Islands/Puerto Rico and Canada and International Charter Tariff CTA(A) 5) so that the existing text in respect of food and water distribution and disembarking with the commander's permission after 90 minutes is supplemented with the terms and conditions that incorporate the provisions of Air Transat's Contingency Plan for Lengthy Tarmac Delays at US Airports (Revised April 2016). Those terms and conditions create a positive obligation to disembark passengers if a tarmac delay reaches four hours – unless there are safety, security, or air traffic control issues that prevent it – and require that during the delay, the carrier provide passengers with updates every 30 minutes, working lavatories, and medical assistance if needed. These amendments are to be filed with the Agency as soon as possible, and no later than February 27, 2018.

[149] Finally, based on the Agency's finding that Rule 5.3.1 of the Tariff is unreasonable, the Agency orders Air Transat to revise Rule 5.3.1 and all corresponding rules of its other international tariffs (Canadian General Rules Tariff No. CGR-1, NTA (National Transportation Agency)(A) 241 applicable to the transportation of passengers and baggage between points in the United States/Virgin Islands/Puerto Rico and Canada and International Charter Tariff CTA(A) 5) to reflect the definition of

Force Majeure found in the Agency's sample tariff for domestic and international scheduled flights. These amendments are to be filed with the Agency as soon as possible, and no later than February 27, 2018.

[150] This Determination provides a resolution to all complaints made by passengers in respect of Flight Nos. 157 and 507 that have been filed with the Agency pursuant to subsection 110(4) and section 111 of the ATR (Air Transportation Regulations).

Appendix A: *Air Transportation Regulations*, SOR/88-58, as amended

110 (4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

111 (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

a. take the corrective measures that the Agency considers appropriate; and
b. pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

Appendix B: Air Transat's International Passenger Rules and Fares Tariff CTA(A) No. 4

5.2 Responsibility for schedules and operations (Subject to Rule 21):

a. The Carrier will endeavor to transport passengers and baggage with reasonable dispatch. Times shown in schedules, scheduled contracts, tickets, air waybills or elsewhere are not guaranteed. Flight schedules are subject to change without notice. Notwithstanding, the Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reason for the delay or change.
b. Where a routing modification subsequent to the purchase of travel results in a change from a direct service to a connecting service, the Carrier will, upon request by the passenger, provide a full refund of the unused portion of the fare paid.

c. Without limiting the generality of the foregoing, the Carrier cannot guarantee that a passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier. Notwithstanding, if the baggage does not arrive on the same flight, the Carrier will take steps to deliver the baggage to the passenger's residence/hotel as soon as possible. The Carrier will take steps to inform the passenger on the status of delivery and will provide the passenger with an overnight kit, as required.
d. If a flight is delayed for/advanced by more than four (4) hours in comparison to the originally scheduled departure time, the Carrier will provide the passenger with a meal voucher. If the flight is delayed for/advanced by more than eight (8) hours and requires an overnight stay, the Carrier will pay for an overnight hotel stay and airport transfers for passengers who did not originate their travel at that airport. If the delay occurs while onboard, the Carrier will offer drinks and snacks, where it is safe to do so. If the delay exceeds 90 minutes and if the aircraft commander permits, the Carrier will offer passengers the option of disembarking until it is time to depart.

5.3 Force Majeure

5.3.1 Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:

a. Act of God.
b. War, revolution, insurrection, riot, blockade or any other unlawful act against public order or authority including an act of terrorism involving the use or release or threat thereof, of any nuclear weapon or device or chemical or biological agent.
c. Strike, lock-out, labour dispute, or other industrial disturbance whether involving the Carrier's employees or others upon whom the Carrier relies.
d. Fire, flood, explosion, earthquake, adverse weather conditions, storm/lightening, infectious disease outbreak, epidemic, pandemic, public health emergency and quarantine.
e. Accidents to or failure of the aircraft or equipment used in connection therewith.
f. Non-availability of fuel at the airport of origin, destination or enroute stop.
g. Others upon whom the Carrier relies for the performance of the whole or any part of any scheduled contract or flight.
h. Government order, regulation, action or inaction.
i. Unless caused by its negligence, any difference in weight or quantity of cargo from shrinkage, leakage or evaporation.
j. The nature of the cargo or any defect in the cargo or any characteristic or inherent vice therein.
k. Violation by a consignor, consignee or any other party claiming an interest in the cargo of any of the terms and conditions contained in this tariff or in any other applicable tariff including, but without being limited to, failure to observe any of the terms and conditions relating to cargo not acceptable for transportation or cargo acceptable only under certain conditions.
l. Improper or insufficient packing, securing, marking or addressing.
m. Acts or omissions of warehouseman, customs or quarantine officials or other persons other than the Carrier or its agents, in gaining lawful possession of the cargo.
n. Compliance with delivery instructions from the consignor or consignee.

o. Any other causes beyond the reasonable control of the Carrier.
p. Failure to obtain the approval of government agency, commission, board or other tribunal having jurisdiction in the circumstances as may be required to the conduct of operations hereunder or any government or legal restraint upon such operation.
q. Loss of or hijacking of aircraft, or any shortage of or inability to provide labour, fuel or facilities.
r. Any other event not reasonably to be foreseen, anticipated or predicted, whether actual, threatened or reported, which may interfere with the operations of the Carrier.

5.3.2 Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the Carrier shall refund the unused portion of the flight and shall use its best efforts to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper

Rule 21 – ADDITIONAL PASSENGER SERVICE COMMITMENTS

1. Given that passengers have a right to information on flight times and schedule changes, the Carrier will make reasonable efforts to inform passengers of delays and schedule changes and to the extent possible, the reason for the delay or change.
2. (C)(i) Given that passengers have a right to take the flight they paid for, if the passenger's journey is interrupted by a flight cancellation, overbooking or in the event that the originally scheduled departure time is advanced, the Carrier will take into account all the circumstances of the case as known to it and will provide the passenger with the option of accepting one or more of the following remedial choices:
    a. transportation to the passenger's intended destination within a reasonable time at no additional cost;
    b. return transportation to the passenger's point of origin within a reasonable time at no additional cost;
    c. where no reasonable transportation option is available and upon surrendering of the unused portion of the ticket, a cash amount or travel credit (at the passenger's discretion) in an amount equal to the fare and charges paid will be refunded or provided as a credit where no portion of the ticket has been used. Where a portion of the ticket has been used, an amount equal to the lowest comparable one-way fare for the class of service paid for shall be refunded or provided as a credit in the event of a one-way booking/itinerary, and for round-trip, circle trip or open jaw bookings/itineraries, an amount equal to fifty percent of the round-trip fare and charges for the class of service paid for, for the unused flight segment(s), shall be refunded or provided as a credit.

    (ii) When determining the transportation service to be offered, the Carrier will consider:

    a. available transportation services, including services offered by interline, code sharing and other affiliated partners and, if necessary, other non-affiliated carriers;
    b. the circumstances of the passenger, as known to it, including any factors which impact upon the importance of timely arrival at destination.

    (C)(iii) Having taken all the known circumstances into consideration, the Carrier will take all measures that can reasonably be required to avoid or mitigate the damages caused by the

overbooking, cancellation or flight departure time advancement. Where a passenger who accepts option (a) or option (b) or option (c) nevertheless incurs expense as a result of the overbooking, cancellation or flight departure time advancement, the Carrier will in addition offer a cash payment or travel credit, the choice of which will be at the passenger's discretion.
(C)(iv) When determining the amount of the offered cash payment or travel credit, the Carrier will consider all circumstances of the case, including any expenses which the passenger, acting reasonably, may have incurred as a result of the overbooking, cancellation or flight departure time advancement, as for example, costs incurred for accommodation, meals or additional transportation. The Carrier will set the amount of compensation offered with a view to reimbursing the passenger for all such reasonable expenses.
[…]

3. (C)Given that passengers have a right to punctuality, the Carrier will do the following:
    a. If a flight is delayed/advanced and the difference between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the Carrier will provide the passenger with a meal voucher;
    b. If a flight is delayed/advanced by more than 8 hours and the delay/advancement involves an overnight stay, the Carrier will pay for an overnight hotel stay and airport transfers for passengers who did not start their travel at that airport;
    c. If the passenger is already on the aircraft when a delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and the aircraft commander permits, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart.

[…]

5. Given that nothing in this tariff would make the Carrier responsible for acts of force majeure per Rule 5.3 or for the acts of third parties that are not deemed servants and/or agents of the Carrier per applicable law or international conventions, the Carrier will not be held responsible for inclement weather or for the actions of such third parties including governments, air traffic control service providers, airport authorities, security and law enforcement agencies, or border control management authorities.
6. In the event of a conflict between the provisions of this Rule and those of any other rule in this tariff, the provisions of this Rule shall prevail except with respect to Rule 5.3.

Appendix C: Air Transat Contingency Plan for Lengthy Tarmac Delays at US Airports (Revised April 2016)

April 2016/GS

In compliance with the U.S Department of Transportation (D.O.T.), this Plan for Lengthy Tarmac Delays at U.S. Airports is intended to provide information regarding Air Transat's policies for handling travel on our airline in the event of a lengthy onboard delay of our aircraft. Above all else, the safety and well-being of our passengers and crew remain our priority, as well as meeting our customer's essential needs.

A tarmac delay is defined as holding an aircraft on the ground after leaving the gate or upon landing without access to the terminal. Our Operations Control Centre will work with the affected airport and In-flight teams to implement the Plan, which may also include the participation of local airport authorities. In conjunction with requirements set forth by the D.O.T., our Plan applies to all U.S. airports served by Air Transat for both scheduled and diverted flights

1. For international flights departing from or arriving at a U.S. airport, Air Transat will not permit its aircraft to remain on the tarmac for more than four (4) hours after the aircraft leaves the gate in the case of departures or touches down in the case of arrivals before allowing passengers to deplane, unless:
    A. The pilot-in-command determines there is a safety-related or security-related reason (e.g. weather, a directive from a government agency/authority) why the aircraft cannot leave its position on the tarmac to deplane passengers; or
    B. Air traffic control advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations.
2. In the event of an opportunity to disembark, Air Transat endeavours to ensure passengers are made aware and kept informed as to the deplaning process and ground services that will be provided and to ensure that passengers are updated every thirty (30) minutes that there is an opportunity to deplane the aircraft if the opportunity to deplane exists.
3. For all flights, Air Transat will:
    A. Ensure passengers are updated every 30 minutes on the status of the delay; and
    B. Provide adequate food (e.g. snack foods such as pretzels or granola bars) and non-alcoholic beverages if more than two (2) hours elapse after the aircraft leaves the gate (in the case of departure) or touches down (in the case of arrival) if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security concerns preclude this offering; local Customs laws, facility limitations, weather, etc. notwithstanding.
4. For all flights, Air Transat will provide operable restroom facilities, as well as adequate medical attention if needed, while the aircraft remains on the tarmac.
5. Air Transat will provide sufficient resources to implement this Plan.
6. Air Transat will coordinate this Plan with airport authorities, U.S. Customs and Border Protection (CBP), and the Transportation Security Administration (TSA) of every airport that we serve in the U.S., including diversion airports.

Member(s)

Scott Streiner
Sam Barone
P. Paul Fitzgerald

Back to rulings

Date modified:

2017-11-30

Air Transat: Cover letter and notice of violation

Cover letter

Case no. : 17-05835

November 30, 2017

Air Transat A.T. Inc.
5959, boul. de la Côte-Vertu
Saint-Laurent, Québec
H4S 2E6

Attention: Mr. Georges Petsikas

Re: Notice of violation – Tarmac delay of flight Nos. 157 and 507 at Ottawa's Macdonald-Cartier International Airport on July 31, 2017

Enclosed is a notice of violation issued pursuant to section 180 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended in relation to the subject matter.

Full payment of the amount specified will be accepted in complete satisfaction of the penalty. A credit up to the amount of the penalty will be applied and accepted as payment in lieu upon provision of evidence, to the satisfaction of the Chief Compliance Officer, of the amount of compensation provided to passengers on the affected flights, excluding the refund of out of pocket expenses.

Should you wish to avail yourself of this option, please contact Simona Sasova, Manager, Monitoring and Compliance at 819-953-9786.

Original signed by:

Carole Girard
Designated Enforcement Officer

Attachment: Notice of violation

c.c. Fred Gaspar, Chief Compliance Officer

Simona Sasova, Manager, Monitoring and Compliance

Notice of violation

To:
Air Transat A.T. Inc.
5959, boulevard de la Côte-Vertu
Saint-Laurent, (Québec)
H4S 2E6

Date: November 30, 2017
Number: 17-05835
Penalty: $295,000
Enforcement Officer: Carole Girard

Pursuant to section 180 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), the undersigned Enforcement Officer has issued this notice of violation believing Air Transat A.T. Inc. (Air Transat) has committed the following violations contrary to subsection 110(4) of the *Air Transportation Regulations*:

(A) On July 31, 2017, while it experienced a tarmac delay of five hours and 51 minutes during its operation of flight No.TSC157 using an Airbus A330-200-type aircraft with C-GTIS registration with 340 passengers on board, Air Transat failed to properly apply the terms and conditions of Rules 5.2d) and 21.3 c) of its tariff in respect of both offering passengers drinks and snacks and disembarking thereby violating subsection 110(4) of the *Air Transportation Regulations*.

(B) On July 31, 2017, while it experienced a tarmac delay of four hours and 47 minutes during its operation of flight No.TSC507 using an Airbus A310-300-type aircraft with C-GPAT registration with 250 passengers on board, Air Transat failed to properly apply the terms and conditions of Rules 5.2d) and 21.3 c) of its tariff in respect of both offering passengers drinks and snacks and disembarking thereby violating subsection 110(4) of the *Air Transportation Regulations*.

The foregoing provision has been designated pursuant to the *Designated Provisions Regulations*, SOR/99-244, and the procedures in section 180 through 180.8 of the CTA respecting monetary penalties apply.

A copy of the evidence supporting this allegation is on file at the Canadian Transportation Agency, 15 Eddy Street, Gatineau, Quebec and can be reviewed by previous arrangement during regular business hours by contacting Simona Sasova, Manager, Monitoring and Compliance at 819-953-9786.

The penalty of **$295,000 CAD** must be paid to “The Receiver General for Canada” on or before the date mentioned below and the payment should be sent to:

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

Payment may be made by certified cheque or money order and should be accompanied by a copy of this notice.

Monetary penalty must be paid before the following date:

January 3, 2018

Full payment of the amount specified above will be accepted in complete satisfaction of the penalty and no further proceedings under Part VI of the CTA shall be taken against Air Transat A.T. Inc., in respect of the violation(s).

If you wish a review by the Transportation Appeal Tribunal of Canada of the Enforcement Officer’s decision, you must file a request in writing on or before the date that is indicated above, or within any further time that the Tribunal on application may allow. Requests for review may be filed with the Registrar, Transportation Appeal Tribunal of Canada, 333 Laurier Avenue West, Room 1201, Ottawa, Ontario, K1A 0N5. The telephone number is 613-990-6906.

The Tribunal will request that you appear before it to hear the allegations against you. You will be afforded a full opportunity consistent with procedural fairness and natural justice to present evidence and make representations in relation to the alleged violation(s) before the Tribunal makes its determination.

If the full amount of the penalty has not been received and a request for review by the Tribunal has not been received on or before the date of payment mentioned above, you will be deemed to have committed the violation alleged in this Notice. The Canadian Transportation Agency may obtain a Certificate from the Tribunal indicating the amount of the penalty specified in this Notice.

The Tribunal has prepared a Guide for Applicants which you may obtain from the Registrar at 333 Laurier Avenue West, Room 1201, Ottawa, Ontario, K1A 0N5. Telephone: 613-990-6906, Fax: 613-990-9153.

Original signed by:

Carole Girard
Designated Enforcement Officer

Date modified:
2017-11-30

Canadian Transportation Agency
Office des transports du Canada

Annotated Dispute Adjudication Rules

Making Transportation Efficient and Accessible for All

available in multiple formats

Canada

Contents

About the Annotated Dispute Adjudication Rules

This is a companion document to the Dispute Adjudication Rules.

The Agency's Dispute Adjudication Rules set out the process that is followed during adjudication. They also provide information on how to make a variety of procedural requests to the Agency on matters that commonly arise in dispute proceedings, including requests to keep information confidential.

The annotation provides explanations and clarifications of the Rules which will be useful to those unfamiliar with the Agency and its processes. It is organized by section number to make accessing the information easier, but it also contains hyperlinks that allow easy navigation to related sections and further explanatory text that the reader will find useful.

Interpretation

1. Definitions

The following definitions apply in these Rules.

“Act” means the Canada Transportation Act.

“affidavit” means a written statement confirmed by oath or a solemn declaration.

Annotation: Definitions (Affidavit)

An affidavit is a written statement that contains important facts that a person wants the Agency to know about. It is sworn by the person making the affidavit in the presence of someone authorized to administer an oath, such as a commissioner for taking oaths, a notary public, a notary (province of Quebec) or a lawyer. The person swearing the affidavit should have direct knowledge of the events or facts set out in the statement. “To swear” means you promise that the information contained in the affidavit is true. Note that there are potential legal sanctions to swearing an affidavit if you know that the content of the affidavit is not true, accurate or complete.

The affidavit is used by the Agency to verify the truthfulness, including both the accuracy and completeness, of some or all of the information in a document.

For more information, refer to section 15: Verification by Affidavit or Witnessed Statement

“applicant” means a person that files an application with the Agency.

Annotation: Definitions (Applicant)

An applicant is a person who comes before the Agency seeking a decision on a particular matter within the jurisdiction of the Agency.

The applicant files an application with the Agency which sets out the information that the applicant wants the Agency to take into account when making a decision. Schedule 5 of the Dispute Adjudication Rules sets out the information that must be included in an application such as the issues that the applicant wants the Agency to consider, the facts, the relief/remedies being asked for) and arguments in support of the application.

An applicant includes a complainant under section 52 or 94 of the *Canada Marine Act* or section 13 of the *Shipping Conferences Exemption Act, 1987*; an appellant under subsection 42(1) of the *Civil Air Navigation Services Commercialization Act*; or an objector under subsection 34(2) of the *Pilotage Act*.

“application” means a document that is filed to commence a proceeding before the Agency under any legislation or regulations that are administered in whole or in part by the Agency.

Annotation: Definitions (Application)

The term “application” is defined broadly to mean a document that commences any proceeding before the Agency, including both dispute proceedings and uncontested economic regulatory proceedings. However, with the exception of sections 3 and 4, the Dispute Adjudication Rules apply only to dispute proceedings.

For example, an application for a dispute proceeding includes:

- A complaint under section 52 or 94 of the *Canada Marine Act*;
- A complaint under section 13 of the Shipping Conferences Exemption Act, 1987;
- An appeal under subsection 42(1) of the Civil Air Navigation Services Commercialization Act;
- An application under section 3 of the *Railway Relocation and Crossing Act*;
- A reference under sections 16 and 26 of the *Railway Safety Act*; or
- A notice of objection under subsection 34(2) of the *Pilotage Act*.

This means that the application must contain the information that the respondent will need to know about the case being made against them and that the Agency must have to make its decision on the matter. In some cases, in addition to the information contained in the application, additional information will be gathered through the asking of questions or the filing of further documents.

In some instances, the Agency has provided further guidance on what is required to be filed to complete various specific types of dispute proceeding applications, including:

- Accessible Transportation Complaints: A Resource Tool for Persons with Disabilities
- Guidelines on the Resolution of Complaints Over Railway Noise and Vibration

For more information, refer to section 18: Application

“business day” means a day that the Agency is ordinarily open for business.

Annotation: Definitions (Business day)

The Agency’s headquarters is located in the province of Quebec, where the statutory holidays recognized by the federal public service are:

- New Year’s Day (January 1)
- Good Friday
- Easter Monday
- Victoria Day Monday
- La Fête nationale du Québec (June 24)
- Canada Day (July 1)
- Labour Day Monday
- Thanksgiving Monday
- Remembrance Day (November 11)
- Christmas Day (December 25)
- Boxing Day (December 26)

If a holiday with a specified date falls on a Saturday or Sunday, the statutory holiday will fall on the next business day.

For example, if a person has five business days from Friday, May 16 to file a document, it will be required to be filed on Monday, May 26 because Monday, May 19 would be a statutory holiday for Victoria Day and would not be considered a business day.

“dispute proceeding” means any contested matter that is commenced by application to the Agency.

Annotation: Definitions (Dispute proceeding)

A dispute proceeding involves two or more parties and is started when an applicant files an application against a respondent or respondents and the application is accepted as complete.

Triage

After an application is filed, Agency staff will review it to make sure that it is complete as the application must be complete before the dispute proceeding can formally begin. Applicants will be notified as to whether their application is complete or incomplete. In some cases, Agency staff may suggest other dispute resolution options, like facilitation or mediation, as an alternative to adjudication.

For more information on complete and incomplete applications, refer to section 18: Application

There are two stages in any dispute proceeding before the Agency:

Pleadings
Pleadings start when notification is sent to the parties that the application is accepted as complete. This is the evidence and information gathering stage of the dispute proceeding where the parties are given the opportunity to provide the Agency with information in support of their positions on the issues raised in the application and to file information that might be requested by the Agency or the other parties.

Deliberations
Deliberations start once the pleadings process has ended and pleadings are closed. The Agency Panel assigned to the case (composed of one or more Agency Members) deliberates on the evidence and information. This stage ends with the issuance of a decision and/or order.

At any stage before a decision or order is issued, an applicant may make a request to withdraw an application (for example, if the matter is resolved between the parties).

For more information, refer to section 36: Request to Withdraw Application

Agency Decision or Order

The Agency's decision or order will contain a summary of the application and other information provided during the pleadings, the Agency's decision, including reasons for that decision, and any corrective action it deemed necessary.

Compliance

When the Agency has made a decision and has ordered a party to do something, like put into effect a particular policy that will address an issue raised in the application, the Agency ensures compliance with its order. For example, Agency staff will follow up with the transportation service provider to ensure that the policy is implemented and meets any conditions imposed by the Agency in the final decision.

If Agency staff is unable to get the party to comply, a new Agency Panel may be assigned to handle this issue directly with the respondent. These issues are typically resolved between the respondent and the Agency. In exceptional circumstances, the Agency may decide to consult with the applicant.

Alternatively, some Agency decisions are subject to administrative monetary penalties (amps), meaning that a fine can be imposed against a respondent that fails to comply with certain types of Agency decisions. To determine if an order is subject to amps, check the *Canadian Transportation Agency Designated Provision Regulations* (DPR).

If a respondent fails to comply with an Agency order that is identified as subject to amps in the DPR, the matter may be referred to the Agency's Enforcement Division for further action. If a Designated Enforcement Officer finds that the respondent has failed to comply with an Agency order that is subject to amps, a Notice of Violation can be issued against the respondent setting an AMP payable by the respondent in an amount of up to $5,000 for individuals and $25,000 for corporate respondents.

In addition, Agency decisions can be enforced against respondents by making the decision an order of the Federal Court or another superior court and then bringing quasi-criminal proceedings in that court to have the respondent found to be in contempt of Court.

"document" includes any information that is recorded in any form.

Annotation: Definitions (Document)

A document includes any pleading (a document that contains arguments that advance a position) as well as any information or evidence filed or otherwise placed on the record during proceedings before the Agency. This includes any correspondence, affidavit, witnessed statement, memorandum, medical note/report, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, video or sound recording, machine readable record and any other recorded material, and any copy of it.

More specific examples of a document include contracts, flight tickets and tariff pages.

"intervener" means a person whose request to intervene filed under section 29 has been granted.

“party” means an applicant, a respondent or a person that is named by the Agency as a party.

Annotation: Definitions (Party)

Applicants and respondents are always parties to a dispute proceeding before the Agency. This means that, subject to any confidentiality determinations, they are sent all documents that are placed on the Agency’s record.

Interested persons who file position statements in a dispute proceeding with the Agency under section 23 are not parties to the dispute proceeding and will not be provided with the documents that are placed on the Agency’s record. They will, however, be provided with a copy of the Agency’s final decision in the dispute proceeding.

Persons who have been granted intervener status by the Agency under section 29 are also not automatically a party to the dispute proceeding (unless so named by the Agency) and are only provided with the documents that they require in order to participate as an intervener to the extent determined by the Agency. They will, however, be provided with a copy of the Agency’s final decision in the dispute proceeding.

If a person believes that they have a “substantial and direct interest” in a proceeding and wish to be named as a party to the proceeding, they should request authority from the Agency to intervene under section 29. In their request to intervene, the person should clearly identify that they wish to be named a party to the proceeding and set out the participation rights that they are seeking.

For more information, refer to section 29: Request to Intervene.

“person” includes a partnership and an unincorporated association.

“proceeding” means any matter that is commenced by application to the Agency, whether contested or not.

Annotation: Definitions (Proceeding)

The Agency performs two key functions within the federal transportation system:

- Informally and through formal adjudication (where the Agency reviews an application and makes a decision), the Agency resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. It operates like a court when adjudicating disputes.
- As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to transportation service providers under federal jurisdiction.

These two key functions mean that the Agency will have some proceedings that only involve one party (for example an air carrier applying for a licence) and others that are

dispute proceedings that involve two or more parties, such as a dispute between a railway company and a group of homeowners about noise coming from a rail yard. ().

With the exception of sections 3 and 4, the Dispute Adjudication Rules apply only to dispute proceedings.

Some types of economic regulatory proceedings may have specific procedural guidelines or resource tools that explain the Agency's processes and how to prepare a particular type of application. For example:

Guidelines:

- Coasting Trade Licence Applications
- Extra-bilateral Air Service Applications to the Canadian Transportation Agency
- Net Salvage Value Determination Applications

Resource tools:

- Apportionment of Costs of Grade Separations
- Crossings

These guidelines generally cover the following topics:

- The structure of the proceeding (e.g. what documents need to be filed, deadlines for filing documents).
- The content of submissions made by the parties. For example, the Agency has tests that it applies for certain types of issues. The guidelines provide information on the tests and what type of information might be filed by a party when making submissions on the test. The guidelines may also set out factors or criteria that the Agency looks at when making a decision on a matter.

Parties should always refer to the relevant publication for more information.

For certain economic regulatory determinations, the guidelines may state that some or all of the provisions in the Dispute Adjudication Rules are applicable. The Agency may also decide that it is appropriate to apply any or all of the provisions of the Dispute Adjudication Rules in a particular case.

"respondent" means a person that is named as a respondent in an application and any person that is named by the Agency as a respondent.

Annotation: Definitions (Respondent)

In a dispute proceeding there are at least two parties: the applicant and the respondent.

The applicant files an application with the Agency against a respondent (or respondents). In the application, the applicant sets out details of the dispute with the

respondent and the issues that it wants the Agency to address. The respondent then has an opportunity to file an answer to the issues raised in the application.

In exceptional circumstances, the Agency may name other respondents to the application where their involvement in the travel situation is not apparent to the applicant.

It is important, for the efficiency of case processing and to be fair to the applicant, that answers be complete when they are filed with the Agency. This means that the answer should address the issues raised by the applicant in their application and that positions should be substantiated.

Annotation: Additional definitions

Adverse in interest

A person is adverse in interest to you if they hold a position that is contrary to or different from that of yourself.

Jurisdiction

The Agency only has the authority to make a decision on a matter that falls within the mandate given to it by the *Canada Transportation Act*. The Agency cannot make decisions on matters that do not fall within its mandate/jurisdiction.

Economic regulatory proceedings

As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to federal transportation carriers. For example, an applicant may be granted a licence if it meets the legislative requirements. These matters are largely uncontested.

Pleadings process

The period of time within a dispute proceeding when parties may file their pleadings (such as answers, replies and requests) with the Agency.

Panel

The Chair of the Agency may assign one or more Members to hear a case. The assigned Member(s) are referred to as the Panel. One Member, the Panel Chair, may be assigned at the outset to make decisions on procedure and the processing of the case.

Procedural matters

A step that is taken in a dispute proceeding in order to assist in the processing of the case. An example is whether expert opinions should be filed in a dispute proceeding and the time lines for such a filing.

Record

All the documents and information gathered during the dispute proceeding that have been accepted by the Agency and which will be considered by it in making its decision. The Agency's record can consist of a public and a confidential record.

Relief/remedies

Generally refers to the solution that a person is seeking to address the issues raised in an application. Examples include covering expenses incurred as a result of the issue or changing a transportation carrier's policy concerning the issue.

Representative

A person who acts for another person. For the purposes of these Rules a representative is anyone who is not a lawyer.

Stay

When the Agency stays a proceeding it means that the proceeding is stopped for a period of time and may be restarted at a later date.

Witnesses

A witness is a person who knows something about an issue in a dispute proceeding and is asked to answer questions under oath at an oral hearing or by means of an affidavit.

Application

2. Dispute Proceedings

Subject to sections 3 and 4, these Rules apply to dispute proceedings other than a matter that is the subject of mediation.

Annotation: Dispute proceedings

General

The Agency performs two key functions within the federal transportation system:

- Informally and through formal adjudication (where the Agency reviews an application and makes a decision), the Agency resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. It operates like a court when adjudicating disputes.
- As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to transportation service providers under federal jurisdiction.

Sections 3 and 4 of the Rules apply to all matters that come before the Agency

Section 3 (the one-Member quorum provision) and section 4 (principle of proportionality) apply to all proceedings before the Agency, which include both:

- Dispute proceedings (e.g. a noise complaint where a group of homeowners or a person acting on behalf of another person or a group of persons files a complaint against a railway company concerning noise produced by railway operations in a rail yard adjacent to their homes); and
- Economic regulatory proceedings (e.g. an application by an air carrier for a licence to operate an air service between Canada and another country).

The Rules do not apply to mediation and arbitration

The Dispute Adjudication Rules do **not** apply to dispute proceedings or any part of a dispute proceeding that is referred for mediation or submitted to arbitration. In each of these cases, there are specific guidelines or resource tools that will apply to that proceeding:

- Resolution of Disputes through Mediation
- Final Offer Arbitration
- Selecting an Arbitrator
- Rules of Procedure for Rail Level of Service Arbitration, Annotation and Resource Tool (in development)

Rules apply to contested matters

As stated above, except for mediations and arbitrations, the Dispute Adjudication Rules apply to all contested dispute proceedings before the Agency.

In the vast majority of cases that come before the Agency, the parties present their positions in writing without having to appear before the Agency at an oral hearing and the Agency makes its decision based on the documents on the file.

Alternatively, the Agency may decide to organize an oral hearing as a means to gather and test the information it needs to make its decision. In an oral hearing, the parties appear before the Agency and make submissions in person. If the proceeding is to be dealt with by way of an oral hearing, then at the time that an oral hearing is called, a pre-hearing conference will typically be held to work out the details of the procedures to be used in that case. These procedures will then be contained in a Procedural Direction specific to that case. The Rules will continue to apply to disputes that proceed by way of oral hearing subject to the Agency establishing customized procedures in any Procedural Direction that may be issued within the proceeding. The Agency has established guidelines in relation to one type of oral hearing, the 35-day adjudication process under section 169.43 of the CTA, and is working to establish more general guidelines in relation to all oral hearings.

All Proceedings

3. Quorum

In all proceedings, one member constitutes a quorum.

Annotation: Quorum

Although only one Member is required to make a decision, the Chair of the Agency may appoint more than one Member to hear a case. The Member or Members assigned to a case are referred to as the Agency Panel.

Even in situations where two or more Members may be assigned to deliberate and issue the final decision, one Member may be assigned at the outset to provide decisions on the processing of the case and to make procedural decisions. This Member is referred to as the Panel Chair.

Note that even when Agency staff communicates decisions of the Agency to the parties, they are doing so on behalf of and with the instructions of the Agency Panel assigned to the case.

4. Principle of Proportionality

The Agency is to conduct all proceedings in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed.

Annotation: Principle of proportionality

The principle of proportionality guides the Agency's decisions on matters that arise in proceedings. The objective is to achieve just, expeditious and resource effective proceedings which sometimes means that a request made by a person must be denied where the anticipated outcome does not justify the means.

For example, Party A asks that Party B produce what would amount to 100 pages of documents. Party B refuses to produce the requested documents and the matter comes before the Agency to make a decision as to whether the documents should be produced by Party B. The Agency may decide that the documents are relevant in that they relate to the matter before the Agency but that the value of the documents to the proceeding is minimal. In that case, having Party B produce 100 pages of documents would not be proportionate to the benefit that the Agency would gain by having those 100 pages on the record.

Dispute Proceedings: General

5. Interpretation of Rules and Agency's Initiative

(1) These Rules are to be interpreted in a manner that facilitates the most expeditious determination of every dispute proceeding, the optimal use of Agency and party resources and the promotion of justice.

(2) Anything that may be done on request under these Rules may also be done by the Agency of its own initiative.

Annotation: Interpretation of Rules

This means that when the Agency conducts dispute proceedings, it will strive to achieve efficiencies so that cases are resolved in a timely way, there is minimal cost or other imposition on the parties and the Agency, all while ensuring that the process is fair to the parties. This often involves a balancing of rights and interests. For example, the Agency deals with a wide range of disputes, including both highly complex cases worth millions of dollars to the parties and less complex cases involving, for example, loss of personal goods by air carriers worth less than $500. Different, proportionate approaches are required for these different types of cases to ensure efficient and effective use of resources for dispute resolution.

Annotation: Agency's initiative

The Agency may do anything under these Dispute Adjudication Rules that a person may do by making a request.

6. Dispensing with Compliance and Varying Rule

The Agency may, at the request of a person, dispense with compliance with or vary any rule at any time or grant other relief on any terms that will allow for the just determination of the issues.

Annotation: Dispensing with compliance and varying rule

The Agency has the power to vary the Dispute Adjudication Rules to help ensure fair decision-making on the issues in a dispute proceeding. Each case before the Agency is different and sometimes a strict application of the Dispute Adjudication Rules is not the best way to deal with a case. For example, the Agency may vary a rule that applies to a party in order to extend it to a person.

To make a request to the Agency under this section, refer to section 27 of the Dispute Adjudication Rules, which sets out what needs to be filed to make a general request to the Agency.

For more information, refer to section 27: Requests – General Request

7. Filing and Agency's public record

(1) Any document filed under these Rules must be filed with the Secretary of the Agency.

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

Annotation: Filing of documents and Agency's Public Record

Documents must be sent to the Secretary of the Canadian Transportation Agency.

By courier or hand delivery
Secretary
Canadian Transportation Agency
15 Eddy Street
17th Floor, Mailroom
Gatineau, Quebec
J8X 4B3

By fax
819-953-5253

By e-mail
secretariat@otc-cta.gc.ca

Due to the timeframes involved and the widespread availability of technology, filings by ordinary mail will no longer be accepted by the Agency unless, in exceptional circumstances, a person has requested and received approval from the Agency to use ordinary mail. In those instances, longer timelines will have to be established for the exchange of pleadings and the processing of the case will be delayed.

The Agency's record

The Agency's record is made up of all the documents and information gathered during the dispute proceeding that have been accepted by the Agency. This record will be considered by the Agency when making its decision.

The Agency's record can consist of two parts: the public record and the confidential record.

Public record

Generally, all documents filed with and accepted by the Agency during the dispute proceeding, including the names of parties and witnesses, form part of the public record.

Parties filing documents with the Agency should not assume that a document that they believe is confidential will be kept confidential by the Agency. A request to have a document kept confidential may be made pursuant to section 31 of the Dispute Adjudication Rules.

Documents on the public record will be:

- Provided to the other parties involved;
- Considered by the Agency in making its decision; and
- Made available to members of the public, upon request, with limited exceptions.

Decisions and applications are posted on the Agency's website and include the names of the parties involved, as well as witnesses. Medical conditions which relate to an issue raised in the application will also be disclosed. The decision will also be distributed by e-mail to anyone who has subscribed through the Agency's website to receive Agency decisions.

Confidential record

The confidential record contains all the documents from the dispute proceeding that the Agency has determined to be confidential.

If there are no confidential documents, then there is only a public record.

No person can refuse to file a document with the Agency or provide it to a party because they believe that it is confidential. If a person is of the view that a document is confidential, they must file it with the Agency along with a request for confidentiality under section 31 of the Dispute Adjudication Rules. This will trigger a process where the Agency will determine whether the document is confidential. During this process, the document is not placed on the public record.

Decisions that contain confidential information that is essential to understanding the Agency's reasons will be treated as confidential as well and will not be placed on the Agency's website. However, a public version of the decision will be issued and placed on the website.

8. Copy to parties

A person that files a document must, on the same day, send a copy of the document to each party or, if a party is represented, to the party's representative, except if the document is

(a) a confidential version of a document in respect of which a request for confidentiality is filed under section 31;

(b) an application; or

(c) a position statement.

Annotation: Copy to parties

With three exceptions all documents to be filed with the Agency must be sent to the other parties (or their representatives) on the same day that they are filed with the Agency. Failure to comply with this requirement, which is the responsibility of the person filing the document, will result in the document not being considered to be filed with the Agency. If a dispute arises about whether a document was sent to the other parties, the sender may be required to provide proof that the document was sent. As such, the sender should keep proof that the document was sent.

The most efficient means of sending documents to the Agency and to the other parties is by e-mail as by sending the document electronically to the Agency and copying the other parties in the same transmission, it is easy to confirm that this requirement has been met. It is up to the person filing documents to determine the most appropriate means of transmission, particularly in situations where confidential information or documents are being filed with the Agency, where concerns may exist about ensuring the safe transmission of confidential information.

Exceptions to sending a copy to other parties

There are three exceptions to the requirement that all documents filed with the Agency must also be sent to the other parties.

1. A person who makes a request for confidentiality under section 31.

In these circumstances the confidential version of the document must be filed with the Agency, but does not need to be sent to the parties. A public version of the document must also be filed with the Agency and this document must be sent to the other parties pending the Agency's decision on confidentiality.

For more information, refer to section 31: Request for Confidentiality

2. The filing of applications under section 18.

The application will be sent to the other parties by the Agency once it has been accepted as complete.

3. The filing of position statements under section 23.

A position statement will be sent to the other parties by the Agency once it has been filed with the Agency.

For more information refer to:

- Section 18: Application
- Section 23: Position Statement

9. Means of Transmission

Documents may be filed with the Agency and copies may be sent to the other parties by courier, personal delivery, email, facsimile or other electronic means specified by the Agency.

Annotation: Means of transmission

Electronic means of filing

The Agency encourages people to use e-mail to file documents with the Agency and provide them to the other parties. As instantaneous communication, it is the most efficient way to file and exchange information and it will also show that the document has been provided to the other parties on the same day as it has been filed with the Agency, which is a requirement of section 8. In some circumstances, the Agency may require the parties to use e-mail, for example, in the case of expedited proceedings under section 25

In exceptional circumstances, where a person does not have access to an electronic means of transmission, a request can be made to the Agency under section 27 of these Dispute Adjudication Rules to use ordinary mail to file documents with the Agency and provide them to other parties. This means that longer timelines will have to be established for the exchange of pleadings and the processing of the case will be delayed.

In some cases, such as the filing of affidavits or witnessed statements, although the person may file the document electronically, the Agency will require the person to follow up by providing an original copy of the document to the Agency by ordinary mail.

It is up to the person filing documents to determine the most appropriate means of transmission, particularly in situations where confidential information or documents are being filed with the Agency.

10. Facsimile—Cover Page

A person that files or sends a document by facsimile must include a cover page indicating the total number of pages transmitted, including the cover page, and the name and telephone number of a contact person if problems occur in the transmission of the document.

11. Electronic Transmission

(1) A document that is sent by email, facsimile or other electronic means is considered to be filed with the Agency and received by the other parties on the date of its transmission if it is sent at or before 5:00 p.m. Gatineau local time on a business day. A document that is sent after 5:00 p.m. Gatineau local time or on a day that is not a business day is considered to be filed with the Agency and received by the other parties on the next business day.

(2) A document that is sent by courier or personal delivery is filed with the Agency and received by the other parties on the date of its delivery if it is delivered to the Agency and the other parties at or before 5:00 p.m. Gatineau local time on a business day. A document that is delivered after 5:00 p.m. Gatineau local time or on a day that is not a business day is considered to be filed with the Agency and received by the other parties on the next business day.

Annotation: Date of filing and receipt (Electronic transmission and courier or personal delivery)

Filing deadlines

Documents sent by e-mail, facsimile or other electronic means must be both filed with the Agency and sent to the other parties before 5:00 p.m. Gatineau local time to be considered as having been sent that day. Documents sent by courier, or that are delivered in person, must be both filed with the Agency and received by the other parties before 5:00 p.m. Gatineau local time to be considered as having been filed that day.

For example, if a party e-mailed a document to the Agency at 4:30 p.m on the date of the filing deadline, but didn't copy the other parties with the e-mail and waited until 5:30 p.m. before e-mailing it to the other parties, the document will not be considered as received by the parties that day and will not be placed on the Agency's record unless a request is made under section 30 for an extension of the filing deadline.

When a person is required to file a document within a number of business days under the Dispute Adjudication Rules or by order of the Agency, the time limit for filing is counted from the day after the person is notified of the requirement and includes the last day.

Most time limits in a dispute proceeding will have the specific deadline date for filing set out in a procedural decision or letter(e.g. June 10, 2013). This date will generally be based on the time limits set out in the Dispute Adjudication Rules.

Statutory holidays are not considered business days.

Example of counting business days

An applicant has been given five business days to file a reply to an answer.

If the answer was filed on Monday, day one would be Tuesday. The reply must be filed by the end of day five, which is 5:00 p.m. Gatineau local time the following Monday. If Monday is a statutory holiday, the reply would be due by 5:00 p.m. Gatineau local time on Tuesday, the next business day.

Filing of documents with forms

Parties are encouraged to use the Agency's forms, especially when filing documents where specific information is required as set out in the Schedules to the Dispute Adjudication Rules. The forms link to a secure file transfer system to allow for attachments to be filed with the Agency and copied to the parties.

12. Filing after Time Limit

(1) A person must not file a document after the end of the applicable time limit for filing the document unless a request has been filed under subsection 30(1) and the request has been granted by the Agency.

(2) A person must not file a document whose filing is not provided for in these Rules unless a request has been filed under subsection 34(1) and the request has been granted by the Agency.

(3) A document that is filed in contravention of subsection (1) or (2) will not be placed on the Agency's record.

Annotation: Consequences of missing a deadline

Filing deadlines that are set by the Agency, as set out in the Dispute Adjudication Rules or by decision or order of the Agency, must be met.

The Agency will not accept a document that has been filed late unless a request is made under section 30 of the Dispute Adjudication Rules for an extension of time and the Agency has approved the request.

In addition, a person must not file a document which is not required to be filed under these Dispute Adjudication Rules or by the Agency. For example, a person cannot file a response to a reply without Agency approval. Where a request to file a document whose filing is not provided for is filed after the close of pleadings, it does not need to be accompanied by a request to extend the time limit under section 30.

Without these approvals, the document will not form part of the record and will not be considered by the Agency when making its final decision.

For more information, refer to:

- Section 30 Request to Extend or Shorten Time Limit
- Section 34: Request to File Document Whose Filing is not Otherwise Provided For in Rules

13. Language of Documents

(1) Every document filed with the Agency must be in either English or French.

(2) If a person files a document that is in a language other than English or French, they must at the same time file an English or French translation of the document and the information referred to in Schedule 1.

(3) The translation is treated as the original for the purposes of the dispute proceeding.

Annotation: Language of documents

Documents to be filed in one of the official languages

A person filing a document is entitled to submit the document in the official language of their choice (English or French).

If documents are submitted by persons in different official languages, the Agency is not required to translate the documents. Where translation is required by a person to understand the document, that person will be responsible for obtaining and paying for the translation.

In such situations, the person does not have to file the translation with the Agency or any other party.

Procedure to be followed for documents that are not in one of the official languages

A person submitting a document in a language other than English or French is responsible for ensuring that the document is accompanied by:

- A translation to English or French; and
- A properly completed and sworn affidavit from the translator (Schedule 1).

Note: the translated document and affidavit must be filed with the Agency and provided to the other parties at the same time as the document filed in the other language. The English or French translation will be considered the official document on the record.

Any document in a language other than English or French that is not accompanied by a translation and affidavit will not form part of the record and therefore will not be considered by the Agency when making a decision. The party is free to submit a proper document; however, if the time limit for the filing of the document has passed, the party

will also have to obtain approval to do so by filing a request to extend the time line for the filing of the document.

Note that all Agency decisions are posted on the website in English and French.

Also, in exceptional cases and on request, the Agency may accept a witnessed statement in place of an affidavit, for example, when the person lives in a remote community with no access to a lawyer or other person who can swear the affidavit

Translator

Unless specified otherwise by the Agency, the person who translated the document does not need to be a certified translator.

Agency form: Form 1: –Translation – Required Information

14. Amended Documents

(1) If a person proposes to make a substantive amendment to a previously filed document, they must file a request under subsection 33(1).

(2) A person that files a document that amends a previously filed document, whether the amendment is substantive or not, must ensure that the amendment is clearly identified in the document and that the word "AMENDED" appears in capital letters in the top right corner of the first page.

Annotation: Filing of amended document

There are two types of amendments or changes that can be made to a document: substantive and non-substantive.

Substantive amendments: Any substantive amendment to a document needs to be approved by the Agency.

The person must file a new copy of the document which clearly identifies the amendment being made by:

- Underlining any new text and striking out (or drawing a line through) any deleted text; and
- Adding "AMENDED" at the top right hand corner of the first page of the document.

In addition, the person must make a request to file the amended document.

For more information and instructions on how to make a request for a substantive amendment, refer to section 33: Request to Amend Document.

Where appropriate, the Agency may provide parties adverse in interest with an opportunity to respond to the amended document. The Agency will establish the process to be followed and the time limits to be met in a procedural direction.

Non-substantive amendments: A request to the Agency is not required to make a minor amendment to a document.

Some examples of non-substantive amendments that can be made without the approval of the Agency are:

- Correction in spelling of names and places; and
- Dates (if they have no substantive implications).

The person must file a new copy of the document which clearly identifies the amendment being made by:

- Underlining any new text and striking out (or drawing a line through) any deleted text; and
- Adding “AMENDED” at the top right hand corner of the first page of the document.

The other parties must be provided with a copy of the amended document on the same day that it is filed with the Agency.

Where a person submits a non-substantive amendment, but the Agency considers it to be a substantive amendment, the person will be notified of the requirement to follow the procedure for substantive amendments in subsection 33(1) of the Dispute Adjudication Rules.

15. Verification by Affidavit or by Witnessed Statement

(1) If the Agency considers it just and reasonable, the Agency may, by notice, require that a person provide verification of the contents of all or any part of a document by affidavit or by witnessed statement.

(2) The verification by affidavit or by witnessed statement must be filed within five business days after the date of the notice referred to in subsection (1) and must include the information referred to in Schedule 2 or Schedule 3, respectively.

(3) The Agency may strike the document or the part of the document in question from the Agency’s record if the person fails to file the verification.

Annotation: Verification by affidavit or by witnessed statement

The Agency may require an affidavit or a witnessed statement to be filed if evidence is contested or if the accounts or positions of the parties conflict.

Affidavit

An affidavit is a written statement that contains important facts that a person wants the Agency to know about. It is sworn by the person making the affidavit in the presence of someone authorized to administer an oath, such as a commissioner for taking oaths, a notary public, a notary (province of Quebec) or a lawyer. The person swearing the affidavit should have direct knowledge of the events or facts set out in the statement. "To swear" means that you promise that the information contained in the affidavit is true. Note that there are potential legal sanctions to swearing an affidavit if you know that the affidavit is not true, accurate or complete.

The affidavit is used by the Agency to verify the truthfulness, including both the accuracy and completeness, of some or all of the information in a document.

Agency form: Form 2 – Verification by Affidavit

Note that if a party adverse in interest makes a request and the request is approved by the Agency, they may be permitted to conduct oral cross-examinations on an affidavit in order to test the evidence contained in the affidavit. A party may make such a request under section 27 of the Dispute Adjudication Rules.

For more information, refer to section 27 – General Request

Witnessed Statements

Witnessed statements are written and signed statements that the person signing the statement believes to be true. Unlike affidavits, they are not signed and sworn in the presence of an authorized individual, like a lawyer, but are signed in the presence of a witness who also signs the document.

Agency form: Form 3 – Verification by Witnessed Statement

Timelines for the filing of an affidavit or a witnessed statement

The affidavit or witnessed statement must be filed within five business days after the date of receipt of the notice by the Agency requiring the filing of verification by affidavit or witnessed statement. The Agency will provide notice as to which means of verification is to be filed.

If it would be impossible or impracticable to obtain an affidavit, a person may submit a witnessed statement along with a request under section 27 that the Agency accept the witnessed statement instead of an affidavit. The request must include:

- A clear and concise description of the reasons supporting the request, including why it would be impossible or impracticable to obtain an affidavit;

- All information or documents that are relevant in explaining or supporting the request; and
- Confirmation that copies of the witnessed statement and the request have been provided to the other parties in the proceeding

For more information refer to: Section 27 Requests – General Request

Consequences of not providing the required verification

If the Agency has required verification of a document or part of a document, but the verification by affidavit or a witnessed statement is not provided, the document will either:

1. Form part of the record, but will be given limited or no weight by the Agency when making its final decision; or
2. Not form part of the record and not be considered by the Agency when making its final decision (that is the document will be struck from the record).

16. Representative Not a Member of the Bar

A person that is represented in a dispute proceeding by a person that is not a member of the bar of a province must authorize that person to act on their behalf by filing the information referred to in Schedule 4.

Annotation: Authorization for representative

Persons involved in a dispute proceeding are not required to be represented by a lawyer, although a lawyer can be consulted, if desired. They can also choose to be represented by another person, including a family member or friend.

If a person would like to have a representative (other than a lawyer or an officer or employee of the company, for example in the case of a corporate respondent) act on their behalf, written authorization must be filed with the Agency. The authorization only needs to be filed once during the dispute proceeding. This authorization is not necessary if the person is represented by a lawyer.

Power of attorney: persons acting under a power of attorney must file a copy of the power of attorney in place of the written authorization.

Parents/Legal Guardians acting on behalf of minor children: parents/legal guardians do not require authorization to act on behalf of their minor children.

Agency form: Form 4 – Authorization of Representative

17. Change of Contact Information

A person must, if the contact information they provided to the Agency changes during the course of a dispute proceeding, provide their new contact information to the Agency and the parties without delay.

Dispute Proceedings: Pleadings

18. Application

(1) Any application filed with the Agency must include the information referred to in Schedule 5.

(2) If the application is complete, the parties are notified in writing that the application has been accepted.

(3) If the application is incomplete, the applicant is notified in writing and the applicant must provide the missing information within 20 business days after the date of the notice.

(4) If the applicant fails to provide the missing information within the time limit, the file is closed.

(5) An applicant whose file is closed may file a new application in respect of the same matter.

Annotation: Application

Who is an applicant?

The applicant is the person who files an application with the Agency.

Complete applications

A dispute proceeding does not formally start until the application is accepted as complete. Although an applicant might fill out Form 5 or file its application in another format this does not necessarily mean that the application is complete.

Parties will be notified in an opening pleadings letter when the application has been accepted as complete and the date on which the pleadings process has begun.

Contents of an application

An application must include the information set out in Schedule 5. It should clearly and concisely:

- Set out the relevant facts;
- Identify the issues;

- Identify the relevant provisions of the legislation or regulations that are administered by the Agency and that relate to the application;
- Set out the arguments in support of the application;
- Set out any relief/remedies sought (e.g. The solution to the issues that were raised); and
- Set out any other information and arguments that help to explain or support the position set out in the application.

The Agency encourages the use of Form 5 to file an application. The Form provides guidance on the information that is required for the application to be considered complete. The application should be as detailed as possible and include all relevant information. This will make the dispute proceeding more efficient.

Agency form: Form 5 – Application

In addition to the general application form, Form 5, the Agency has separate application forms for two specific types of dispute proceeding. These forms are accessible through the Agency's complaint wizard:

- Accessible transportation – Form 5a
- Rail noise and vibration – Form 5b

Guidance for completing specific types of applications

In some instances, the Agency has provided further guidance, in guidelines and resource tools, on what is required to be filed to complete various specific types of dispute proceeding applications, including:

- Accessible Transportation Complaints: A Resource Tool for Persons with Disabilities
- Guidelines on the Resolution of Complaints Over Railway Noise and Vibration

Time limit for filing an application

Applicants should first try to resolve their issue with the other party before initiating a dispute resolution process with the Agency. In some instances, the Agency cannot accept an application until this has been done, for example, in rail noise and vibration disputes.

If this fails, an application should be filed with the Agency as soon as possible, in order to:

- Minimize the challenge of substantiating allegations or obtaining records after significant time has passed;

- Ensure the availability of any witnesses;
- Maximize the possibility that all potential relief/remedies will be available by, for example, meeting statutory deadlines for obtaining relief/remedies from the Agency (e.g. The solution to the issues that were raised). As an example, while there is no statutory time limit for the filing of an application under the Canada Transportation Act, in the case of air disputes, the Montreal Convention and the Carriage by Air Act provide a statutory time limit of two years to obtain relief for certain air disputes.

Filing an application

The filing of an application is done by instantaneous means of communication unless it is made by personal delivery or courier. This assists in the timely processing of applications.

Note that ordinary mail cannot be used as a means of filing unless there are exceptional circumstances where electronic, personal delivery or courier as a means of communication are not available or practicable. In these situations, a request must be made to the Agency under section 27 and approval must be granted by the Agency to use ordinary mail. This will require a change in the filing deadlines.

For more information, refer to:

- Section 27: Requests - General Request
- Section 9: Means of Transmission

Application goes on the public record

An application filed with the Agency is placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the application, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Having a representative represent you

If a person filing an application would like to have a representative (other than a lawyer) act on their behalf, a written authorization must be filed with the Agency at the same time that the application is filed. An authorization is not required if the person is represented by a lawyer.

Note that where the representative did not witness the incident described in the application, the applicant will have to sign the account of the events in the application.

For more information, refer to section 16: Representative Not a Member of the Bar

Agency form: Form 4 – Authorization of Representative

Pleadings process

The party (or parties) against whom the application has been filed (also known as the respondent[s]) will have the opportunity to file an answer. The applicant will then have the opportunity to file a reply to the respondent(s)' answer.

For more information, refer to:

- Section 19: Answer
- Section 20: Reply

Incomplete application

A dispute proceeding does not formally start until the application is accepted as complete. If the application is not complete, the person attempting to file the application will be notified and will have 20 business days to provide the missing information.

If the missing information is not provided within 20 business days, the file will be closed.

Consequences of the Agency closing a file

Even if a file has been closed due to an incomplete application, the application can be filed again at a later date.

- However, the application should be filed with the Agency as soon as possible, in order to:
- Minimize the challenge of backing up allegations or getting records after significant time has passed;
- Ensure the availability of any witnesses;
- Maximize the possibility that all potential relief/remedies will be available by, for example, meeting statutory deadlines for obtaining relief/remedies from the Agency. As an example, while there is no statutory time limit for the filing of an application under the Canada Transportation Act, in the case of air disputes, the Montreal Convention and the Carriage by Air Act provide a statutory time limit of two years to obtain relief for certain air disputes.

19. Answer

A respondent may file an answer to the application. The answer must be filed within 15 business days after the date of the notice indicating that the application has been accepted and must include the information referred to in Schedule 6.

Annotation: Answer

Who is a respondent?

In a dispute proceeding there are at least two parties: the applicant and the respondent.

The applicant files an application with the Agency against a respondent. In the application, the applicant sets out the details of the dispute with the respondent and the issues that the applicant wishes the Agency to address. In some cases, there may be a number of respondents involved.

Although the applicant must clearly identify the respondent in the application, in exceptional circumstances, the Agency may identify the respondent or other respondents where it is not evident to the applicant who is responsible for the situation that is the subject of their application.

The purpose of filing an answer

The purpose of filing an answer is to respond to the arguments and issues raised in the application.

If the respondent does not file an answer, the Agency will make its decision based on the information provided by the applicant. This could result in the Agency making a decision in favour of the applicant and might result in the Agency finding that the respondent must provide relief/remedies to the applicant. In some instances, the relief may relate to expenses that were incurred by the applicant. For example, in the situation of a flight delay where the Agency finds in favour of the applicant, the respondent may be directed to reimburse the applicant for related expenses, such as for lunch and a hotel room, which had been paid for by the applicant.

Contents of an answer

The answer must include the information set out in Schedule 6 and should clearly and concisely:

- Indicate which parts of the application the respondent agrees with or disagrees with; and
- Set out the arguments in support of the respondent's position.

Any documents that support the position set out in the answer should be filed with the Agency by the respondent and provided to the other parties on the same day. A person filing an answer may either use form 6 or another document.

Agency form: Form 6 – Answer to Application

Answer goes on the public record

An answer filed with the Agency is placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the answer, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Time limit for filing an answer

The answer must be filed within 15 business days after the respondent receives notice that the application has been accepted as complete.

There are exceptions to this time limit. In particular, if the parties receive notice from the Agency that an expedited process will be used, then the respondent will have five business days to file an answer.

For more information, refer to:

- Section 25: Expedited Process
- Section 28: Request for Expedited Process

The Agency has the power to extend time limits where a party has good reason for not being able to meet a time limit. In this situation, a party must make a request under section 30 for an extension of the time limit for filing an answer.

For more information, refer to section 30: Request to Extend or Shorten Time Limit

Having a representative represent you

If a person filing an answer would like to have a representative (other than a lawyer or an officer or employee of the company in the case of a corporate respondent) act on their behalf, a written authorization must be filed with the Agency.

For more information, refer to section 16: Representative Not a Member of the Bar

Agency form: Form 4 – Authorization of Representative

20. Reply

(1) An applicant may file a reply to the answer. The reply must be filed within five business days after the day on which they receive a copy of the answer and must include the information referred to in Schedule 7.

(2) The reply must not raise issues or arguments that are not addressed in the answer or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Annotation: Reply to the answer

Once the respondent has filed an answer to the application, the applicant is then given an opportunity to reply to the answer.

Contents of a reply to the answer

The reply must include the information set out in Schedule 7.

An applicant filing a reply may either use Form 7 or another document and the other parties must be provided with a copy of the reply on the same day as it is filed with the Agency.

A reply can only address issues raised in the answer. It must not repeat arguments already made in the application, or raise new issues, arguments or evidence not related to the answer.

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material. For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

Agency form: Form 7 – Reply to Answer

Reply to the answer goes on the public record

A reply to an answer filed with the Agency is placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the answer, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Time limit for filing the reply to the answer

The reply to an answer must be filed within five business days after the applicant receives the answer.

There are exceptions to this time limit. In particular, if the parties receive notice from the Agency that an expedited process will be used, then the applicant has three business days to file a reply to an answer.

For more information, refer to:

- Section 25: Expedited Process
- Section 28: Request for Expedited Process

The Agency has the power to extend time limits where a party has good reason for not being able to meet a time limit. In this situation, a party must make a request under section 30 for an extension of the time limit for filing an answer.

For more information, refer to: Section 30: Request to Extend or Shorten Time Limit

21. Intervention

(1) An intervener may file an intervention. The intervention must be filed within five business days after the day on which their request to intervene is granted by the Agency and must include the information referred to in Schedule 8.

(2) An intervener's participation is limited to the participation rights granted by the Agency.

Annotation: Intervention

Section 29 sets out how a person applies to become an intervener in a dispute proceeding while section 21 sets out the process to be followed *after* the Agency has accepted a person as an intervener.

For more information on how to become an intervener, refer to section 29: Request to Intervene

Who is an intervener?

An intervener is a person with a "substantial and direct interest" in a dispute proceeding before the Agency. A person must make a request to the Agency and be accepted as an intervener before they can participate as an intervener in a dispute proceeding.

An intervener is not a party to the dispute proceeding unless they are named as a party by the Agency. However, interveners may be required to respond to questions or information requests from the Agency or from any party to the proceeding that is adverse in interest to them.

Extent of participation in the dispute proceeding

The Agency will determine the extent of an intervener's participation in the proceeding, including limitations on the issues that can be addressed in the intervention, and will

inform the intervener and the parties. This decision is based on the participation rights requested by the person and an assessment of what would be useful and necessary to the Agency's consideration of the issues in dispute.

The Agency may require that an intervener file information or documents, respond to questions from the Agency or respond to questions or document requests from a party that is adverse in interest.

Content of an intervention

An intervention must include the information set out in Schedule 8.

Agency form: Form 8 – Intervention

Time limit for filing an intervention

An intervention must be filed within five business days of the intervener being notified by the Agency that their request to intervene has been accepted. Note that the Agency can specify a shorter time limit. A person filing an intervention may either use Form 8 or another document and the other parties must be provided with a copy of the intervention on the same day that it is filed with the Agency.

Failure to meet this deadline means that the Agency will proceed with the dispute proceeding without the intervener's position being taken into account unless a request to extend the time limit for filing the intervention is filed and is accepted by the Agency.

For more information, refer to section 30: Request to Extend or Shorten Time Limit

Intervention goes on the public record

All interventions filed with the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the intervention, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

22. Response to Intervention

An applicant or a respondent that is adverse in interest to an intervener may file a response to the intervention. The response must be filed within five business days after the day on which they receive a copy of the intervention and must include the information referred to in Schedule 9.

Annotation: Response to Intervention

Who can file a response to an intervention

You have the option of filing a response to an intervention if you are:

- An applicant or a respondent; and
- Adverse in interest to the intervener

Content of a response to an intervention

The response to the intervention must include the information set out in Schedule 9.

The response can only address the issues raised in the intervention.

An applicant or a respondent filing a response may either use Form 9 or another document and the other parties must be provided with a copy of the response on the same day that it is filed with the Agency.

Agency form: Form 9 – Response to Intervention

Time limit for filing a response to an intervention

A response must be filed within five business days after the party adverse in interest receives the intervention. Note that the Agency can specify a shorter time limit.

Response to an intervention goes on the public record

All responses to interventions filed with the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the response to the intervention, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

23. Position Statement

(1) An interested person may file a position statement. The position statement must be filed before the close of pleadings and must include the information referred to in Schedule 10.

(2) A person that files a position statement has no participation rights and is not entitled to receive any notice in the dispute proceeding.

Annotation: Position statement

A person may become aware of a dispute proceeding that is before the Agency that they have an interest in and would like their views to be considered in the Agency's decision-making process. However, they might not want to apply to become an intervener or their interest might not be sufficient to permit them to participate as an intervener.

For more information, refer to:

- Section 21: Intervention
- Section 29: Request to Intervene

Position statements are automatically accepted

There is no requirement to demonstrate a "substantial and direct interest" in the dispute proceeding before filing a position statement, unlike a request to intervene. An interest in the dispute proceeding is sufficient to file a position statement.

The Agency will automatically accept a position statement and will consider it in its decision- making process, unless it has no relevance to the dispute proceeding.

Contents of the position statement

The position statement must include the information set out in Schedule 10. A person filing a position statement may either use Form 10 or another document to set out their interest in the dispute proceeding.

It is important to clearly set out whether the position statement is in support of or in opposition to the application and to provide a clear and concise description of your interest. You should also include any documents that are relevant in support of your position.

Agency form: Form 10 – Position Statement

Extent of participation in the dispute proceeding

Filing a position statement allows a person to have their views placed on the Agency's record without having to actively participate in the dispute proceeding (unless required to do so by the Agency). However, the Agency may require that a person who files a position statement file information or documents, respond to questions from the Agency or respond to questions or document requests from a party that is adverse in interest.

After a person files a position statement, their participation ends as they are not a party to the dispute proceeding. This means that they will not:

- Be copied on any documents filed;

- Receive updates on the proceeding; or
- Be provided with the opportunity to comment on subsequent correspondence.

A person who files a position statement will, however, receive a copy of the Agency's final decision in the matter.

Time limit for filing of a position statement

A position statement must be filed before the close of pleadings.

Section 26 of the Dispute Adjudication Rules sets out when the pleadings in a proceeding are closed. Parties will be notified once pleadings have closed. In addition, this information will be reflected in the status of cases on the Agency's website.

For more information, refer to

- Section 26: Close of Pleadings
- Appendix A: Agency Contact Information

Position statement goes on the public record

All position statements filed with the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the position statement, or parts of it, are confidential.

Although parties do not normally respond to position statements any party that believes that it should respond to a position statement may make a request to file a response to a position statement under section 34.

For more information, refer to:

- Section 7: Filing
- Section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules
- Section 31: Request for Confidentiality

24. Written Questions and Production of Documents

(1) A party may, by notice, request that any party that is adverse in interest respond to written questions that relate to the matter in dispute or produce documents that are in their possession or control and that relate to the matter in dispute. The notice must include the information referred to in Schedule 11 and must be filed

(a) in the case of written questions, before the close of pleadings; and

(b) in the case of the production of documents, within five business days after the day on which the party becomes aware of the documents or before the close of pleadings, whichever is earlier.

(2) The party to which a notice has been given must, within five business days after the day on which they receive a copy of the notice, file a complete response to each question or the requested documents, as the case may be, accompanied by the information referred to in Schedule 12.

(3) If a party wishes to object to a question or to producing a document, that party must, within the time limit set out in subsection (2), file an objection that includes

(a) a clear and concise explanation of the reasons for the objection including, as applicable, the relevance of the information or document requested and their availability for production;

(b) any document that is relevant in explaining or supporting the objection; and

(c) any other information or document that is in the party's possession or control and that would be of assistance to the party making the request.

Annotation: Asking questions or requesting documents of another party

Limitations on asking questions and requesting documents

To help respond to an application, answer, intervention or request, a party that is adverse in interest to another party can ask that party to respond to questions or produce documents. This request is made by sending a notice to the other party. A party may also request approval under section 27 to ask questions or request document production from persons who are not parties to the proceeding (for example, persons who file position statements and interveners who are not granted full party status in the proceeding by the Agency). If the Agency approves such a request, this rule applies to the person in the same way as it would to a party.

The notice to respond to questions or produce documents allows a party to test evidence or submissions made by another party adverse in interest to them, or to obtain further information in relation to the dispute.

Questions and requests for documents must be relevant and designed to clarify matters so that the party can clearly and accurately state its position in the matter that is before the Agency. There must be a link between the answers and documents requested and the matter in dispute.

A notice to produce documents must be for existing documents that the other party possesses or has access to or control of. The document must be referred to or relied on

in a submission to the Agency, or related to a matter in the dispute. A party cannot request that a new document be created.

Note that if a party adverse in interest makes a request before the close of pleadings and the request is approved by the Agency, they may be permitted to conduct oral cross-examinations on an affidavit to test the evidence contained in the affidavit. A party may make such a request under section 27 of the Dispute Adjudication Rules.

For more information, refer to section 27 – General Request

Content of a notice to respond to written questions or produce documents

The notice must include the information set out in Schedule 11.

A party filing a notice may either use form 11 or another document and the other parties must be provided with a copy of the notice on the same day as it is filed with the Agency.

Agency form: Form 11 – Written Questions or Request for Documents

Time limit for the notice for asking questions or requesting documents

Questions: any time before the close of pleadings.

Production of documents: within five business days of the party becoming aware of the document or before the close of pleadings, whichever is earlier.

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

For more information, refer to:

- Section 26: Close of Pleadings
- Appendix A: Agency Contact Information

Annotation: Response to a notice to respond to questions or produce documents

Time for responding to a notice

A party has five business days to respond after receiving a copy of the notice.

Responding to the notice

A party that has received a notice to respond to questions or produce documents must:

1. Provide a complete response to each question and/or produce copies of documents requested; and/or

2. Object to responding to any question or producing any document on the basis, among other matters, that it is not relevant to the issue before the Agency or that the information is not available.

Any questions that the party is responding to or any documents produced must be accompanied by the information contained in Schedule 12.

A party filing a response to the notice may either use Form 12 or another document and the other parties must be provided with a copy of the response to the notice on the same day as it is filed with the Agency.

Agency form: Form 12 – Response to Written Questions or Request for Documents

If a party objects to responding to any questions or producing any of the requested documents, it must provide the information set out in subsection 24(3). It is very important that the reasons for the objection be clearly set out. For example, if a party is of the view that the requested documents or questions asked are not relevant to the matter, then the reasons supporting this position must be stated.

Annotation: Party satisfied or not satisfied with the response

If the party asking questions or requesting documents is satisfied with the response, then this part of the dispute proceeding concludes. The information that was gathered goes on the public record or the confidential record if a claim for confidentiality is made by the party filing the documents and the Agency determines that the information is confidential. However, the party asking questions or requesting documents may not be satisfied that the response is complete or agree with the objections raised by the other parties. They then must make a request under subsection 32(1) for the Agency to require the other party to respond. .

Responses and documents go on the public record

Any information or documents gathered under section 24 of the Rules are placed on the public record unless:

1. A claim for confidentiality is made at the same time that they are filed or gathered; and
2. The Agency determines that the response, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Annotation: Documents and information required by the Agency

Although this provision only provides for the parties to ask questions and request documents from other parties, the Agency also has the power to require parties and other persons involved in a dispute proceeding to answer questions and provide further documents.

Agency gathering of additional information/documents

In addition to any documents filed, the Agency may require additional information from the parties and other persons (such as interveners) to assist in its decision making.

The Agency may gather additional information/documents in two ways:

1. By directing a person to produce information/documents and/or posing specific questions; or
2. By the Agency or staff performing a site inspection to collect information and data.

Documents and information required by the Agency go on the public record

All information/documents gathered by the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that they are filed or gathered; and
2. The Agency determines that the information/documents, or parts of them, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Documents filed with the Agency are provided to the parties in the dispute proceeding

Documents must be provided to the other parties on the same day that they are filed with the Agency, unless a request for confidentiality is made under section 31.

With respect to confidential information, if the Agency determines that the information is confidential, the Agency may limit the distribution of the information, permit a person to only make the documents available for review by other parties under limited circumstances, such as at a specified location or during certain hours, and require any person who is to receive access to the information to sign a confidentiality undertaking.

For more information, refer to section 31: Request for Confidentiality

Consequences of not providing documents or complying with the information gathering process

If a person does not comply with the process established by the Agency to gather more documents/information, the Agency may stay the dispute proceeding until the person complies.

If a dispute proceeding is stayed, a matter will not progress until the Agency determines that the process can continue. While the proceeding is stayed, the Agency will not accept or consider any documents. This will delay the issuance of the decision.

For more information, refer to section 41: Stay of Proceeding, Order or Decision

25. Expedited Process

(1) The Agency may, at the request of a party under section 28, decide that an expedited process applies to an answer under section 19 and a reply under section 20 or to any request filed under these Rules.

(2) If an expedited process applies to an answer under section 19 and a reply under section 20, the following time limits apply:

> **(a) the answer must be filed within five business days after the date of the notice indicating that the application has been accepted; and**
>
> **(b) the reply must be filed within three business days after the day on which the applicant receives a copy of the answer.**

(3) If an expedited process applies to a request filed under these Rules, the following time limits apply:

> **(a) any response to a request must be filed within two business days after the day on which the person who is responding to the request receives a copy of the request; and**
>
> **(b) any reply to a response must be filed within one business day after the day on which the person who is replying to the response receives a copy of the response.**

Annotation: Expedited Process

The expedited process can apply to:

- An answer under section 19 and a reply under section 20; or
- A request made under these Dispute Adjudication Rules

The expedited process has shorter time limits for filing documents in a dispute proceeding.

The Agency may on its own initiative apply an expedited process or a party can make a request for an expedited process. The expedited process is used if it is clearly demonstrated that following the time limits set out in the Dispute Adjudication Rules would cause a party financial or other prejudice. For example, a decision by the Agency is needed as soon as possible because a shipper has filed a level of service complaint against a railway company where perishable cargo is at risk.

Section 28 sets out how a party files a request for an expedited process.

Section 25 sets out the time limits for filing an answer and a reply and a request made under these Dispute Adjudication Rules in an expedited process, once the Agency has decided that such a process is appropriate.

For more information, refer to section 28: Request for Expedited Process

Time limit for an expedited process

The time limits depend upon whether they apply to a respondent's answer and the applicant's reply, or a request under these Dispute Adjudication Rules.

Answer/Reply: the answer must be filed within five business days and the reply must be filed in three business days.

A request made under these Dispute Adjudication Rules: a response to a request must be filed within two business days and a reply must be filed within one business day.

For information about the time limits for the close of pleadings in an expedited pleadings process, refer to section 26: Close of Pleadings

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

26. Close of Pleadings

(1) Subject to subsection (2), pleadings are closed

(a) if no answer is filed, 20 business days after the date of the notice indicating that the application has been accepted;

(b) if an answer is filed and no additional documents are filed after that answer, 25 business days after the date of the notice indicating that the application has been accepted; or

(c) if additional documents are filed after an answer is filed, the day on which the last document is to be filed under these Rules.

(2) Under the expedited process, pleadings are closed

(a) if no answer is filed, seven business days after the date of the notice indicating that the application has been accepted;

(b) if an answer is filed and no additional documents are filed after that answer, 10 business days after the date of the notice indicating that the application has been accepted; or

(c) if additional documents are filed after an answer is filed, the day on which the last document is to be filed under these Rules.

Annotation: Close of pleadings

The importance of knowing when pleadings are closed

It is important to know when pleadings are closed. The Agency will not accept documents filed after the close of pleadings unless a request is made under sections 30 or 34 and the Agency has approved the request. Without this approval, the document will not form part of the record and it will not be considered by the Agency when making its final decision.

Parties are responsible for making any requests before the close of pleadings. In particular, requests where information will be placed on the record (e.g. questions between parties) must be made before the close of pleadings.

Expedited process: pleadings will close earlier than they would in a regular dispute proceeding.

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

For more information, refer to:

- Section 30: Request to Extend or Shorten Time Limit
- Section 34: Request to File Document Whose Filing is Not Otherwise Provided for in Rules
- Appendix A: Agency Contact Information

Dispute Proceedings: Requests

Annotation: Requests

In any dispute proceeding, procedural issues can arise that need to be decided by the Agency in the course of the proceeding. Sections 27 to 36 of the Dispute Adjudication Rules deal with the process by which people can bring these procedural issues forward for decision. The request mechanism replaces what used to be known as “motions”.

Depending on the section, parties and in some instances persons can make a request to have a procedural issue determined by the Agency. Agency decisions on requests are sometimes referred to as “interlocutory decisions” meaning that they are a

procedural decision that is made during a proceeding before the final substantive decision is made on the merits of the application.

The Agency will render a decision or order on each request. The decision or order will contain a summary of the request as well as the Agency's conclusions. Where the request is contested, the Agency will provide reasons for its decision.

27. General Request

(1) A person may file a request for a decision on any issue that arises within a dispute proceeding and for which a specific request is not provided for under these Rules. The request must be filed as soon as feasible but, at the latest, before the close of pleadings and must include the information referred to in Schedule 13.

(2) Any party may file a response to the request. The response must be filed within five business days after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

(3) The person that filed the request may file a reply to the response. The reply must be filed within two business days after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Annotation: General requests

When to use section 27

If a person wants the Agency to address a procedural matter that is not covered in the specific requests found in sections 28 to 36, they must make a request under the general request provision, section 27, and obtain the Agency's approval.

The Dispute Adjudication Rules set out the process to be followed for specific types of procedural requests:

- Section 28 – Request for Expedited Process
- Section 29 – Request to Intervene
- Section 30 – Request to Extend or Shorten Time Limit
- Section 31 – Request for Confidentiality
- Section 32 – Request to Require Party to Provide Complete Response
- Section 33 – Request to Amend Document

- Section 34 – Request to File Document Whose Filing is not Otherwise Provided For in Rules
- Section 35 – Request to Withdraw Document
- Section 36 – Request to Withdraw Application

Content of a request

It is the responsibility of the person making the request to demonstrate to the satisfaction of the Agency that the request should be granted.

The person must provide details as to why the request should be granted by the Agency. It is not sufficient to merely make a request.

The request must include the information set out in Schedule 13. A person filing a request may either use form 13 or another document and the other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

Agency form: Form 13 – Request

Time limit for filing a request under section 27

A request must be filed as soon as possible after the issue arises and before the close of pleadings.

If the need to file a request arises after pleadings close, the request should be accompanied by a request under section 30 for an extension of time. For more information, refer to:

- Section 26: Close of Pleadings
- Section 30: Request to Extend or Shorten Time Limit

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

Annotation: Responding to a request

Contents of a response to a request

Any party to the proceeding can file a detailed response to the request with the Agency and the other parties.

For example, a party may choose to respond if it may be affected by the request. A party may be affected by a request if the request:

- Would require the party to do something; or
- Has an impact on the party, for example, it might delay the proceedings. The party must clearly indicate whether they support or oppose the request. If

opposed, the party must state why it does not want the Agency to grant the request, including the impact this would have on it or on the proceeding.

The response must include the information set out in Schedule 14. A party filing a response may either use Form 14 or another document and the other parties must be provided with a copy of the response to the request on the same day that it is filed with the Agency.

Agency form: Form 14 – Response to Request

Time limit for filing of a response to a request

A response to a request must be filed within five business days after the party receives the request.

Annotation: Replying to a response to a request

Contents of a reply to a response to a request

Once a party has responded to a request, the person who filed the request can file a written reply.

The purpose of the reply is to respond only to the issues raised in the response to the request. It must not raise new issues, arguments or evidence and should not repeat what is already in the request.

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is not Otherwise Provided For in Rules

Agency form: Form 15 – Reply to Response to Request

Time limit for filing a reply to a response to a request

Any reply to the response must be filed within two business days after the person receives the response, unless otherwise directed by the Agency.

28. Request for Expedited Process

(1) A party may file a request to have an expedited process applied to an answer under section 19 and a reply under section 20 or to another request filed under these Rules. The request must include the information referred to in Schedule 13.

(2) The party filing the request must demonstrate to the satisfaction of the Agency that adherence to the time limits set out in these Rules would cause them financial or other prejudice.

(3) The request must be filed

(a) if the request is to have an expedited process apply to an answer and a reply,

(i) in the case of an applicant, at the time that the application is filed, or

(ii) in the case of a respondent, within one business day after the date of the notice indicating that the application has been accepted; or

(b) if the request is to have an expedited process apply to another request,

(i) in the case of a person filing the other request, at the time that that request is filed, or

(ii) in the case of a person responding to the other request, within one business day after the day on which they receive a copy of that request.

(4) Any party may file a response to the request. The response must be filed within one business day after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

(5) The party that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

(6) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Annotation: Request for expedited process

Sections related to shortened time limits

Section 28 sets out how a party can file a request for an expedited process and some of the factors that the Agency might consider.

Section 25 sets out shorter time limits for filing pleadings in a dispute proceeding where the Agency has approved an expedited process. Section 30 should be used to shorten an individual time line.

For more information, refer to:

- Section 25: Expedited Process
- Section 30: Request to Extend or Shorten Time Limit

What is an expedited process?

The expedited process allows for shorter time limits for filing pleadings in a dispute proceeding. The Agency, either on its own initiative or at the request of a party, determines whether it is appropriate to apply the expedited process to the dispute proceeding.

This is an exceptional process and it is very important that the party making the request set out all relevant factors. The Agency will consider the impact of an expedited process on the other party or parties. Note that given the shortened time limits, the expedited process will only be considered where the parties can use an electronic instantaneous means of communication.

There are two situations where pleadings may be expedited:

The dispute proceeding: In an expedited proceeding, the time limits for the answer and reply are shortened.

A request under Sections 27 to 36: If a request is expedited, the time limits for the response and reply to the request are shortened. For example, if it is necessary for the parties to file additional information/documents or respond to questions of the other parties as part of the dispute proceeding, the time limits provided in the Dispute Adjudication Rules for responding can be expedited upon request.

Factors that the Agency may consider

Requests to expedite pleadings should refer to the factors that the Agency may take into account when considering a request:

- The complexity of the matter;
- The reasons for the request, including any financial or other prejudice that may be caused by following the time limits set out in the Dispute Adjudication Rules;
- The financial or other prejudice, if any, to the other parties if the request is granted; and
- Any other factors that may be relevant.

Contents of a request for an expedited process

It is the responsibility of the party making the request to demonstrate to the satisfaction of the Agency that the request should be granted. Reasons must be provided for expediting a pleadings process.

The request must include the information set out in Schedule 13 and reference should be made to the factors that the Agency looks at which are set out above. A party filing a request may either use Form 13 or another document. The other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

Agency form: Form 13 – Request

Time limit for requesting an expedited process

The time limit depends on whether it applies to a dispute proceeding (the filing of an answer and reply) or a request under sections 27 to 36.

Dispute proceeding: the request must be filed at the same time that the application is filed with the Agency or, in the case of a respondent within one business day after the date of the notice that the application is complete.

Request under Sections 27 to 36: the person must file the request at the same time that the other request is filed with the Agency or, in the case of a person responding to the other request, within one business day after the day on which they receive a copy of the request.

Annotation: Responding to a request

Contents of a response to a request for an expedited process

Any party to the dispute proceeding may file a detailed response to the request with the Agency and, on the same day, with the other parties.

The party must clearly indicate whether it supports or opposes the request. If the request is opposed, the party must state why it does not want the Agency to grant the request, including the impact this would have on it or on the proceeding.

A person filing a response to a request may either use Form 14 or another document.

Agency form: Form 14 – Response to Request

Time limit for responding to a request for an expedited process

All other parties to the proceeding will have one business day to file a response to a request for an expedited process.

Annotation: Replying to a response to a request

Contents of a reply to a response to a request

A reply to the response may be filed.

A reply can only address issues raised in the response to the request. It must not repeat arguments already made in the request, or raise new issues, arguments or evidence not related to the response to the request.

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

Time limit for filing a reply to a response to a request

Any reply to the response must be filed within one business day after the person receives the response, unless otherwise directed by the Agency.

29. Request to Intervene

(1) A person that has a substantial and direct interest in a dispute proceeding may file a request to intervene. The request must be filed within 10 business days after the day on which the person becomes aware of the application or before the close of pleadings, whichever is earlier, and must include the information referred to in Schedule 16.

(2) If the Agency grants the request, it may set limits and conditions on the intervener's participation in the dispute proceeding.

Annotation: Request to intervene

Section 29 sets out how a person applies to become an intervener in a dispute proceeding.

Section 21 sets out the process to be followed after the Agency has accepted a person as an intervener.

For more information, refer to section 21: Intervention

Who is an intervener?

An intervener is a person who has a “substantial and direct interest” in a dispute proceeding, either supports or opposes the application filed by the applicant and has been granted intervener status by the Agency. An intervener may be considered a party to the proceeding if the person asks for this status and it is granted by the Agency.

In a dispute proceeding, an applicant files an application against a specific party – the respondent. However, there may be other persons who have an interest in the application. Intervener status allows those persons to participate in the proceeding and have the Agency consider their views when making its decision.

Contents of the request to intervene in a dispute proceeding

A person requesting to be an intervener in a dispute proceeding before the Agency must demonstrate a “substantial and direct interest” in the application. The request must include the information set out in Schedule 16. A person filing a request may either use Form 16 or another document.

It is the Agency that determines the extent of your participation in the proceeding, based on your stated needs and an assessment of what will be helpful to the Agency in its decision-making process. As such, you should also indicate how you wish to participate in the proceeding. Do you want to fully participate and respond to other parties’ pleadings or do you want to participate in a more limited way (e.g. by only filing a written submission)? Do you want to be a party to the proceeding?

If the Agency grants your request to intervene in the proceeding, it will inform you of the extent of your participation.

Agency form: Form 16 – Request to Intervene

The discretion to allow an intervention lies with the Agency based on the Panel's assessment of whether the intervention will bring new information from a different perspective to the Agency that is relevant and necessary to its decision. As a result, a right of response and reply has not been provided. In exceptional cases, however, the Agency may, upon request filed under section 34 or on its own initiative, provide parties who are adverse in interest with the opportunity to respond to such requests, as well as a right of reply to the person seeking intervener status.

If the request to intervene is approved by the Agency, parties adverse in interest will have an opportunity to respond to the intervention when it is filed.

For more information refer to section 21 -- Intervention

Time limit for filing a request to intervene

A request to intervene must be filed within 10 business days after the person becomes aware of the dispute proceeding and, in any event, before the close of pleadings. The parties must be provided with a copy of the request on the same day that it is filed with the Agency. The Agency's website contains information about all dispute applications before the Agency for adjudication. This information will help you decide whether you want to intervene and it will provide information about the status of the file, including when pleadings are expected to close or if they are closed already.

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

If a person just becomes aware of an application and wishes to intervene but pleadings have already closed, the person may make a request under section 30 of the Dispute Adjudication Rules to permit the late filing. In exceptional circumstances, where the relevance and importance of the person's evidence to the Agency outweighs the prejudice or harm in delaying the proceeding, the Agency may reopen the pleadings to permit a late intervention.

For more information, refer to:

- Section 26: Close of Pleadings
- Section 30: Request to Extend or Shorten Time Limit
- Appendix A: Agency Contact Information

Intervention goes on the public record

Interventions filed with the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the intervention, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

In considering a claim for confidentiality of a document the Agency may reject the claim and place the document on the public record or determine that the information is in whole or in part confidential and grant access only to specific persons/parties on the filing of written undertakings to maintain the confidentiality of the information. In exceptional circumstances the Agency might determine that the document is confidential and cannot be viewed by other parties although it will be taken into consideration by the Agency when making a decision.

An intervener is not automatically a party to the dispute proceedings

Even if a request to intervene is granted by the Agency, the intervener does not become a party to the proceeding unless the Agency names the intervener as a party. This means that an intervener will not be copied on documents filed between the parties unless the Agency accepts them as a party or unless their participation rights include being provided with copies of documents. They will, however, be provided with a copy of the Agency's final decision in the dispute proceeding.

An intervener may be asked to respond to questions or document requests from either the Agency or the parties, regardless of whether or not they are a party.

Having a representative represent you

If a person filing a request to intervene would like to have a representative (other than a lawyer) act on their behalf, a written authorization must be filed with the Agency.

For more information, refer to section 16: Representative Not a Member of the Bar

Agency form: Form 4 – Authorization of Representative

Position statement as an alternative to becoming an intervener

Sometimes a person may have an interest in a dispute proceeding and want their views to be taken into consideration by the Agency. However, they may not have a "substantial and direct interest" in the proceeding and/or may want to limit their participation in the proceeding to simply filing a statement.

A position statement can be filed with the Agency as an alternative to being an intervener. Agency approval is not required to file a position statement.

For more information, refer to section 23: Position Statement

30. Request to Extend or Shorten Time Limit

(1) A person may file a request to extend or shorten a time limit that applies in respect of a dispute proceeding. The request may be filed before or after the end of the time limit and must include the information referred to in Schedule 13.

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Annotation: Request to extend or shorten time limit

Section 30 is used when a person wishes to extend or shorten a time limit in a dispute proceeding that has been established either in the Dispute Adjudication Rules or by the Agency.

For example, a person may have five business days to file a document with the Agency, but if there are factors that they believe would make it impossible to meet the deadline, they may apply to the Agency under this section to extend the time limit.

Contents of the request to extend or shorten time limit

It is the responsibility of the person making the request to demonstrate to the satisfaction of the Agency that the request should be granted. Reasons must be provided for extending or shortening time limits. Reference should be made to the factors that the Agency considers, which are set out below.

The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document.

Agency form: Form 13 – Request

Factors that the Agency may consider

Requests to extend or shorten time limits should refer to the factors appropriate to your request. The following are factors that the Agency may take into account when considering a request:

- The complexity of the matter;
- The impact of the request on other parties;
- The time required to compile the necessary information;
- The difficulty in obtaining the necessary information;
- Whether the party made a serious effort to meet the deadline;
- The period of time since the party first became aware of the matter;
- When the party requested the extension of time;
- The number of extensions already granted;
- The availability of key personnel of parties;

- A reasonable opportunity for parties to comment; and
- Any other factors that may be relevant.

Time limit for filing a request under section 30

Requests to extend a time limit should be made in enough time to permit the party to meet the original deadline if the request to extend the time limit is denied by the Agency. Under exceptional circumstances, the Agency may consider a request filed after the expiry of a time limit provided that the person demonstrates why the request could not have been made before the expiry of the time limit.

Responding to a request to extend or shorten time limit

The response to a request should reference the factors that the Agency may consider (set out above) and must be filed within three business days of the party receiving the request. It must include the information set out in Schedule 14.

A party filing a response to a request may either use Form 14 or another document and the other parties must be provided with a copy of the response to the request on the same day that it is filed with the Agency.

Agency form: Form 14 –Response to Request

Replying to the response to a request to extend or shorten time limit

A reply to the response, if any, must be filed within one business day of the party receiving the response. It should clearly address the issues raised in the response and must not raise any new issues.

A person filing a reply may either use form 15 or another document and the other parties must be provided with a copy of the reply on the same day that it is filed with the Agency.

Agency form: Form 15 – Reply to Response to Request

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

31. Request for Confidentiality

(1) A person may file a request for confidentiality in respect of a document that they are filing. The request must include the information referred to in Schedule 17 and must be accompanied by, for each document identified as containing confidential information,

> **(a) one public version of the document from which the confidential information has been redacted; and**
>
> **(b) one confidential version of the document that identifies the confidential information that has been redacted from the public version of the document and that includes, at the top of each page, the words: "CONTAINS CONFIDENTIAL INFORMATION" in capital letters.**

(2) The request for confidentiality and the public version of the document from which the confidential information has been redacted are placed on the Agency's public record. The confidential version of the document is placed on the Agency's confidential record pending a decision of the Agency on the request for confidentiality.

(3) Any party may oppose a request for confidentiality by filing a request for disclosure. The request must be filed within five business days after the day on which they receive a copy of the request for confidentiality and must include the information referred to in Schedule 18.

(4) The person that filed the request for confidentiality may file a response to a request for disclosure. The response must be filed within three business days after the day on which they receive a copy of the request for disclosure and must include the information referred to in Schedule 14.

(5) The Agency may

> **(a) if the Agency determines that the document is not relevant to the dispute proceeding, decide to not place the document on the Agency's record;**
>
> **(b) if the Agency determines that the document is relevant to the dispute proceeding and that no specific direct harm would likely result from its disclosure or that any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed, decide to place the document on the Agency's public record; or**
>
> **(c) if the Agency determines that the document is relevant to the dispute proceeding and that the specific direct harm likely to result from its disclosure justifies confidentiality,**
>
> > **(i) decide to confirm the confidentiality of the document or any part of it and keep the document or part of the document on the Agency's confidential record,**

(ii) decide to place a version of the document or any part of it from which the confidential information has been redacted on the Agency's public record,

(iii) decide to keep the document or any part of it on the Agency's confidential record but require that the person requesting confidentiality provide a copy of the document or part of the document in confidence to any party to the dispute proceeding, or to certain of their advisors, experts and representatives, as specified by the Agency, after the person requesting confidentiality has received a signed undertaking of confidentiality from the person to which the copy is to be provided, or

(iv) make any other decision that it considers just and reasonable.

(6) The original copy of the undertaking of confidentiality must be filed with the Agency.

Annotation: Request for confidentiality

The Agency is a quasi-judicial tribunal that follows the "open court principle." This principle guarantees the public's right to know how justice is administered and to have access to decisions rendered by courts and tribunals, except in exceptional cases. That is, the other parties in a dispute proceeding have a fundamental right to know the case being made against them and the documents that the decision-maker will review when making its decision which must be balanced against any specific direct harm the person filing the document alleges will occur if it is disclosed. This means that, upon request, and with limited exceptions, all information filed in a dispute proceeding can be viewed by the public.

In general, all documents filed with or gathered by the Agency in a dispute proceeding, including the names of parties and witnesses, form part of the public record. Parties filing documents with the Agency must also provide the documents to the other parties involved in the dispute proceeding under section 8 of the Dispute Adjudication Rules.

No person may refuse to file a document with the Agency because they believe that it is confidential. If a person believes that a document is confidential, they must make a request for confidentiality under section 31 and the Agency will decide whether the document is confidential. During this process, the document is not placed on the public record.

The Agency may also, without a request for disclosure being made, decide whether a document should be confidential after it provides the parties with a chance to comment on the issue.

Where the Agency finds that the document is not relevant to the dispute proceeding, the document will not form part of the record and will not be taken into consideration by the Agency when making its decision.

Where the Agency finds that the document is relevant to the dispute proceeding, the document will be put on the public record if the Agency finds that its disclosure will likely cause no specific direct harm, or that any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed.

It should be noted that in some situations documents that have been determined to be confidential by the Agency may have to be disclosed in whole or in part to some or all of the other parties if the Agency determines that not disclosing them to the other parties would be unfair. In this regard, safeguards are put in place to ensure that documents remain confidential, including ensuring that people who will have access to the documents sign confidentiality undertakings in which they promise to maintain the confidentiality of the information that they will have access to in the dispute proceeding.

For more information, refer to:

- Section 7: Filing
- Section 8: Copy to Parties

Contents of a request for confidentiality

The person making a request for confidentiality must file:

1. One **public version** of the document for the public record with the confidential information redacted (or blacked out). This version will go on the Agency's public record.
2. One **confidential version** of the document that contains and identifies the confidential information that has been redacted, or blacked out from the public version, by underlining with a single line the confidential text. The document must be marked "CONTAINS CONFIDENTIAL INFORMATION" on the top of each page. This version will go on the Agency's confidential record pending a final determination by the Agency on its confidentiality.
3. A **request for confidentiality** containing the information contained in Schedule 17, which will be placed on the public record. The request for confidentiality must address the relevance of the documents to the issue(s) before the Agency, as well as whether the disclosure would cause specific direct harm sufficient enough to outweigh the public interest in having it disclosed. A person filing a request may either use Form 17 or another document.

The request for confidentiality and the public version of the document must also be provided to the parties at the same time that they are filed with the Agency. A person filing a request for confidentiality may either use Form 17 or another document.

In the past, the Agency has indicated that vague claims of unspecified harm are not sufficient when making a request.

Related decision: Decision No. LET-P-A-67-2011

Agency form: Form 17– Request for Confidentiality

Party opposing a request for confidentiality

A party may oppose a request for confidentiality of a document by filing a written request for disclosure within five business days after receiving the request for confidentiality.

The request for disclosure should address the relevance of the document to the issue(s) before the Agency, as well as why the document is required to be disclosed or must be seen by the party, including the public interest in its disclosure. The request for disclosure must include the information set out in Schedule 18. . A party filing a request for disclosure may either use Form 18 or another document and the other parties must be provided with a copy of the request for disclosure on the same day that it is filed with the Agency.

Agency form: Form 18 – Request for Disclosure

Person making the request for confidentiality may respond

The person making the request for confidentiality may respond to the request for disclosure. The response must include the information set out in Schedule 14. A person filing the response may either use Form 14 or another document and the other parties must be provided with a copy of the request for disclosure on the same day that it is filed with the Agency.

The response must be filed within three business days after receiving the request for disclosure.

The response can only address the issues raised in the request for disclosure.

Agency form: Form 14 –Response to Request

If the document is determined to be not relevant

If the Agency determines that a document is not relevant to a dispute proceeding it will not be placed on the record and will not be taken into consideration by the Agency when making its decision on the matter before it.

If the document is relevant but the Agency determines that it is not confidential

If the Agency determines that a document is relevant and not confidential then it is put on the Agency's public record and will be taken into consideration by the Agency when making its decision on the matter before it.

If the document is determined to be confidential

If the Agency determines that the document is relevant and confidential, the Agency may :

- Order that the document be kept in confidence and not be placed on the public record;
- Order that a version or part of the document be placed on the public record from which the confidential information has been redacted (or blacked out);
- Order that the document (or any part of it) not be placed on the public record, but that it be provided in confidence to any of the other parties to the proceeding upon receipt of a signed confidentiality undertaking; or
- Make any other decision that it considers just and reasonable.

When a person makes a claim for confidentiality for a document and the Agency has ruled that it is confidential, the confidential document:

- Will be placed on a confidential record;
- Will be considered by the Agency in its decision-making process;
- Will not be made available to the public; and
- May be provided to the other parties or to some of them if the Agency finds that they require access to the document to make their case. Usually the person to receive the document must file a signed confidentiality undertaking before receiving the document.

The original copy of the undertaking must be filed with the Agency.

32. Request for Agency to Require Party to Respond

(1) A party that has given notice under subsection 24(1) may, if they are not satisfied with the response to the notice or if they wish to contest an objection to their request, file a request to require the party to which the notice was directed to provide a complete response. The request must be filed within two business days after the day on which they receive a copy of the response to the notice or the objection, as the case may be, and must include the information referred to in Schedule 13.

(2) The Agency may do any of the following:

(a) require that a question be answered in full or in part;

(b) require that a document be provided;

(c) require that a party submit secondary evidence of the contents of a document;

(d) require that a party produce a document for inspection only;

(e) deny the request in whole or in part.

Annotation: Request for Agency to require a party to provide a complete response

Request

Under section 24 of the Dispute Adjudication Rules, a party can give notice to another party to answer questions or produce documents.

If the party asking questions or requesting documents is satisfied with the response received, then this part of the dispute proceeding concludes. The information that was gathered goes on the public record or the confidential record (if the Agency determines that the information is confidential) and the dispute proceeding continues.

However, if a party is not satisfied with the response to its document request or to the answers provided to its questions, or if it opposes an objection to producing the documents or answering the questions, it may file a request under section 32 of the Dispute Adjudication Rules for an Agency decision on the matter. For example, the party who gave notice may oppose the objection(s) made to respond to questions or produce documents.

Note that if a party adverse in interest makes a request before the close of pleadings and the request is approved by the Agency, they may be permitted to conduct oral cross-examinations on an affidavit to test the evidence contained in the affidavit. A party may make such a request under section 27 of the Dispute Adjudication Rules.

For more information, refer to section 27 – General Request

Time limit

The request must be made within two business days after receiving the response to the document request or questions.

Content of the request

Justification must be provided for each question or document request where the party is not satisfied with the completeness of the answer or where an objection was made. The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document and the other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

Agency form: Form 13 – Request

Relief

The Agency may

(a) Require answering of a question in whole or in part
(b) Require production of a document
(c) Require production of secondary evidence of the content of a document
(d) Require that a document be provided for inspection only
(e) Deny the request in whole or in part

Responses and documents go on the public record

Any information or documents gathered under section 32 of the Dispute Adjudication Rules are placed on the public record unless:

- A claim for confidentiality is made at the same time that they are filed or gathered; and
- The Agency determines that the response, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

33. Request to Amend Documents

(1) A person may, before the close of pleadings, file a request to make a substantive amendment to a previously filed document. The request must include the information referred to in Schedule 13 and a copy of the amended document that the person proposes to file.

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include

(a) the information referred to in Schedule 14; and

(b) a description of any prejudice that would be caused to the party if the request were granted including, if applicable, an explanation of how the proposed amendments would hinder or delay the fair conduct of the dispute proceeding.

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

(5) The Agency may

(a) deny the request; or

(b) approve the request in whole or in part and, if the Agency considers it just and reasonable to do so, provide parties that are adverse in interest with an opportunity to respond to the amended document.

Annotation: Request to amend document

Types of amendments

There are two types of amendments or changes that can be made to documents: substantive and non-substantive.

Substantive amendments: A substantive amendment would have a direct impact on the matter in dispute. Examples include an amendment to the names of the persons involved in the dispute proceeding or information being added or taken out of a document such as an expert's report.

Any substantive amendment to a document will need to be approved by the Agency.

Non-substantive amendments:

Some examples of non-substantive amendments are:

- Correction of spelling of names and places; and
- Dates (if they have no substantive implications).

A request under the Dispute Adjudication Rules is not required to make a non-substantive amendment to a document.

The person must file a new copy of the document which clearly identifies the amendment being made by:

- Underlining any new text and striking out (or drawing a line through) any deleted text; and
- Adding "AMENDED" at the top right hand corner of the first page of the document.

Where a person submits a non-substantive amendment, but the Agency considers it to be a substantive amendment, the person will be notified of the requirement to follow the procedure for substantive amendments in subsection 33(1).

For more information, refer to section 14: Amended Documents

Time Limit for making a substantive amendment to a document

The request should be made as soon as the person learns of the change and in any event it must be made before pleadings close. Any delay in making the amendment

may result in the request being denied, particularly if prejudice or harm will be caused to the other parties.

Contents of a request to make a substantive amendment

A party that wants to make a substantive amendment to a document must file a request with the Agency to explain the change and why it needs to be made. The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document and the other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

The person must file a new copy of the document that clearly identifies the amendment being made by:

- Underlining any new text and striking out (or drawing a line through) any deleted text; and
- Adding “AMENDED” at the top right hand corner of the first page of the document.

For more information, refer to section 14: Amended Documents

Agency form: Form 13 – Request

Response to a request to make a substantive amendment

A party may respond to a request to amend a document.

Any party opposing the request must include a description of any prejudice or harm that would be caused to the party if the request were granted, and, if applicable, whether permitting the amendment will hinder or delay the fair conduct of the proceeding. The response must include the information set out in Schedule 14. A person filing a response to a request may either use Form 14 or another document and the other parties must be provided with a copy of the response to the request on the same day that it is filed with the Agency.

The response must be filed within three business days after the party receives a copy of the request.

Agency form: Form 14 – Response to Request

Replying to the response to a request to amend a document

A reply to the response to a request to amend a document, if any, must be filed within one business day of the party receiving the response. It should clearly address the issues raised in the response and must not raise any new issues.

A person filing a reply may either use form 15 or another document and the other parties must be provided with a copy of the reply on the same day that it is filed with the Agency.

Agency form: Form 15 –Reply to Response to Request

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

Outcome of a request to make a substantive amendment

After receiving a request to amend a document, the Agency may:

- Deny the request; or
- Approve the request, in whole or in part.

If the Agency approves the request, it may provide parties adverse in interest with the opportunity to respond to the amended document and will set out the process to be followed and the time limits to be met in a decision to the parties.

34. Request to File Document Whose Filing is not Otherwise Provided For in Rules

(1) A person may file a request to file a document whose filing is not otherwise provided for in these Rules. The request must include the information referred to in Schedule 13 and a copy of the document that the person proposes to file.

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include

(a) the information referred to in Schedule 14; and

(b) a description of any prejudice that would be caused to the party if the request were granted including, if applicable, an explanation of how the proposed filing would hinder or delay the fair conduct of the dispute proceeding.

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

(5) The Agency may

(a) deny the request; or

(b) approve the request and, if pleadings are closed and if the Agency considers it just and reasonable to do so, reopen pleadings to provide the other parties with an opportunity to comment on the document.

Annotation: Request to file document whose filing is not otherwise provided for in Rules

This section applies where a person seeks to file a document that is not identified in the Dispute Adjudication Rules or that the Agency has not required to be filed.

A request must be made and approved by the Agency. Without this approval, the documents will not form part of the record and will not be considered by the Agency when making its final decision. Where a request to file a document whose filing is not provided for is filed after the close of pleadings, it does not need to be accompanied by a request to extend the time limit under section 30.

For more information, refer to section 12: Filing After Time Limit

Content of a request to file document whose filing is not otherwise provided for in Rules

In their request the person must include the information referred to in Schedule 13 as well as a copy of the document that the person proposes to file. A person filing a request may either use Form 13 or another document and the other parties must be provided with a copy of the request on the same day as it is filed with the Agency.

The person making the request is responsible for demonstrating that the document should be accepted and form part of the record. In making a request the person should refer to the following factors (whichever are applicable) which the Agency may take into account:

- Was the document available before pleadings were closed or before the expiry of the time limit?
- Could the document have been obtained with reasonable effort (due diligence) before pleadings closed?

- Is the document relevant and necessary to the matter?
- Will the document advance the proceedings or assist the Agency in making its decision?
- Should the document be allowed on the record to avoid a miscarriage of justice – for instance, to correct an error in the record?
- Would the late filing of the new document allow a party to split or reargue their case?
- Will the other party suffer prejudice or harm?

Agency form: Form 13 – Request

Response to a request to file document whose filing is not otherwise provided for in Rules

A party may respond to a request to file documents whose filing is not otherwise provided for in the Dispute Adjudication Rules.

Any party opposing the request must include a description of any prejudice or harm that would be caused to the party if the request were granted, including, if applicable, whether permitting the request will hinder or delay the fair conduct of the proceeding. The response must also include the information set out in Schedule 14. A party filing a response to a request may either use Form 14 or another document and the other parties must be provided with a copy of the response on the same day that it is filed with the Agency.

The response must be filed within three business days after the party receives a copy of the request.

Agency form: Form 14 – Response to Request

Replying to the response to a request to file a document whose filing is not otherwise provided for in Rules

A reply to the response, if any, must be filed within one business day of the party receiving the response. It should clearly address the issues raised in the response and must not raise any new issues. A person filing a response to a request may either use form 15 or another document and the other parties must be provided with a copy of the response on the same day that it is filed with the Agency.

Agency form: Form 15 – Reply to Response to Request

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the

reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

Outcome of a request to file document whose filing is not otherwise provided for in Rules

After receiving a request to file documents after a time limit, the Agency may:

- Deny the request; or
- Approve the request, in whole or in part.

If the Agency approves the request, it may provide parties adverse in interest with the opportunity to respond to the documents and will set out the process to be followed and the time limits to be met in a decision to the parties.

For more information, refer to section 12: Filing After Time Limit

35. Request to Withdraw Document

(1) Subject to section 36, a person may file a request to withdraw any document that they filed in a dispute proceeding. The request must be filed before the close of pleadings and must include the information referred to in Schedule 13.

(2) If the Agency grants the request, it may impose any terms and conditions on the withdrawal that it considers just and reasonable, including the awarding of costs.

Annotation: Request to withdraw document

A party may request to withdraw any document filed in a dispute proceeding before the Agency. The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document. This request must be made before the close of pleadings and the other parties must be provided with a copy of the request on the same day as it is filed with the Agency.

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

The parties will be notified as to the Agency's decision on the matter and, if it approves the withdrawal, any terms and conditions the Agency may determine just and reasonable, such as the applicant paying the costs of another party.

For example, the Agency could require the applicant to pay the costs paid by the respondent in having an expert report prepared to address a document that was filed by the applicant if the applicant later decides to withdraw that document.

For more information, refer to:

- Section 26: Close of Pleadings
- Appendix A: Agency Contact Information

Agency form: Form 13 – Request

36. Request to Withdraw Application

(1) An applicant may file a request to withdraw their application. The request must be filed before a final decision is made by the Agency in respect of the application and must include the information referred to in Schedule 13.

(2) If the Agency grants the request, it may impose any terms and conditions on the withdrawal that it considers just and reasonable, including the awarding of costs.

Annotation: Request to withdraw application

An applicant may request to withdraw their application and discontinue their dispute proceeding before the Agency. This request must be made before the Agency issues its final decision. All other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document. The parties will be notified as to the Agency's decision on the matter and, if it approves the withdrawal, any terms and conditions that the Agency may determine just and reasonable, such as the applicant paying the costs of another party. For example, the Agency could require the applicant to pay the costs incurred by the respondent for that part of the dispute proceeding where the respondent incurred costs preparing expert reports to respond to the application.

Agency form: Form 13 – Request

Dispute Proceedings: Case Management

37. Formulation of Issues

The Agency may formulate the issues to be considered in a dispute proceeding in any of the following circumstances:

(a) the documents filed do not clearly identify the issues;

(b) the formulation would assist in the conduct of the dispute proceeding;

(c) the formulation would assist the parties to participate more effectively in the dispute proceeding.

Annotation: Formulation of issues

It is essential – for both the Agency and the parties – to have the issues in the dispute proceeding clearly identified.

If the submissions filed in a dispute proceeding do not clearly identify the issues, the Agency may, where appropriate, identify or clarify the issues. This will help the Agency conduct an efficient dispute proceeding and identify areas where further information may be required. It will also give the parties a better understanding of the issues before the Agency and allow for clearer and more directed responses.

In some situations, the Agency might require the parties to attend a conference by means of a telephone conference call or by personal attendance in order to identify or clarify the issues.

For more information on conferences, refer to section 40: Conference

An application may be considered incomplete if the applicant has not clearly identified the issues. In these cases, the applicant will be given 20 business days to complete their application.

For more information, refer to section 18: Application

38. Preliminary Determination

The Agency may, at the request of a party, determine that an issue should be decided as a preliminary question.

Annotation: Preliminary determination of issues

In some circumstances, the Agency may make a decision on a certain matter at the outset, before continuing with the dispute proceeding. These matters are often referred to as “preliminary matters”. For example, where there is a serious question about whether the party has standing to appear before the Agency, the Agency will usually

consider that issue as a preliminary matter and issue a decision on the preliminary issue before starting to gather pleadings and information on the merits of the application.

How to make a request for the preliminary determination of an issue

To request that an issue be determined as a preliminary matter, the process for making a general request to the Agency should be followed.

For more information, refer to: section 27: Requests – General Request

Agency form: Form 13 – Request

Staying the proceeding

The Agency may stay the dispute proceeding if the preliminary matter is a central issue, such as the Agency's jurisdiction to consider the issue(s) raised in the application.

This means that the dispute proceeding will stop while the Agency considers the preliminary matter. The Agency will not usually address any other issues raised in the dispute proceeding during the stay.

For more information, refer to section 41: Stay of Proceeding, Order or Decision

39. Joining of Applications

The Agency may, at the request of a party, join two or more applications and consider them together in one dispute proceeding to provide for a more efficient and effective process.

Annotation: Joining of applications

The Agency may, where appropriate, decide to join applications filed by different parties and consider them together in one dispute proceeding.

For example, this could occur if one or more applications raise similar issues, whether they are against the same respondents or different respondents. Note that the information contained in the various applications would be provided to all parties, subject to any request for confidentiality being made and a ruling from the Agency that information is confidential and should not be circulated.

How to make a request for the joining of applications

To request the joining of applications, the process for making a general request to the Agency should be followed.

For more information, refer to section 27: Requests – General Request

Agency form: Form 13 – Request

40. Conference

(1) The Agency may, at the request of a party, require the parties to attend a conference by a means of telecommunication or by personal attendance for the purpose of

(a) encouraging settlement of the dispute;

(b) formulating, clarifying or simplifying the issues;

(c) determining the terms of amendment of any document;

(d) obtaining the admission of certain facts or determining whether the verification of those facts by affidavit should be required;

(e) establishing the procedure to be followed in the dispute proceeding;

(f) providing for the exchange by the parties of documents proposed to be submitted;

(g) establishing a process for the identification and treatment of confidential information;

(h) discussing the appointment of experts; and

(i) resolving any other issues to provide for a more efficient and effective process.

(2) The parties may be required to file written submissions on any issue that is discussed at the conference.

(3) Minutes are prepared in respect of the conference and placed on the Agency's record.

(4) The Agency may issue a decision or direction on any issue discussed at the conference without further submissions from the parties.

Annotation: Conference

A conference is a meeting to discuss and resolve procedural matters or other issues. It can be held in person, by teleconference (telephone) or by web conference.

A conference may be conducted by Agency staff, counsel or the Agency Panel assigned to the case.

A conference may be held during any proceeding. However, if the proceeding is to be dealt with by way of an oral hearing, then at the time that an oral hearing is called, a pre-hearing conference will typically be held to work out the details of the procedures to be used in that case.

The result of a conference is usually a procedural direction, which is a decision issued by the Agency setting out specific procedural requirements and instructions to the

parties for the processing of the application. For example, a procedural direction might direct the parties to file specific information and if some of that information is confidential, it will also set out the rules as to how it is to be treated and who can have access to that information and under what terms and conditions.

Where the Agency and the parties agree on procedural matters, this agreement will be reflected in the procedural direction. Where the parties do not agree, the Agency will decide the matter based on the positions of the parties, as set out either in the minutes of the meeting and/or any written submissions made by the parties. Note that parties will have the opportunity to comment on the minutes.

Minutes are prepared for all conferences, circulated to the parties to ensure accuracy and placed on the Agency's record.

How to make a request for a conference

To request a conference, the process for making a general request to the Agency should be followed.

For more information, refer to section 27: Requests – General Request

Agency form: Form 13 – Request

41. Stay of Proceeding, Order or Decision

(1) The Agency may, at the request of a party, stay a dispute proceeding in any of the following circumstances:

(a) a decision is pending on a preliminary question in respect of the dispute proceeding;

(b) a decision is pending in another proceeding or before any court in respect of an issue that is the same as or substantially similar to one raised in the dispute proceeding;

(c) a party to the dispute proceeding has not complied with a requirement of these Rules or with a procedural direction issued by the Agency;

(d) the Agency considers it just and reasonable to do so.

(2) The Agency may, at the request of a party, stay a decision or order of the Agency in any of the following circumstances:

(a) a review or re-hearing is being considered by the Agency under section 32 of the Act;

(b) a review is being considered by the Governor in Council under section 40 of the Act;

(c) an application for leave to appeal is made to the Federal Court of Appeal under section 41 of the Act;

(d) the Agency considers it just and reasonable to do so.

(3) In staying a dispute proceeding or a decision or order, the Agency may impose any terms and conditions that it considers to be just and reasonable.

Annotation: Stay of proceeding, order or decision

What is a stay?

When the Agency stays a dispute proceeding, it means that the proceeding is stopped for a period of time. The dispute proceeding may be restarted at a later date. It means that the Agency is stopping the proceeding while another matter is being decided that has relevance to the matter that is before the Agency.

When the Agency stays a decision or order, it means that it will not enforce compliance with that Agency decision or order for the duration of the stay.

The Agency may decide on its own or at the request of another party to stay a dispute proceeding, or a decision or order of the Agency.

The Agency is much more likely to stay a proceeding than it is to stay a decision or order. The Agency's position is that its decisions and orders are properly made and final and binding unless and until they are overturned by either an appeal court or the Governor-in-Council. As such, the Agency's policy is to ensure compliance with its decisions and orders regardless of whether reviews or appeals are pursued. Should a respondent against whom a decision or an order is made wish to obtain a stay of the decision or order pending a review or appeal, it is the responsibility of that party to either seek a stay of the decision or order from the Agency or from the appeal court in the context of the appeal proceedings.

The Agency determines on a case-by-case basis whether it is appropriate to order a stay.

How to make a request for a stay

To request a stay of a proceeding, order, or decision, the process for general requests under section 27 must be followed.

A stay can delay either the issuance of the final decision or the implementation of any relief/remedies that were ordered by the Agency. As a result, the party making the request must clearly demonstrate to the Agency that the stay is justified.

In deciding whether to grant a stay, the Agency uses a three-part test that has been established by the courts (see below). A party, when providing reasons for the request for a stay, must provide submissions on all three parts of the test for a stay.

The Agency may also provide other parties to the dispute proceeding with the opportunity to comment on the request for a stay and the party requesting the stay will have an opportunity to reply to any responses received.

For more information, refer to section 27: Requests – General Request

Agency form: Form 13 –Request

Three-part test for a stay

To decide whether a stay should be granted, the Agency is guided by the three-part test in the Supreme Court of Canada decision *RJR - Macdonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 (RJR Macdonald). The Agency must determine whether:

1. There is a serious question to be tried based on a preliminary assessment of the merits of the case;
2. The party seeking the stay would suffer irreparable harm if the stay wasn't granted; and,
3. The party seeking the stay will suffer the greater harm if the stay is refused than the other party(ies) if the stay is granted (referred to as the balance of inconvenience to the parties).

Related decisions:

- Decision No. LET-R-267-1999
- Decision No. LET-R-174-2000
- Decision No. LET-AT-A-124-2013

The parties will be notified as to the Agency's decision on the matter and, if it approves the stay, any terms and conditions the Agency may determine appropriate, such as one party paying the costs of another party.

42. Notice of Intention to Dismiss Application

(1) The Agency may, by notice to the applicant and before considering the issues raised in the application, require that the applicant justify why the Agency should not dismiss the application if the Agency is of the preliminary view that

(a) the Agency does not have jurisdiction over the subject matter of the application;

(b) the dispute proceeding would constitute an abuse of process; or

(c) the application contains a fundamental defect.

(2) The applicant must respond to the notice within 10 business days after the date of the notice, failing which the application may be dismissed without further notice.

(3) The Agency may provide any other party with an opportunity to comment on whether or not the application should be dismissed.

Annotation: Notice of intention to dismiss application

In certain cases it seems apparent that the Agency does not have jurisdiction over a matter, or that the application does not properly raise an issue, or that the issue is irrelevant or has already been decided. In these cases, the Agency may express a preliminary view that the application should be dismissed but it will give the applicant an opportunity to address the Agency's preliminary view and justify why the application should not be dismissed. In other words, the applicant has the opportunity to change the Agency's initial view of the matter.

If the applicant does not convince the Agency to change its preliminary view, the application will be dismissed, which means that it will not be considered by the Agency.

Time limit for the applicant to respond to the Agency's preliminary view

The applicant must file a response to the Agency's preliminary view within 10 business days after being given notice of the Agency's preliminary view.

If the applicant does not respond within that time limit, the application will be dismissed without further notice.

Time limit for other parties to respond to the preliminary view

The Agency might provide other parties with an opportunity to comment on whether the application should be dismissed. The Agency will establish time limits for the filling of submissions by the other parties and will communicate this information in a decision.

Impact of dismissal

If an application is dismissed under this provision, this is a substantive, final decision by the Agency and the applicant will not be able to pursue the same matter before the Agency again.

This is different from a situation where an applicant is informed that their incomplete application is being closed as they have not provided the missing information. In this case, the Agency has not considered the application, the file is simply closed and the applicant is free to pursue the matter in the future.

For more information, refer to section 18: Application

Three situations where the Agency can dismiss an application

1. **The Agency does not have jurisdiction over the subject matter of the application:** The Agency can only issue decisions on matters within its mandate,

as set out in the *Canada Transportation Act* and other related legislation or regulations. In cases where the matter is clearly outside the Agency's mandate, the applicant will be notified and the application will be returned.

2. **Abuse of proceedings:** An abuse of proceedings could include cases where:
    - The supporting reasons are frivolous or vexatious;
    - Pleadings were initiated with the intent to cause distress or harm to others;
    - A proceeding was initiated for the purpose of delay; or,
    - A proceeding was an unjustified attempt to have a matter redetermined where it was already resolved in an earlier proceeding.
3. **Fundamental defect:** This includes situations where an issue is irrelevant or has already been determined.

43. Transitional Provision

The *Canadian Transportation Agency General Rules*, as they read immediately before the coming into force of these Rules, continue to apply to all proceedings before the Agency that were commenced before the coming into force of these Rules except proceedings in respect of which the application filed before that time was not complete.

Annotation: General Rules

The *Canadian Transportation Agency General Rules* (the Rules that existed before the coming into force of these Dispute Adjudication Rules) will continue to apply to all applications that are accepted as complete before June 4, 2014. If an application is filed before June 4 but is not accepted as complete until June 4 or after, these new Dispute Adjudication Rules will apply once the application has been accepted as complete.

44. Repeal

The *Canadian Transportation Agency General Rules*[1] are repealed.

45. Coming into Force

These Rules come into force on June 4, 2014, but if they are published after that day, they come into force on the day on which they are published.

[1] SOR/2005-35

List of schedules

Schedule 1: Translation — Required Information

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.
3. A list of the translated documents that indicates, for each document, the language of the original document.
4. An affidavit of the translator that includes
    a. the translator's name and the city or town, the province or state and the country in which the document was translated;
    b. an attestation that the translator has translated the document in question and that the translation is, to the translator's knowledge, true, accurate and complete;
    c. the translator's signature and the date on which and the place at which the affidavit was signed; and
    d. the signature and the official seal of the person authorized to take affidavits and the date on which and the place at which the affidavit was made.
5. The name of each party to which a copy of the documents is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 2: Verification by Affidavit

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.
3. An affidavit that includes
    a. the name of the person making the affidavit and the city or town, the province or state and the country in which it was made;
    b. a full description of the information being verified, a list of any supporting documents and a copy of each of those documents marked as appendices;
    c. an attestation that the person has personal knowledge of the information and that the information is, to their knowledge, true, accurate and complete or, if the person does not have personal knowledge of the information, a statement indicating the source of the

information and an attestation that the information is, to their knowledge, true, accurate and complete;

d. the person's signature and the date of signing; and

e. the signature and the official seal of a person authorized to take affidavits and the date on which and the place at which the affidavit was made.

4. The name of each party to which a copy of the verification is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 3: Verification by Witnessed Statement

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.
3. A statement before a witness that includes
    a. the name of the person making the statement and the city or town and the province or state and the country in which it was made;
    b. a full description of the information being verified, a list of any supporting documents and a copy of each of those documents marked as appendices;
    c. an attestation that the person has personal knowledge of the information and that the information is, to their knowledge, true, accurate and complete or, if the person does not have personal knowledge of the information, a statement indicating the source of the information and an attestation that the information is, to their knowledge, true, accurate and complete;
    d. the person's signature and the date of signing; and
    e. the name and signature of the person witnessing the statement and the date on which and place at which the statement was signed.
4. The name of each party to which a copy of the verification is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 4: Authorization of Representative

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person giving the authorization and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. The name of the person's representative and the representative's complete address, telephone number and, if applicable, email address and facsimile number.
4. A statement, signed and dated by the representative, indicating that the representative has agreed to act on behalf of the person.
5. A statement, signed and dated by the person giving the authorization, indicating that they authorize the representative to act on their behalf for the purposes of the dispute proceeding.
6. The name of each party to which a copy of the authorization is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 5: Application

1. The applicant's name, complete address, telephone number and, if applicable, email address and facsimile number.
2. If the applicant is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.
3. If the applicant is represented by a person that is not a member of the bar of a province, a statement to that effect.
4. The respondent's name and, if known, their complete address, telephone number and, if applicable, email address and facsimile number.
5. The details of the application that include
    a. any legislative provisions that the applicant relies on;
    b. a clear statement of the issues;
    c. a full description of the facts;
    d. the relief claimed; and
    e. the arguments in support of the application.
6. A list of any documents submitted in support of the application and a copy of each of those documents.

Schedule 6: Answer to Application

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The respondent's name, complete address, telephone number and, if applicable, email address and facsimile number.
3. If the respondent is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.
4. If the respondent is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the answer that include
    a. a statement that sets out the elements that the respondent agrees with or disagrees with in the application;
    b. a full description of the facts; and
    c. the arguments in support of the answer.
6. A list of any documents submitted in support of the answer and a copy of each of those documents.
7. The name of each party to which a copy of the answer is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 7: Reply to Answer

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the reply.
3. The details of the reply that include
    a. a statement that sets out the elements that the applicant agrees with or disagrees with in the answer; and
    b. the arguments in support of the reply.
4. A list of any documents submitted in support of the reply and a copy of each of those documents.
5. The name of each party to which a copy of the reply is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 8: Intervention

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The intervener's name, complete address, telephone number and, if applicable, email address and facsimile number.
3. If the intervener is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.
4. If the intervener is represented by a person that is not a member of the bar of a province, a statement to that effect.
5. The details of the intervention that include
    a. a statement that indicates the day on which the intervener became aware of the application;
    b. a statement that indicates whether the intervener supports the applicant's position, the respondent's position or neither position; and
    c. the information that the intervener would like the Agency to consider.

6. A list of any documents submitted in support of the intervention and a copy of each of those documents.
7. The name of each party to which a copy of the intervention is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 9: Response to Intervention

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the response.
3. The details of the response that include
    a. a statement that sets out the elements that the person agrees with or disagrees with in the intervention; and
    b. the arguments in support of the response.
4. A list of any documents submitted in support of the response and a copy of each of those documents.
5. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 10: Position Statement

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the position statement or, if the person is represented, the name of the person on behalf of which the position statement is being filed, and the person's complete address, telephone number and, if applicable, email address and facsimile number.
3. If the person is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.
4. If the person is represented by a person that is not a member of the bar of a province, a statement to that effect.
5. The details of the position statement that include
    a. a statement that indicates whether the person supports the applicant's position, the respondent's position or neither position; and
    b. the information that the person would like the Agency to consider.
6. A list of any documents submitted in support of the position statement and a copy of each of those documents.

Schedule 11: Written Questions or Request for Documents

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the written questions or the request for documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.
3. The name of the party to which the written questions or the request for documents is directed.
4. A list of the written questions or of the documents requested, as the case may be, and an explanation of their relevance to the dispute proceeding.
5. A list of any documents submitted in support of the written questions or the request for documents and a copy of each of those documents.
6. The name of each party to which a copy of the written questions or the request for documents is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 12: Response to Written Questions or Request for Documents

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the response to the written questions or the request for documents.
3. A list of the documents produced.
4. A list of any documents submitted in support of the response and a copy of each of those documents.
5. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 13: Request

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the request and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.
3. The details of the request that include
    a. the relief claimed;
    b. a summary of the facts; and
    c. the arguments in support of the request.

4. A list of any documents submitted in support of the request and a copy of each of those documents.
5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 14: Response to Request

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the response.
3. An identification of the request to which the person is responding, including the name of the person that filed the request.
4. The details of the response that include
    a. a statement that sets out the elements that the person agrees with or disagrees with in the request; and
    b. the arguments in support of the response.
5. A list of any documents submitted in support of the response and a copy of each of those documents.
6. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 15: Reply to Response to Request

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the reply.
3. An identification of the response to which the person is replying, including the name of the person that filed the response.
4. The details of the reply that include
    a. a statement that sets out the elements that the person agrees with or disagrees with in the response; and
    b. the arguments in support of the reply.
5. A list of any documents submitted in support of the reply and a copy of each of those documents.
6. The name of each party to which a copy of the reply is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 16: Request to Intervene

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person that wishes to intervene in the dispute proceeding, their complete address, telephone number and, if applicable, email address and facsimile number.
3. If the person is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.
4. If the person is represented by a person that is not a member of the bar of a province, a statement to that effect.
5. The details of the request that include
    a. a demonstration of the person's substantial and direct interest in the dispute proceeding;
    b. a statement specifying the date on which the person became aware of the application;
    c. a statement that indicates whether the person supports the applicant's position, the respondent's position or neither position; and
    d. a statement of the participation rights that the person wishes to be granted in the dispute proceeding.
6. A list of any documents submitted in support of the request and a copy of each of those documents.
7. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 17: Request for Confidentiality

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the request and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.
3. The details of the request that include
    a. an identification of the document or the portion of the document that contains confidential information;
    b. a list of the parties, if any, with which the person would be willing to share the document; and
    c. the arguments in support of the request, including an explanation of the relevance of the document to the dispute proceeding and a description of the specific direct harm that could result from the disclosure of the confidential information.
4. A list of any documents submitted in support of the request and a copy of each of those documents.

5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Schedule 18: Request for Disclosure

1. The applicant's name, the respondent's name and the file number assigned by the Agency.
2. The name of the person filing the request.
3. The details of the request that include
    a. an identification of the documents for which the party is requesting disclosure;
    b. a list of the individuals who need access to the documents; and
    c. an explanation as to the relevance of the documents for which disclosure is being requested and the public interest in its disclosure.
4. A list of any documents submitted in support of the request and a copy of each of those documents.
5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

Appendix A: Agency Contact Information

Documents must be sent to the Secretary of the Canadian Transportation Agency.

By mail
Secretary
Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9

By courier
Secretary
Canadian Transportation Agency
15 Eddy Street
17th Floor, Mailroom
Gatineau, Quebec
J8X 4B3

By fax
819-953-5253

By e-mail
secretariat@otc-cta.gc.ca

For further information:

Canadian Transportation Agency
Ottawa, Ontario K1A 0N9
Tel: 1-888-222-2592
TTY: 1-800-669-5575
Web: www.cta.gc.ca
E-mail: info@otc-cta.gc.ca

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

For more information, refer to section 26: Close of Pleadings

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION | ASSOCIATION DES LIBERTÉS CIVILES DE LA COLOMBIE-BRITANNIQUE

September 5, 2017

BY EMAIL – Tim.Hillier@otc-cta.gc.ca

Canadian Transportation Agency
15 Eddy Street
Gatineau, QC J8X 4B3

Attn: Tim Hillier, Director of Communications

Dear Mr. Hillier,

I write on behalf of the British Columbia Civil Liberties Association ("BCCLA"). It has come to our attention through media reports that the Canadian Transportation Agency ("CTA") has been deleting public comments left under posts on its Facebook page, and intends to continue this practice.

More specifically, the CTA has stated that any comments with links to another webpage "will be deleted" due to a breach of the CTA's social media policy.[1] These stories led us to review the nature of the comment that was allegedly in violation of your policy as well as a review of the social media policy itself.

As explained at greater length below, the CTA's stated intention to delete any comments that include a certain hyperlink, and the policy upon which it is based, are concerning to the BCCLA. We believe that these practices have negative implications for freedom of expression. I am writing to ask that you conduct a review of your social media policy and revise as needed to better protect freedom of expression for Canadians.

[1] See Appendix 1.

British Columbia Civil Liberties Association
900 Helmcken Street, 2nd floor
Vancouver, BC, Canada V6Z 1B3
T 604.687.2919
F 604.687.3045
info@bccla.org
www.bccla.org

Freedom of Expression and Social Media

The right to free expression is a cornerstone of Canadian democracy. Under section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), Canadians are free to peacefully express opinions and ideas contrary to those held by government, subject only to such reasonable limits as may be justified in a free and democratic society. Our courts have been clear that the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process are the core values protected by this constitutional provision. The protection afforded by the *Charter* to this right diminishes as a person's conduct moves further away from these core values.

In the modern era, as our courts have observed, social media has become a valuable public forum [2]- comparable to a digital public square - with a potentially unlimited audience. It is also recognized by the Government of Canada as an essential means of communication with the public.[3] Government social media accounts on platforms such as Facebook, Twitter and YouTube, are an online equivalent of government property and are therefore spaces in which Canadians should be free to exchange opinions, debate ideas and praise or criticize the government.

We recognize that the public's right to free expression is not absolute. Our constitution accepts that some limits may be imposed and courts have recognized such limits for example to protect a person's reputation or to prohibit the willful promotion of hatred against an identifiable group. Further, we appreciate that statutory privacy laws and appropriate moderation do sometimes require interceding in comments. However, we feel that the guidelines need review.

[2] R. v. Elliott, 2016 ONCJ 35; R. v. MacKinnon, 2015 ABPC 268 at para. 6.

[3] Government of Canada, Directive on the Management of Communication, ss. 6.20 and 6.21, available at https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=30682

Deletion of Comments left by Gabor Lukacs

The CBC has recently reported that the CTA's "social media co-ordinator" messaged Gabor Lukacs threatening to block him from the agency's Twitter and Facebook accounts if he continues to include a hyperlink to a specific webpage "5 Reasons not to Trust the Canadian Transportation Agency."[4] The BCCLA subsequently reviewed the CTA Facebook page and found a post from July 28, 2017 informing the public that comments with links to that same webpage would be removed because it breaches the agency's social media policy in four ways.[5]

One of the reasons cited for deleting the comment is that the post "puts forward serious, unproven or inaccurate accusations against individuals or organizations." The CBC story provides that your agency did not respond to repeated requests for specific inaccurate accusations in the post. Another reason cited is that the post was "repetitive or spam." The repeated posts by Gabor Lukacs, each made after a previous post of his was deleted, could instead be interpreted as persistence in wanting to express himself in the face of repeated silencing by the CTA.

We are concerned by the precedent that the CTA is setting in this context. Gabor Lukacs' posts to your agency's social media account is relevant, a matter of public interest, and a legitimate exercise of his right to freedom of expression. Your agency's repeated removal of his comment with the link to another website that is critical of the CTA does not appear to the BCCLA to be reasonably justified in these circumstances. It appears as if the CTA is acting to silence a dissenting opinion. We urge you to reconsider your position and your agency's moderation of comments on social media platforms.

[4]Yvonne Colbert, "Transportation agency accused of censorship after deleting online criticism", *CBC News*, August 8, 2017, online at http://www.cbc.ca/news/canada/nova-scotia/canadian-transportation-agency-facebook-post-gabor-lukacs-1.4235123

[5] See Appendix 1.

Use of Social Media Rules are Problematic

As discussed above, we acknowledge that there are legitimate reasons to moderate discussion on social media platforms. We also realize that it can be difficult to develop public policy that accounts for all possible social media interactions.

There are a number of criteria that the CTA uses to edit or delete comments from the public on social media that are problematic to the BCCLA. The criteria that stand out as the most likely to be incompatible with the *Charter* right to free expression are the following:[6]

- Contain announcements from labour or political organizations;
- Are written in a language other than English or French;
- Are unintelligible or irrelevant;
- Are repetitive or spam; and
- Do not, in our opinion, add to the normal flow of the discussion.

We urge you to restore the unjustifiably deleted comments on your Facebook page, and to undertake a review and revision of CTA's Use of Social Media policy.

We hope to hear from you soon about this important matter.

Sincerely,

Micheal Vonn
Policy Director

[6] https://www.otc-cta.gc.ca/eng/use-social-media

Appendix 1: Screenshot of the CTA's Facebook Post about Reasons for Deleting Comments with Links to "5 Reasons Not to Trust the Agency."

Justice Centre
for Constitutional Freedoms

September 13, 2017

Via email and regular mail

Elizabeth C. Barker
General Counsel
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec J8X 4B3
liz.barker@cta-otc.gc.ca

Dear Ms. Barker:

Re: Unconstitutional Censorship of Expression on CTA Facebook Page

We write on behalf of Dr. Gabor Lukacs, the coordinator of Air Passenger Rights, an air passenger rights advocacy network. The Canadian Transportation Agency (CTA) has violated Dr. Lukacs' freedom of expression, guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*, by deleting Dr. Lukacs' posts from the public CTA Facebook page.

We request that the Canadian Transportation Agency cease its policy of censorship on social media.

Background Facts

CTA uses social media, such as Facebook, Twitter and YouTube, to "encourage communications between [the public] and the Agency."[1] Further, CTA has repeatedly stated that it "is committed to an open and transparent dialogue with Canadians and welcomes a variety of perspectives and opinions."[2] Additionally, CTA has stated:

> We believe that only by being open to challenge, debate and a free and honest exchange of ideas can we ensure that we are serving Canadians to the best of our ability.[3]

On its Facebook page, CTA regularly posts public announcements about the Agency, tips on air travel and links to various webpages. Members of the public frequently comment on CTA's Facebook posts and occasionally CTA replies to those comments. These communications are all public, allowing members of the public to interact with the Agency and with each other.

[1] See CTA Use of Social Media policy, https://www.otc-cta.gc.ca/eng/use-social-media.
[2] July 5, 2017 Facebook message to Dr. Lukacs from CTA Social Media Coordinator ("July 5 Message").
[3] July 26, 2017 Facebook post by CTA on CTA Facebook page.

Dr. Lukacs published an article "5 Reasons not to Trust the Canadian Transportation Agency" (the "Article"). The Article listed 5 concerns with the CTA: 1) institutional bias, 2) track record of lack of enforcement, 3) Vice-Chair: former airline lobbyist, 4) Manager of Enforcement: on first-name basis with industry, and 5) Chief Dispute Officer: lawyer suspended for misconduct. The Article is enclosed with this letter.

The issue of systemic passenger abuse by airlines is a matter of concern for all Canadians. Dr. Lukacs and the informal Air Passenger Rights network are concerned that airlines frequently act in violation of passenger rights and the laws of contract, and do so with impunity. Dr. Lukacs feels that the Agency is not fulfilling its role to hold airlines accountable for improper or unlawful practices. As he posted comments on the CTA's Facebook page, Dr. Lukacs would occasionally post a link to the Article.

On July 5, 2017, Dr. Lukacs received a private Facebook message from an unnamed individual purporting to be the CTA Social Media Coordinator using the Facebook name of "Cta Otc". The message told Dr. Lukacs that a number of his comments "directly targeted a number of Agency employees that draw their integrity into question." It further informed him that these posts violated CTA's Use of Media policy, and that if they continued, "the Agency will block your future access to comment on our Facebook and Twitter channels."[4]

Dr. Lukacs immediately responded to confirm whether the message actually originated with the Agency. He denied making improper posts and asked for clarification as to how he had disclosed "personal information" or made "unproven or inaccurate accusations against individuals or organizations". Dr. Lukacs asserted that attempts to censor him unlawfully interfered with his freedom of expression.

On July 19, 2017, Dr. Lukacs received another Facebook message from a person purporting to be the CTA Social Media Coordinator, telling him that his posting of "5 Reasons not to Trust the Canadian Transportation Agency" did not comply with their guidelines and was being removed. The message did not explain what "personal information" or "unproven or inaccurate accusations" were made in the Article. The message warned Dr. Lukacs to "stop posting references to the article" or his account would be blocked.

On July 28, 2017, the CTA made the following public post on its Facebook page:

> Comments with links to "5 Reasons Not To Trust The Agency" will be deleted as it is deemed to be in breach of our social media policy, as well as Facebook's Community Guidelines, based on:
> • It is repetitive or spam;
> • Contains references to personal information;
> • Puts forward serious, unproven or inaccurate accusations against individuals or organizations;
> • Do not, in our opinion, add to the normal flow of the discussion.

[4] July 5 Message.

CTA removed comments with links to or that referred to the Article, and blocked Dr. Lukacs from posting on the CTA's Facebook page.

Violation of Freedom of Expression

The CTA is a government body and is required to respect freedom of expression, guaranteed under section 2(b) of the *Charter.*

CTA has created a public Facebook page and invited the public to express their opinions and perspectives and has committed itself to being open to challenge and debate on its Facebook page. Clearly, the CTA Facebook page is a proper forum for public expression regarding the CTA, and expression there is protected under section 2(b) of the *Charter.*

The CTA's censorship of Dr. Lukacs in a public forum is unlawful. CTA's Use of Social Media policy cannot be used to justify censorship of government criticism. The Use of Social Media policy violates section 2(b) of the *Charter* by prohibiting, for example, comments that include "serious … accusations", that are "offensive", "irrelevant" or that do not "add to the normal flow of the discussion."

In *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, the Supreme Court of Canada struck down policies that prohibited controversial and political advertisements, finding that those policies prohibited a "highly valued form of expression in a public location that serves as an important place for public discourse."

CTA itself acknowledges the importance of a free and open expression on its Facebook page, which it has set up as an important place for public discourse concerning the CTA. It is important that the CTA actually allow freedom of expression on the CTA Facebook page and other social media, not just pay lip service to the *Charter* rights of Canadians. Policies that improperly prevent lawful expression must be changed.

In this present situation, CTA has applied its policies to censor Dr. Lukacs' expression. The reasons CTA cites for removing links to the Article and blocking Dr. Lukacs are not justifiable in a free and democratic society, where freedom of expression is protected in order to (1) enable democratic discourse, (2) facilitate truth seeking, and (3) contribute to personal fulfillment.[5] As a government agency, CTA would do well to regard the following passage from Canada's Supreme Court and govern itself accordingly:

> Freedom of expression was entrenched in our Constitution and is guaranteed … so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic

[5] *See Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*] at p. 976.

> society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:
>
> > . . . is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[6]

Conclusion

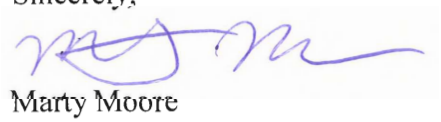
The CTA censorship of Dr. Lukacs, and the policy on which that censorship is based, violate the freedom of expression guaranteed by the *Charter*. This violation cannot be justified in Canada's free and democratic society.

We request that the Canadian Transportation Agency cease its censorship of Dr. Lukacs, and change its Use of Social Media policy to properly respect freedom of expression. Further, we request that CTA confirm in writing that Dr. Lukacs is no longer blocked from posting on CTA's social media pages, including links to the Article, and that Dr. Lukacs' posts will not be summarily deleted.

Should CTA choose rather to continue to violate Dr. Lukacs' constitutional freedom, we will have no alternative but to pursue further steps to defend our client's rights.

We request a response from CTA no later than 4:00 p.m. EST, Friday September 22, 2017.

Sincerely,



Marty Moore
Justice Centre for Constitutional Freedoms
Counsel for Dr. Gabor Lukacs

Enclosures

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[6] *Irwin Toy*, at pp. 968-69.

Members

- Scott Streiner, Chair and CEO
- Sam Barone, Vice-Chair and Member
- Peter Paul Fitzgerald, Member
- William G. McMurray, 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.

Sam Barone, Vice-Chair and Member

Mr. Sam Barone became a Member and Vice-Chair of the Canadian Transportation Agency on March 18, 2013.

Mr. Barone has more than 30 years of transportation leadership experience in a wide variety of positions in the public, private and not-for-profit sectors.

Prior to joining the Agency, he was President and CEO of the Canadian Business Aviation Association; and from 2006-2008, was President and CEO of the Air Transport Association of Canada.

His previous roles include that of Regional Vice-President of InterVISTAS Transportation Consulting Inc. and President and CEO of the Canadian Trucking Human Resources Council.

Mr. Barone holds a B.A. in Economics from McMaster University in Hamilton, Ontario and completed graduate studies as an Executive Fellow of Business Administration at the Canadian School of

Management in Toronto. He is a Fellow of the Chartered Institute of Logistics & Transport, an organization representing transport and logistics industries worldwide. Mr. Barone also completed executive management programs at the Queens University and Harvard University graduate schools of business. He also completed the Alternative Dispute Resolution program at the Faculty of Law, University of Windsor.

He has also served on many boards, such as the Canadian Council for Aviation & Aerospace, the Hope Air Charity, the Chartered Institute of Logistics and Transport in North America, and the Canada Safety Council. Mr. Barone was awarded the Queen's Golden Jubilee Medal in 2002.

Peter Paul Fitzgerald, Member

Dr. Peter Paul Fitzgerald became a Member of the Canadian Transportation Agency on June 18, 2014.

Dr. Fitzgerald handled legal files related to the Air India Flight 182 disaster and has published for over 25 years in peer-reviewed law journals in Canada, the United States and Europe. He has presented papers at international conferences in Canada, the United States, Europe and Asia. Dr. Fitzgerald has taught aviation law to students at McGill University’s Institute of Air and Space Law and Chicago’s DePaul University College of Law.

He has served as an advisor to government on aviation, rail and marine matters. He championed Canada’s Blue Skies policy and helped promote changes to the *Canada Transportation Act* and the *Canada Marine Act*. He was awarded the Queen’s Golden Jubilee Medal in 2003 and the Queen’s Diamond Jubilee Medal in 2012.

Dr. Fitzgerald holds an earned doctorate in Law at McGill University's Institute of Air and Space Law. He holds a master of business administration from the Richard Ivey School of Business at the University of Western Ontario, a joint bachelor of common and civil law from McGill University and a bachelor of political science from Université Laval. He is a Fellow of the Royal Aeronautical Society and also a Fellow of the Chartered Institute of Logistics and Transport.

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.

⚠ Related pages

Code of Conduct for Members of the Agency

Date modified:
2017-02-07

Tel: 613-238-8501 Fax: 613-238-1045 Toll Free 1-800-267-3926

Examination No. 14-0857 Court File No. A-167-14

FEDERAL COURT OF APPEAL

B E T W E E N:

DR. GABOR LUKACS

APPLICANT

- and -

CANADIAN TRANSPORTATION AGENCY

RESPONDENT

****

CONTINUED CROSS-EXAMINATION OF SIMONA SASOVA ON HER AFFIDAVIT sworn May 20th, 2014, pursuant to an appointment made on consent of the parties, to be reported by Gillespie Reporting Services, on the 15th day of September, 2014, commencing at the hour of 11:29 in the forenoon.

****

APPEARANCES:

Dr. Gabor Lukacs, for the Applicant

Mr. John Dodsworth, for the Respondent

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

(i)

INDEX

NAME OF WITNESS: SIMONA SASOVA

CONTINUED CROSS-EXAMINATION BY: DR. GABOR LUKACS

NUMBER OF PAGES: 93 THROUGH 153 INCLUSIVE

ADVISEMENTS, OBJECTIONS & UNDERTAKINGS

EXHIBITS

DATE TRANSCRIPT ORDERED: SEPTEMBER 15, 2014

DATE TRANSCRIPT COMPLETED: OCTOBER 06, 2014

also be objecting to.

423. Q. Is it your practice to be on a first-name basis with executives of corporations against whom you take enforcement actions?

A. Yes.

DR. LUKACS: So, counsel, now that I have that answer would you withdraw your objection to answer this specific question about Expedia?

MR. DODSWORTH: Yes, I withdraw my objection.

DR. LUKACS: Okay.

424. Q. So for how long have you been on a first-name basis with Mr. de Blois of Expedia?

A. Probably since we started communicating. It is a common practice.

425. Q. Now let’s look at page 49. On May 1, 2014, Expedia had further questions for Mr. Lynch, correct?

MR. DODSWORTH: Before you ask your question, we will just confirm that this is in fact a new document.

DR. LUKACS: Please take your time.

THE WITNESS: Yes, go ahead. That is a new one, yes. That is a new one. I am sorry, what was the question again?

DR. LUKACS:

426. Q. The question was: Expedia had further questions for Mr. Lynch on May 1, 2014.

The Law Society of Upper Canada | Barreau du Haut-Canada

Lawyer and Paralegal Directory

Discipline History Information

New Search Back to Discipline Summary Page

Douglas William Smith , Lawyer, Suspended

Conduct Proceeding: 21-Jun-2004

Douglas William Smith was found to have engaged in professional misconduct for: failing to serve 4 clients in a conscientious, diligent and efficient manner; failing to complete the settlement in a matrimonial matter by failing to make a prompt application for a consent divorce judgment, as had been agreed to by him and his client, another lawyer, and his client; failing to respond in a timely and complete fashion to written and oral communications from another lawyer; and breaching his Undertaking given to the Law Society on November 15, 1994 to respond promptly to Law Society. The Hearing Panel ordered that the Member be suspended for nine months to commence not later than August 15, 2004 subject to four conditions of reinstatement: (1) prior to reinstatement, the Member shall obtain the written approval of the Secretary of the Law Society of a plan of supervision to last not less than two years after reinstatement, and to feature a supervisor who is not a member of his current (as of the date of the Order) firm; (2) prior to reinstatement, the Member shall obtain the written approval of the Secretary of the Law Society of a recognized health care practitioner who will treat the Member for, in the discretion of the Secretary, not less than two years, and who shall file reports with the Secretary at roughly six month intervals; (3) prior to reinstatement, the Member shall provide evidence satisfactory to the Secretary of having written letters of apology to MH, BD'A, DW and JS and to PM in respect of his client, BHB; and (4) prior to reinstatement, the Member shall pay the Law Society's costs of $2,000.00.

- Media Room

SCC File Number: 37276

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

DELTA AIR LINES INC.

Appellant
(Respondent)

- and -

DR. GÁBOR LUKÁCS

Respondent
(Appellant)

AFFIDAVIT OF NICOLA COLVILLE
(Affirmed 16 June 2017)
(In support of the Motion for Leave to Intervene of the Proposed Intervener, the International Air Transport Association (IATA))

I, Nicola Colville, of the City of Montreal, in the Province of Quebec, make oath and say:

1. I am the Area Manager, Canada and Bermuda of the International Air Transport Association ("IATA") and as such have personal knowledge of the matters set out below, except where this knowledge is based on information and belief provided by others, in which case I verily believe it to be true.

2. Founded in 1945, IATA is an international trade association for the airline industry. IATA has 274 airline members located in 117 countries and its members account for approximately 83 percent of the world's total air traffic. Approximately 65 IATA member airlines hold licenses to fly into, out of, and within Canada. Attached as Exhibit "A" to this Affidavit is a list of IATA's members with Canadian domestic or international licences.

3. Headquartered in Montreal, IATA is a Canadian corporation established by a Special Act of Parliament in 1945, (*An Act to Incorporate the International Air Transport Association*, SC 1945, c 51)). IATA's purposes, objects and aims are:

(a) to promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce and to study the problems connected therewith;

(b) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service; and

(c) to co-operate with the International Civil Aviation Organization and other international organizations.

4. IATA's responsibilities include operating a variety of financial services and settlement systems catering to a vast array of aviation stakeholders, including international airlines, travel agents, cargo agents, airports, civil aviation authorities and other public sector agencies, and ground handling companies. IATA is also the industry's commercial standard-setter, maintains a comprehensive program of regular airline safety audits, liaises with governments and organizations around the world on matters affecting air transport in areas such as safety, flight operations, industry standards, and training, and provides relevant and timely information and guidance to stakeholders throughout the global aviation sector.

The Parties and Issues Raised on this Appeal

5. In its Factum, Delta Air Lines Inc. ("Delta") described the "central issue" in the appeal as "whether the Canadian Transportation Agency (the "Agency") has the authority to decline to hear an air travel complaint through its formal adjudicative process on the basis of a lack of standing."[1]

6. Accordingly, in this appeal, IATA anticipates that this Honourable Court will consider, amongst other issues:

(a) whether the Agency has a discretion under the *Canada Transportation Act*, SC 1996, c.10 (the "Act") to inquire into, hear or determine a complaint pertaining to services provided by or policies of an international airline operating in Canada;

[1] Factum of the Appellant, Delta Air Lines Inc., at para 1.

(b) whether the Agency has the discretion to grant or refuse standing to a person who seeks to bring a complaint to the Agency against the holder of international licence granted under the Act;

(c) whether the Agency has a residual discretion to determine if it ought to hear such a complaint on its merits; and

(d) the scope of or basis upon which the Agency may exercise properly any such discretion.

7. The Agency did not participate in the appeal before the Federal Court of Appeal. Accordingly, the Agency is not expected to appear before this Honourable Court on this appeal.

8. In its Factum, Delta submits that the Federal Court of Appeal erred when it held that the Agency was incorrect when it exercised its discretion and held that Dr. Gabor Lukács did not have standing to bring a complaint against that airline. Dr. Lukács, who was not directly affected by Delta's alleged actions that gave rise to Dr. Lukács' complaint to the Agency, submits he ought to have public interest standing.

9. Unlike Delta and Dr. Lukács, who will present arguments on appeal based on their own individual perspectives, IATA is uniquely placed to and can assist this Court on the issues raised on this appeal from a global aviation industry perspective.

10. IATA can assist by addressing the Agency's broad regulatory powers, generally, and, in particular, whether the Agency has the discretion to inquire into, hear and determine a complaint against an international air carrier holding an international licence under the Act, if such a discretion includes the discretion to determine if a person ought properly to be granted standing to bring such a complaint and, if so, the factors that ought properly to be considered — from a global air travel sector perspective — for the exercise of that discretion.

IATA

11. IATA has had and continues to have a broad role in the global aviation sector. First, IATA has worked with and continues to work with its international members and other airline industry participants to develop and improve global aviation standards. Second, IATA has

provided and continues to provide professional support services to various participants in the airline industry to ensure that its members operate safely, securely, efficiently and economically. Third, and germane to this application for leave to intervene, IATA, as a result of its expertise and specialized role in the domestic and international aviation industry, has made and continues to make presentations and provide detailed airline industry information and data to governments and various decision makers to assist them in dealing with a broad range of issues which affect the aviation sector globally.

IATA's Knowledge and Expertise in Domestic and International Aviation

12. IATA is an internationally recognized leader in the aviation sector. IATA has been and continues to be a vital source of practical industry-based information for the International Civil Aviation Organization ("ICAO"), a specialized United Nations agency dedicated to producing Standards, Recommended Practices and policies for international aviation. IATA has worked and continues to work with ICAO to advance international airline industry standards and policies. To that end, IATA participates directly in the work of 18 technical and 6 policy drafting bodies of ICAO as well as in three of their governance bodies, the Air Navigation Commission and the Air Transport Committee, and the Legal Committee.

13. IATA frequently presents working papers at ICAO. These working papers range in topics and include:

(a) presentations on a range of safety issues including the use of safety data, and promoting various safety standards;

(b) the economic impact of taxation on air carriers;

(c) comments on the cost impact of a global carbon offsetting mechanism;

(d) aircraft leasing; and

(e) the prevention of illegal wildlife trafficking.

14. Attached as Exhibit "B" to this affidavit is a listing of the recent IATA presentations and working papers presented to ICAO.

15. In addition, IATA operates a comprehensive training program that has included ICAO and government officials. Attached as Exhibit "C" to this affidavit is a list of all courses offered by IATA.

IATA Routinely Assists with the Development of Aviation Regulations and Policies

16. Since its origin, IATA has been at the forefront of global aviation regulation and policy development. It regularly makes submissions to all forms of governments and to various policy and regulation making bodies.

17. For example, in 2011, IATA made submissions to the Australian Competition and Consumer Commission regarding the Air Services Australia Draft Pricing proposal. Attached as Exhibit "D" to this affidavit is a copy of IATA's 27 July 2011 submissions.

18. More recently, IATA, in conjunction with other aviation industry groups, made submissions to the Mexican Senate on the Mexican proposed passenger rights legislation. Attached as Exhibit "E" to this affidavit is a copy of the August 2013 submissions.

19. IATA also made submissions to the Irish Commission for Aviation Regulation regarding regulatory policies, methodologies and data sources proposed to be used to determine charges at the Dublin Airport. Attached as Exhibit "F" to this affidavit is a copy of IATA's 27 September 2013 submissions.

20. In 2014, IATA made submissions before the US Department of Transportation regarding the Department's proposed consumer protection legislation. Attached as Exhibit "G" to this affidavit is a copy of IATA's 29 September 2014 submissions.

21. In addition to the submissions referenced in paragraphs 16 to 19, in the past 5 years, IATA has provided detailed submissions on a wide variety of topics including consumer and economic regulations to governments including those of Bahrain, Brazil, Chile, China, Colombia, Costa Rica, India, Israel, Jordan, Korea, Mexico, Nigeria, Oman, Palau, Philippines, Qatar, South Africa and Vietnam.

22. Moreover, IATA has recently developed a policy to increase partnerships with governments to promote "smarter regulations" with the goal of assisting governments in their

promulgation of air regulations. The "Smarter Regulation Policy's" objective is to deliver clearly defined, measureable objectives in the least burdensome way. IATA believes this can be achieved through a transparent, objective, and consultative process. The "Smarter Regulation" policy can be found at http://www.iata.org/policy/promoting-aviation/Pages/smarter-regulation.aspx.

23. IATA has made several presentations regarding the "Smarter Regulation," including presenting to the ICAO Economic Commission. Attached as Exhibit "H" to this affidavit is a copy of the IATA Working Paper delivered to ICAO's 39th Session of the Economic Commission.

24. Finally, IATA has provided commentary on Canadian legislation. IATA provided submissions to the Canadian Transportation Act Review Secretariat in February 2015 when it undertook a review of the Act. Attached as Exhibit "I" to this affidavit is a copy of the IATA 6 February 2015 submission.

25. Also, on 16 May 2017, Minister of Transport Marc Garneau introduced Bill C-49, the Transportation Modernization Bill, that proposes to amend several key provisions of the *Canada Transportation Act*. Bill C-49, as currently drafted, authorizes the Agency to make regulations in respect of various matters affecting air passengers. The Agency has sought IATA's input with regard to the regulations it will draft. IATA is actively participating in the consultation process with Transport Canada and the Agency on this topic.

IATA Involvement in the Development of Case Law

26. IATA has assisted in the development of the law with respect to international airline and air-travel issues. It has done so both by bringing proceedings itself and by intervening in proceedings commenced by others.

27. For example, in 2006, IATA was a complainant before the Court of Justice of the European Union in *International Air Transport Association and European Low Fairs Airline Association v Department for Transport* (C-344/04, [2006] ECR I-00403). The European Commission Legal Services lists this case amongst its "Important Judgements" because of the decision's role in establishing the parameters of the scope of the European Commission's

regulatory powers. Attached as Exhibit "J" to this Affidavit is a copy of the European Commission's summary of the judgment.

28. IATA also intervened in the 2011 Court of Justice of the European Union case of *Air Transport Association of America and Others*, where IATA and several American airlines challenged the inclusion of aviation in the EU's emissions trading scheme.

29. In the United States, IATA was an *amicus curiae* in the US Supreme Court case of *Northwest, Inc v Ginsberg*, No-12-462, where IATA presented arguments that addressed the effect of the US *Airline Deregulation Act*, as it applied to foreign air transportation, in the context of the international obligations that bind the United States.

30. Recently, IATA appeared as *amicus curiae* in the High Court of Australia in the case of *Australian Competition and Consumer Commission v Flight Centre Travel Group Limited*, [2016] HCA 49 (14 December 2016), which dealt with questions of agency and competition law.

Overview of IATA'S Submissions on this Appeal

31. I believe that IATA's submissions will assist this Honourable Court when it considers the important issues raised in this appeal. Made from a perspective different from those of Delta and Dr. Lukács, the immediate parties, and likely other possible interveners, IATA's submissions on these issues will be grounded in the Association's expertise with global aviation policymaking and international regulation.

32. If this Court grants IATA leave to intervene in this appeal, I anticipate that IATA will present an approach that:

(a) focuses on the global policy implications of Agency decisions, the nature and scope of the Agency's discretion to inquire into, hear and determine a complaint pertaining to services provided by or policies of an international airline operating in Canada, including the nature and scope of the Agency's discretion to determine a person's standing to make a complaint to the Agency related to an air service provided by or a policy of an international licence holder under the Act, as well as

the factors that are to be properly considered in the exercise of any such discretion; and

(b) presents a global perspective on those issues derived from its international experience, knowledge and expertise.

33. If granted leave to intervene, I anticipate that IATA's submissions will include the following:

(a) The Agency's decisions affect all air carriers holding international licenses under the Act. The Agency has a broad discretion, consistent with the National Transportation Policy and Canada's international obligations with respect to international air travel, to inquire into, hear and determine a complaint pertaining to services provided by or policies of an international airline operating in Canada, including the discretion to determine a person's standing to make a complaint to the Agency against an international licence holder operating in Canada. The Agency, when considering the question of standing — particularly when the putative complainant person is not and would never be directly affected by the decision or policy in issue — should properly consider a number of factors. In addition to such factors as the nature of the complaint and its urgency, the limits of the Agency's scarce and limited resources and whether the complainant has the best evidence, the factors should include whether the person would have standing before a foreign regulator or decision maker in similar circumstances or whether the nature of the service, policy or decision subject of the putative complaint is one permitted or not prohibited under foreign and international practices, policies, international treaties or foreign law. With its members holding both domestic and international licenses, IATA is uniquely placed make such submissions to assist this Honourable Court on these issues;

(b) The Federal Court of Appeal held that the use of the term "any person" in s 67.2(1) of Act implies that Parliament intended to grant to any person, directly affected or not, the ability to bring a complaint to the Agency. Delta has argued that s 67.2(1) does not apply as that section only applies to holders of domestic

licenses. Delta holds an international license. IATA will provide submissions to this Honourable Court which focus on this issue from a global perspective and not one not limited either to Delta's or Dr. Lukács' individual circumstances; and

(c) IATA will provide this Honourable Court with submissions on the impact of Agency decisions on domestic and international air carriers to attempt to clarify, from a global perspective, the regulatory scheme and statutory framework under which the Agency functions as the Federal Court of Appeal appears to have taken a narrow approach in considering the scope of the Agency's powers and did so without consideration of the international or global impact of the Agency's power.

34. IATA will expand on these submissions if leave to intervene is granted.

Costs

35. IATA seeks no costs, and asks that no costs be awarded against it.

SWORN before me at the City of Montreal, in the Province of Quebec this 16th day of June, 2017

A Commissioner, etc.

COMMISSAIRE À L'ASSERMENTATION / COMMISSIONER FOR OATHS
CAROL L. DEAKIN
#115 642
POUR LE QUÉBEC / FOR QUEBEC

Nicola Colville

Carole Girard

From: secretariat
Sent: November-30-17 11:10 AM
To: Jean-Emmanuel Beaubrun (jean-emmanuel.beaubrun@transat.com)
Subject: Under embargo - Determination No. A-2017-194
Attachments: A-2017-194.pdf; Appendix A to A-2017-194.pdf; Appendix B to A-2017-194.pdf; Appendix C to A-2017-194.pdf

Mr. Beaubrun,

Please find attached a copy of the Canadian Transportation Agency's Determination No. A-2017-194 in the matter of its inquiry into the tarmac delays experienced by Air Transat Flight Nos. 157 and 507 at the Ottawa MacDonald-Cartier International Airport on July 31, 2017.

As discussed yesterday evening, this Determination is confidential until its public release by the Agency. A copy of this Determination is being released to you under embargo in advance of its release to the public, expected to take place at or after 2:00 p.m. today. I would ask that you strictly manage the distribution of this document within Air Transat on a need to know basis and only upon receipt by you of signed confidentiality undertakings (provided to you already under cover of a separate email) by the individuals who will receive a copy.

You should be aware that the matter is also under review by a Designated Enforcement Officer and a Notice of Violation may issue this afternoon as well.

Kind regards,

Elizabeth C. Barker

Secrétaire de l'Office des transports du Canada
Office des transports du Canada / Gouvernement du Canada
secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca
Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Secretary of the Canadian Transportation Agency
Canadian Transportation Agency / Government of Canada
secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca
Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

Statistics 2016-2017

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Overview

Total rulings by Members

Note: Sometimes a single ruling is made that covers multiple cases. As well, some cases may result in multiple types of rulings.

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Orders	212	229	227	309	423
Decisions	353	405	438	458	518
Determinations	14	n/a	n/a	n/a	n/a

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Permits	353	374	355	485	481
Final letter decisions	14	25	32	25	18
Interim decisions	58	68	83	93	189
Total	**1004**	**1101**	**1135**	**1370**	**1629**

Disputes resolved by the Agency

Disputes resolved by facilitation

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Accessible	53	40	15	20	12
Air	2126	716	706	519	370
Marine	0	0	0	0	0
Rail	14	3	24	6	31
Total	**2193**	**759**	**745**	**545**	**413**

Disputes resolved by mediation

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Accessible	10	3	5	4	1
Air	55	20	19	7	4
Marine	0	0	0	2	0
Rail	7	6	7	10	3
Total	**72**	**29**	**31**	**23**	**8**

Disputes resolved by adjudication

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Accessible	6	3	5	8	17
Air	14	21	116	24	16
Marine	6	2	9	4	6
Rail	8	18	17	17	10
Total	**34**	**44**	**147**	**53**	**49**

Fostering compliance

Inspections and investigations

Agency enforcement officers conduct periodic inspections and targeted investigations to verify that service providers comply with the *Canada Transportation Act*, the *Air Transportation Regulations* and the *Personnel Training for the Assistance of Persons with Disabilities Regulations*.

Agency officers also regularly verify that any person or corporation that advertises air fares complies with all-inclusive air price advertising regulations.

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Air carriers - periodic inspections	139	167	141	156	225
Passenger terminals - periodic inspections	22	27	34	23	29
Targeted investigations	34	45	82	75	40
Verification of air carriers' advertisements	16	9	39	102	n/a
Total	**211**	**248**	**296**	**356**	**294**

Contraventions

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Monetary penalties	14	12	30	21	6
Informal warnings	5	4	21	96	123
Formal warnings	42	48	78	113	37
Total	**61**	**64**	**129**	**230**	**166**

Providing consumer protection for air passengers

Number and outcome of air travel complaints

Note: These statistics only include complaints that were submitted to the Agency – they do not reflect the total number of air travel complaints against air carriers. Many travellers resolve their complaints directly with the carrier.

New complaints and complaints carried over

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Carry-over from previous reporting period	269	236	283	137	54
New complaints	3367	826	824	882	529
Total	**3636**	**1062**	**1107**	**1019**	**583**

Outcome of complaint

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Resolved by facilitation	2126	716	706	519	370
Resolved by mediation	55	20	19	7	4
Resolved by adjudication	14	21	116	24	16

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Determined to be outside of the Agency's mandate	517	26	57	76	42
Withdrawn	40	24	72	43	23
Total	**2752**	**807**	**970**	**669**	**455**

Number of complaints in progress at year end (March 31)

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Complaints in progress at year end	884	269	185	331	118

Number of complaints resolved (by carrier)

Note: Complaints against more than one air carrier are counted for each carrier involved in the dispute resolution process.

Complaints against an air carrier include complaints that were made against that carrier's subsidiaries and affiliates. For example, Air Canada includes complaints against Jazz Aviation, Sky Regional, Air Georgian, etc.

The "Other" category includes carriers that:

- only have 1-2 complaints against them; and/or
- ceased operations in the previous reporting periods.

Number of complaints against Canadian carriers

	2016-2017 [1]	2015-2016	2014-2015	2013-2014	2012-2013
Air Canada	1556	449	428	434	233
Air Transat	141	22	34	26	18
CanJet	0	1	4	7	6
Porter Airlines	43	14	19	12	3

	2016-2017 [1]	2015-2016	2014-2015	2013-2014	2012-2013
Sunwing	51	25	29	35	26
WestJet	166	36	34	25	14
Other	28	14	13	7	1
Total	**1985**	**561**	**561**	**546**	**301**

Number of complaints against U.S. carriers

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
American Airlines	40	17	14	7	6
Delta	19	7	1	9	3
United [2]	76	36	38	31	21
US Airways	1	1	3	9	6
Other	6	1	6	1	2
Total	**142**	**62**	**72**	**57**	**38**

Number of complaints against European carriers

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Air France	20	5	13	13	9
Alitalia [3]	13	14	18	12	8
British Airways	27	10	13	13	9
Iberia	2	1	1	15	4
KLM	19	5	9	14	9
Lufthansa	47	15	20	6	13
Swiss International	7	4	3	74	51

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Other	151	27	14	13	5
Total	**286**	**81**	**91**	**160**	**108**

Number of complaints against other foreign carriers

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Air India	15	5	11	3	5
Cathay Pacific	8	0	2	1	3
China Eastern	17	1	7	6	4
Etihad Airways	15	9	8	8	5
Jet Airways	27	12	11	14	9
Royal Air Maroc	24	11	9	8	4
Turkish Airlines	23	0	5	3	5
Other	210	58	44	62	27
Total	**339**	**96**	**97**	**105**	**62**

Issues raised in air travel complaints

The Agency is required by the *Canada Transportation Act* to provide an overview of the all air travel complaints it processes – even if it's not an issue the Agency can help with. These issues are reported separately.

Learn more about the types of complaints the Agency can and cannot handle.

Note: Complaints often involve more than one issue. That's why the total number of issues is greater than the number of complaints.

Issues – all carriers

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Baggage	968	276	308	281	212
Carrier-operated loyalty programs	10	1	3	4	6
Denied boarding	135	55	50	82	55
Fares	49	14	11	105	63
Flight disruptions	1325	595	635	568	281
Refusal to transport	382	114	122	170	64
Reservations	159	71	78	172	116
Ticketing	334	106	111	136	92
Other	14	7	4	69	7
Issues outside the Agency's jurisdiction	508	274	88	402	701
Total	**3884**	**1139**	**1322**	**1587**	**896**

Issues within the Agency's jurisdiction – major Canadian carriers (2016-2017)

	Air Canada	Air Transat	Porter	Sunwing	WestJet	Other
Baggage	465	33	2	19	24	4
Carrier-operated loyalty programs	2	1	1	1	0	0
Denied boarding	85	1	4	0	4	0
Flight disruptions	694	74	22	20	75	17
Refusal to transport	195	15	3	7	12	1
Reservations	69	9	5	5	7	0
Ticketing	228	14	4	1	9	2

	Air Canada	Air Transat	Porter	Sunwing	WestJet	Other
Other	0	26	6	5	23	2
Total	**1738**	**173**	**47**	**58**	**154**	**26**

▸ Previous statistics on issues raised in complaints – major Canadian air carriers

Other statistics by mode of transportation

Air carriers holding Agency licences

Note: the number of licences is the total on March 31 (the end of the fiscal year).

Total number of air carriers

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Canadian	613	630	648	665	679
U.S.	607	610	624	629	632
Other	220	205	184	177	170
Total	**1440**	**1445**	**1456**	**1471**	**1481**

Types of licences held by Canadian air carriers (2016-2017)

	Small aircraft	Medium aircraft	Large aircraft	All cargo	Total
Domestic	609	25	13	43	690
Non-scheduled international	256	22	13	29	320
Scheduled international	9	41	152	98	300
Total	**874**	**88**	**178**	**170**	**1310**

▸ Previous statistics on licences held by Canadian air carriers

Types of licences held by U.S. and other foreign air carriers (2016-2017)

	U.S.	Other
Non-scheduled international	598	172
Scheduled international	42	110
Total	**640**	**282**

▸ Previous statistics on licences held by U.S. and other foreign carriers

Air licensing activities

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
New licences	114	111	116	108	138
Amendment of licences initiated by the applicant	89	65	52	141	79
Amendment of licences initiated by the Agency	14	10	7	9	63
Suspensions initiated by the applicant	32	28	60	71	97
Suspensions initiated by the Agency	147	159	127	165	148
Exemptions/rulings	120	151	137	123	119
Reinstatements	88	83	81	81	92
Cancellations	105	93	99	92	109
Code share authorities	73	99	93	65	73
Wet lease authorities	20	29	26	15	12
Total	**802**	**828**	**798**	**870**	**930**

Air charter permits

Number of permits issued

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Passenger non-resaleable entity charters	179	178	158	179	150
Cargo non-resaleable entity charters	109	113	125	141	104
Passengers resaleable	63	82	82	161	221
Total	**351**	**373**	**365**	**481**	**475**

Other air charter permit activities

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Exemptions granted to the charter regulations	603	594	552	592	548
Amendments to charter permits	13	30	31	27	50

Air charter flight notifications

Air charter flight notifications for Canada – U.S. charters

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Canadian originating (non-resaleable passenger)	443	699	673	706	549
Canadian originating (cargo)	23	31	33	47	56
U.S. originating (passenger)	599	798	675	719	611
U.S. originating (cargo)	235	240	243	206	377
Total	**1300**	**1768**	**1624**	**1678**	**1593**

Air charter flight notifications for Canada – Foreign charters

Note: Note: As of April 1, 2014, the Agency has granted certain carriers with an exemption to operate last minute air ambulance and entity cargo charter flights following the Agency's elimination of its after-hours service.

These flights were processed using this new approach and would have ordinarily been captured under air charter permits issued.

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Foreign originating (passenger)	79	113	88	85	70
Foreign originating (cargo)	43	28	95	124	52
Canadian originating passenger non-resaleable entity charters	2	2	5	n/a	n/a
Canadian originating cargo non-resaleable entity charters	6	1	4	n/a	n/a
Total	**130**	**144**	**192**	**209**	**122**

Railway infrastructure and construction

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Railway crossing agreements filed [5]	127	84	3	157	79
Approvals - railway line locations and construction of railway crossings	1	4	1	1	0
Approvals - railway line locations on federal lands	0	1	0	0	0
Notices of railway discontinuance received	3	2	11	0	0

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Net salvage value determinations [6]	0	0	0	1	0
New, modified or cancelled certificates of fitness	6	10	5	7	5

Marine coasting trade applications

Applications processed

	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Approved	108	80	89	98	87
Denied	5	0	2	3	3
Withdrawn	2	7	5	10	5
Total	**115**	**87**	**96**	**111**	**95**

Notes

1 Data for 2016-2017 updated on June 29, 2017.

2 Includes statistics for Continental Airlines as of 2012-2013.

3 Includes complaints about the "old" Alitalia (Atalia-Linee Aerree Italiane, S.P.A).

4 The "other" category includes Canadian carriers such as Skyservice, Canjet, Porter and Zoom, where applicable. Statistics vary from previous reporting years due to the separate reporting of data for Sunwing and the inclusion of data for Skyservice.

5 A comprehensive process review resulted in a temporary decline in agreements filed with the Agency in 2014-2015.

6 Includes net salvage value estimates performed by staff under contract with clients.

Date modified:

2017-06-16

Analysis

When is a passenger reimbursement policy not a policy? Ask Air Canada

Beware next time an airline asks for volunteers to forgo a flight

By Neil Macdonald, CBC News Posted: Feb 11, 2016 5:00 AM ET Last Updated: Feb 11, 2016 5:00 AM ET

Anyone who's ever tried to get a fair shake from a big, faceless company should take a few minutes to read the maddening journey of Chris Johnson, a guy who tried to do the right thing at the airport gate.

Johnson, 57, is a colonel in the Royal Canadian Air Force, a fellow with the studied equanimity you often find in someone whose very job description calls for honourable behaviour.

In late 2013, he was in London, preparing to board an Air Canada flight to Ottawa, where he lives. Then the aircraft broke down, and the airline's ground staff began scrambling to assign passengers to other flights. They called for volunteers who might be willing to wait a day.

"I was on vacation, not military duty," Johnson told me the other day, "and there were a lot of people who had to get home right away, and I figured I can hang tight."

He was told to head to the baggage area and collect his suitcase, and wait for an Air Canada representative who would have hotel and meal vouchers. But that person never showed up, he later stated in an affidavit to the Canadian Transport Agency.

Back at the departure area, the Air Canada staff had disappeared. Johnson then got on the phone to Air Canada's customer service

centre in Montreal. Go find a hotel, he says he was told, and submit a claim later.

Johnson then took a bus (not a taxi, because "I was treating their money as though it was mine") to the airport Holiday Inn, hardly luxury lodging.

He ate supper at the hotel, and breakfast. The bill for the room, including taxes, was 257 pounds, which, if you know anything about London, is utterly average. He ate a modest Holiday Inn meal, and the grand total charged to his card came to $531.56 Cdn.

When he submitted the claim, though, Air Canada regretfully informed him that "our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner."

But Johnson likes to treat his own money like his own, too. So he argued. He also found email addresses on the Air Canada site (it provides precious few staff phone numbers) and sent a complaint to the airline's president, Calin Rovinescu.

No dice. One of Rovinescu's underlings wrote Johnson, informing him that "an exception to this policy … can be seen as discriminatory to those customers who received the normal assistance."

Eventually, Air Canada sent Johnson a cheque for $222, purely as a matter of "goodwill," leaving him $309 out of pocket.

"I was only asking for my expenses," says Johnson. "Nothing else."

The Montreal Convention

Johnson's next step was to contact Gabor Lukacs, a passenger rights advocate who himself has a policy: that airlines should follow the law, and the law should be enforced.

- **Lukacs takes airline industry fight to new heights**
- **Marketplace: 5 things you need to know about your flight rights**

That law is reflected in something called the Montreal Convention, which governs passenger compensation, and provides for full reimbursement of reasonable costs up to nearly $9,000 if the cause is considered something within the airline's control.

So, Lukacs and Johnson filed a complaint with the Canadian Transportation Agency, and things started to get weird.

They asked for a copy of the reimbursement policy Air Canada had quoted in denying Johnson's expenses.

Air Canada objected. The airline would only disclose the policy if Lukacs and Johnson agreed to sign a confidentiality agreement.

Public disclosure of a document detailing how stranded passengers are treated, argued an airline lawyer, would put Air Canada at a competitive disadvantage.

Johnson refused to sign. But Air Canada had filed the policy and a supporting document with the CTA, which Lukacs promptly posted on his Air Passenger Rights website.

- **Air Canada's response to the Christopher Johnson, Gabor Lukacs complaint before the CTA (PDF)**

Interestingly, the policy dictates a much better hotel compensation for "premium" passengers than ordinary passengers.

When is a policy not a policy?

Air Canada then proceeded to argue that, in any event, the policy is not really a policy, even though it is titled "Expense Policy" and Air Canada staff had described it to Johnson as not just a policy, but an unbreakable policy when they denied him full compensation.

In reality, argued Air Canada, the policy is just a sort of internal guideline, some suggestions for staff, and it doesn't stipulate absolute limits, and therefore it conforms with the Montreal Convention, so Johnson's complaint should be dismissed.

"It's a policy unless it isn't, and we'll decide when it is," is how Johnson put it to me, with a typically military ability to distill the essence of a sprawling rule.

I emailed Air Canada spokesman Peter Fitzpatrick with a simple question: Why would the airline take the position that its passengers don't have the right to know its reimbursement policy for stranded passengers?

His email answer (he declined an actual conversation) was that "at issue is what AC pays as goodwill in cases where the delay is beyond our control."

Goodwill? What about the legal dictates of the Montreal Convention?

And how exactly was Johnson's case "beyond our control?" Was his flight not cancelled due to a mechanical breakdown, which is Air

Canada's responsibility, as opposed, for example, to inclement weather, which is not?

Fitzpatrick refused to answer subsequent questions, but the answer can be found in Air Canada's submissions to the CTA in this case.

Johnson's flight was cancelled that day, states the airline, due to "an uncontrollable electronic pump failure."

Effectively, Air Canada is saying that the proper functioning of its aircraft is something beyond its control, and which should not be considered by any law governing reimbursement.

That is a breathtaking bit of logic, which, if accepted, would appear to free Air Canada of any legal liability for just about every delay or cancellation. An airline CEO's dream.

Still, as the case advanced at the CTA, Air Canada finally offered to reimburse the rest of Johnson's expenses "solely on a goodwill basis."

But he declined: with crisp military rectitude, he says it is a not a matter of goodwill, but a matter of law, and requires a ruling, as a matter of public interest.

For him to take the money now and go away would just not be, well, honourable.

Incidentally, Johnson and Lukacs are also asking the CTA to order Air Canada to reprocess every compensation for every stranded passenger in the past two years.

The ruling, when it comes, will be of great interest to anyone who flies the national airline, and in particular anyone who might think of raising

a hand the next time the Air Canada gate agent calls for volunteers to stay behind.

A spokeswoman for the Canadian Transportation Agency says its hearings operate on the principle of open court, and documentation can be requested at this address.

Air Canada backs down on $40 fee to seat child with parent

Airline says it amended procedures to allow complimentary seating for children on Tango flights

By Fiona Morrow, CBC News Posted: Apr 29, 2016 4:43 PM PT Last Updated: Apr 29, 2016 4:48 PM PT

Air Canada says it has amended its policies after a leading air passenger rights advocate criticized an incident where the airline refused to guarantee a toddler a seat next to her parents on a Vancouver to Toronto flight unless a $40 fee was paid.

- **Air Canada says parents must pay to guarantee 2-year-old can sit with them on flight**

Gabor Lukacs told CBC News Friday that Air Canada is mandated by the Canadian Transportation Agency (CTA) to make all reasonable efforts to seat children 12 and under adjacent to an accompanying adult. Its own operating tariff says it will do just that — and for free, even on the airline's economy brand, Tango, he added.

"Air Canada is misleading the families and is engaging in fear-mongering," Lukacs said.

"Essentially Air Canada is asking for ransom money to ensure that children are seated next to their parents while actually as a matter of law, they are required to do it anyway — and free of charge.

"It is a cash grab," Lukacs said.

New procedures implemented today

Asked for comment over its procedures for seating children, Air Canada said Friday that it, "automatically assigns seating without an advance seat selection fee soon after the booking has been made, either directly through Air Canada or through a travel agency, for parents and guardians who have indicated they are travelling with children on a Tango fare."

Nevertheless, the statement said, procedures have been amended today so that Air Canada call centre agents will now assign "complimentary seating to children and their parents or guardians right at the time of booking a Tango fare directly through Air Canada Reservations or their travel agent."

They said the new information will be updated to their website shortly.

The change of procedure comes a day after CBC News published the story of Caley and Matt Hartney, who were told that their two-year-old daughter, Charlotte, would not be guaranteed a seat next to one of them, without a $40 charge.

"I clarified with the [call centre agent] three or four times, that he was telling me my child was not guaranteed a seat next to [us] without a fee," Carley Hartney said Friday.

Informed that her story had prompted a change in procedures, Hartney said she was delighted.

"I am really happy to hear that," she said.

'Children have to be safe. Full stop'

The idea that a child under 12 should sit next to a parent or guardian

on a flight is not about convenience, Lukacs argues. It is a straightforward safety issue.

"The children have to be safe and Air Canada cannot operate a flight, and cannot have terms and conditions that jeopardize the safety of children — whether it is Tango, executive class or whatever.

"Children have to be safe. Full stop."

Lukacs said that no one is expecting that families should be able to insist on all sitting in a specific row number, just that a child under 12 is seated next to an accompanying adult for no extra charges.

"That's all, " he said. "Nothing beyond that."

Last year, following a passenger complaint against another airline, Air Canada, along with several other carriers, were ordered by the CTA to file new tariffs by March 2, 2015 that "reflect the fact that the respondents have adopted supplemental seating policies or procedures and are making reasonable efforts to ensure that children are seated with their accompanying guardian."

Customer Relations

Expense Policy

- Receipts always required
- Scan receipts acceptable up to $150.00 total
- Expenses exceeding $150.00 original receipts required
- Accommodation is per room not per passenger
- Meal allowance is per passenger based on time of re-accommodation.
- USA meal allowance amounts also apply for international locations
- Amounts in charts are maximum, if actual cost less, pay the actual cost
- Lead approval required for expenses that exceed the per room or meal allowance amount listed
- Lead approval required for total expenses that exceed $300.00
- Lead approval required for expenses of more than 1 night in uncontrollable situations
- Lead approval must always be obtained before responding to writer
- Special case customers (customers with disabilities, UMNR, minors 12-17 travelling alone, and elderly customers) are entitled to meals and hotel accommodation regardless of the situation
- Premium customers are VIP Red Card Holders, Super Elite 100K, Elite 75K, Elite 50K, Star Alliance Gold, Executive, Executive First class
- In controllable situations only, if pax chose to find own ground transportation, ie bus or car rental, and this is a less expensive option than the flight coupon cost plus accommodation cost, refund ground transportation but not the flight coupon.
- In uncontrollable situations, if pax chose to find own ground transportation, refund flight coupon only

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

Irregular Operations - Uncontrollable Situations

- Outbound flight and return flight NO EXPENSES
- Connection point or diversion only – one night only as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

All compensation is goodwill and costs should never exceed amounts above.

Schedule Change

- If pax did not like or accept alternate flight that would have provided same day travel NO EXPENSES
- When schedule change requires an overnight at a connecting city and there is no alternate flight service the same day or when schedule change requires a customer to travel the day before/after originally scheduled flight causing an overnight at the destination as follows:

	Accommodation Canada/US Itinerary	Accommodation International & Sun Itinerary
Regular Customers	$100.00 per room	$175.00 per room
Premium Customers	$100.00 per room	$175.00 per room

All compensation is goodwill and costs should never exceed amounts above.

From ambartell@hotmail.com Tue May 13 08:09:33 2014
Date: Tue, 13 May 2014 06:09:22 -0500
From: anna bartell <ambartell@hotmail.com>
To: Yinka Aiyede <yinka.aiyede@otc-cta.gc.ca>
Cc: "lukacs@airpassengerrights.ca" <lukacs@airpassengerrights.ca>
Subject: RE: Correspondence # 14-02429

    [The following text is in the "Windows-1252" character set.]
    [Your display is set for the "ISO-8859-2" character set.]
    [Some special characters may be displayed incorrectly.]

Good Morning Yinka,
I have never received such an email. Otherwise I would have used the information from it and continued my complaint. Instead of calling in again to tell you I wanted to proceed with a formal complaint.
As I advised you, it is my intent to proceed by way of a formal complaint; however, I would like to draft said complaint, and I will be forwarding it to the Secretary of the Agency on my own. Thus, at the moment, no action is sought or required on your part in this regard
I will say I have been deeply disturbed by your attempt to dissuade me from filing
a formal complaint, which is, as I understand, is my right as a citizen. And Lastly I have been also troubled by your attempt to dissuade me
from associating with Mr. Lukacs and from involving him in my case. I would be grateful if you clarified, in writing, your reasons for this view.

Sincerely yours,
Anna Bartell

> Date: Thu, 8 May 2014 11:36:10 -0400
> From: Yinka.Aiyede@otc-cta.gc.ca
> To: ambartell@hotmail.com
> Subject: RE: Correspondence # 14-02429
>
> Good morning, Anna:
>
> It was a pleasure speaking with you yesterday also.
>
> The letter to which I was referring was the email that Susan Mayo, the
> case officer assigned to your complaint, sent on September 25, 2013. Ms.
> Mayo’s correspondence provided you with the results of her review of
> your complaint through the Agency’s informal facilitation process. I
> have attached a copy for your records.
>
> As discussed yesterday, upon receipt by the Canadian Transportation
> Agency (Agency) of a consumer complaint about an air carrier, Agency
> staff will initially review and attempt to resolve the matter through
> its informal facilitation process. Agency staff evaluate all air travel
> complaints against the provisions included in an air carrier’s tariff -
> the contract of carriage between the air carrier and its passengers. By
> law, carriers must apply those provisions at all times and upon receipt
> of a complaint, it is the Agency’s responsibility to ensure that it
> does.
>
> In addition, the law in Canada states that carriers cannot offer a
> remedy or relief to the passenger that is less than that established in
> its tariff. Therefore, in facilitating the resolution of an air travel
> complaint, Agency staff will review the matter up to the point where it
> appears that the passenger has received the remedy or relief to which
> he/she is legally entitled.
>
> When the consumer advises in writing that the complaint has not been

> resolved informally to his/her satisfaction, he/she may request the
> Agency to deal with the matter through other dispute resolution
> methods.
>
> I mentioned yesterday that, where appropriate, consumer complaints
> about an air carrier may be mediated. The Agency offers mediation as an
> alternative to both its informal facilitation and formal adjudication
> process. Although you stated that you were not interested in having your
> complaint mediated, I wanted to make sure that you were fully informed
> about the Agency’s mediation process before you made a final decision.
>
> To that end, I should advise that mediation is an informal, voluntary
> and confidential process. It is also a collaborative process that
> enables parties to come to a mutually agreeable solution that might not
> otherwise be available under either the informal facilitation or formal
> adjudication process.
>
> Both parties to a dispute must agree to mediation before the mediation
> process is initiated. If one party is agreeable to try mediation and
> submits a mediation request, the Agency will contact the other party to
> gain its consent.
>
> Information about the mediation process and associated forms can be
> found on the Agency?s web site at
> https://www.otc-cta.gc.ca/eng/mediation-docs. Please note that
> mediation is another dispute resolution process offered by the Agency
> that is free of charge.
>
> If you are interested in attempting to resolve your complaint with Air
> Canada through mediation, please send me a quick email before Wednesday,
> May 14th advising me of your interest.
>
> Alternatively, should you wish to pursue your complaint further, you
> may consider advising the Agency that your complaint about Air Canada
> (Case No. 13-03817) was not resolved to your satisfaction through its
> informal process and requesting the Agency deal with the matter through
> its formal process. As a quasi-judicial tribunal, the Agency, through
> formal adjudication, resolves a range of transportation-related disputes
> including those related to air travel. The Agency operates like a court
> when adjudicating disputes. Information about adjudication of disputes
> is available on the Agency’s web site at the following link:
> https://www.otc-cta.gc.ca/eng/decision-making-process.
>
> To have your complaint addressed through the Agency?s formal process,
> you will need to file a written submission with the Agency to set out
> your complaint against the air carrier.
>
> In your submission, you should request that the Agency investigate your
> complaint:
>
> a) if you believe that the air carrier has not applied the fares,
> rates, charges or terms and conditions of carriage set out in its
> tariff; or
> b) if you believe that the carrier’s terms and conditions of carriage
> are unclear, unreasonable or unduly discriminatory.
>
> To ensure that your submission to the Agency is complete, you will need
> to outline the reasons why you find that the carrier has acted in a
> manner that is inconsistent with the provisions of its tariff or why you
> find that the terms and conditions of carriage in the carrier?s tariff
> are unclear, unreasonable or unduly discriminatory.
>

> Upon the Agency?s receipt of your complete submission, the Chair will
> appoint a minimum of one Member to consider it. The Member(s) will
> consider all of the evidence in each case and reach a decision. Agency
> complaints are treated on a case-by-case basis. Each decision is based
> solely on the individual merits of the case. In the course of the
> process, the Agency assesses relevant facts and circumstances, by way of
> written submissions, weighs the various factors and makes these
> decisions based on law, rules of natural justice and evidence presented
> by the parties involved in the cases.
>
> Agency decisions are provided in writing and posted on the web site at:
> https://www.otc-cta.gc.ca/eng/rulings-lists-and-search. An Agency
> decision is binding on all parties to the decision.
>
> If the Agency agrees that the carrier failed to apply the provisions of
> its tariff, it can order the carrier to do so. The Agency can also order
> the carrier to compensate you for out-of-pocket expenses incurred as a
> result of the incident and take any other corrective actions it
> considers appropriate. However, the Agency cannot order the carrier to
> compensate you for things such as pain, suffering or loss of enjoyment
> or loss of income.
>
> If the Agency agrees that the carrier?s terms and conditions of
> carriage are unclear, unreasonable or unduly discriminatory, it can
> suspend or disallow those terms or conditions and substitute other terms
> or conditions in their place. The Agency cannot, however, order a
> carrier to compensate you in such instances.
>
> Additional information about the Agency?s formal process for
> resolving air travel complaints and information about filing a complaint
> via the formal process is available on the web site at:
> https://www.otc-cta.gc.ca/eng/air-travel-complaints-1.
>
> I also recommend that you review the information linked to the Agency’s
> March 14, 2014 news release
> https://www.otc-cta.gc.ca/eng/air-passenger-rights-and-recourse-at-a-glance
> to determine your next course of action.
>
> I trust that you find the above to be helpful.
>
> Feel free to contact me should you require additional information about
> any of the above.
>
> Have a great day,
> Yinka
>
> >>> anna bartell <ambartell@hotmail.com> May 7, 2014 10:37 PM >>>
>
> Dear Yinka ,
> It was so nice chatting to you. I am a little confused though because
> you said something about a letter from someone at the agency called I
> think Susan? concerning ,the decision of the CTA,I cant find that could
> you resend it please.thanks anna
>
> > Date: Wed, 7 May 2014 13:52:01 -0400
> > From: Yinka.Aiyede@otc-cta.gc.ca
> > To: ambartell@hotmail.com
> > Subject: Fwd: Correspondence # 14-02429
> >
> > Dear Ms. Bartell:
> >
> > Further to the request you made to the call centre for the Canadian

> > Transportation Agency for a call back (see below), I just left you a
> > voice mail message to clarify what you are seeking.
> >
> > If you could please let me know when, between 8 am and 4:30 pm this
> > week, you are available for a telephone conversation, I will contact
> you
> > directly.
> >
> > I look forward to hearing from you.
> >
> > Yours truly,
> >
> > Ms. Yinka A. Aiyede
> > Directrice, Direction des plaintes, transport aérien | Director, Air
> > Travel Complaints
> > Direction générale du r?glement des différends | Dispute Resolution
> > Branch
> > Office des transports du Canada | Canadian Transportation Agency
> > 15, rue Eddy, Gatineau QC K1A 0N9 | 15 Eddy Street, Gatineau QC
> K1A
> > 0N9
> > Yinka.Aiyede@cta-otc.gc.ca
> > Téléphone | Telephone 819-953-9936
> > Télécopieur | Facsimile 819-953-5686
> > Téléimprimeur | Teletypewriter 800-669-5575
> > Gouvernement du Canada | Government of Canada
> >
> > >>> Info May 7, 2014 1:21 PM >>>
> >
> > Time of Call / Heure de l’appel
> > 07 May 2014 8:38 AM / 07 mai 2014 08:38
> >
> > Client / Client
> > Name / Nom: ANNA BARTELL
> > Organization / Organisme: N/A
> > Language / Langue: ENGLISH
> >
> > Address / Adresse
> > N/A
> >
> > Contact Information / Coordonnées
> > Telephone (1st) / Téléphone (1e): (416) 709-8691
> > (tel:4167098691)
> > Telephone (2nd) / Téléphone (2e): N/A
> > Email / Courriel: N/A
> >
> > Preferred Callback Time / Heure propice pour le rappel
> > N/A
> >
> > Comments / Commentaires
> > The caller filled an informal complaint with the CTA and was not
> > satisfied with how her case was handled. Consequently, she would now
> > like to file a formal complaint. The caller terminated the call
> without
> > providing a case number and indicated that she would have that
> > information for the representative who would contact her. The issue
> is
> > in regards to a refusal to transport from Air Canada who claimed she
> was
> > late to check-in. A callback would be appreciated.
>
>

CTA Officer Complaint

Gerard Cooke <gerardcooke@hotmail.com> Mon, Jan 2, 2017 at 1:42 PM
To: "Douglas.Smith@otc-cta.gc.ca" <Douglas.Smith@otc-cta.gc.ca>
Cc: "Marc.Garneau@parl.gc.ca" <Marc.Garneau@parl.gc.ca>, "lukacs@airpassengerrights.ca" <lukacs@airpassengerrights.ca>

Dear Mr Smith,

I am writing to complaint about the conduct of Angela Gaetano who was assigned to my complaint case No. 15-50516 against Air Canada, dated May 5, 2015.

First, Gaetano created the false impression that she was a decision-maker at the Canadian Transportation Agency and that my complaint has been dismissed by the Agency.

I have recently found out that this was clearly not the case.
Gaetano is not a Member of the Agency within the meaning of s. 7(2) of the *Canada Transportation Act*, and as such she has no authority to rule on my complaint.

Second, Gaetano misrepresented to me the obligations of Air Canada under its Tariff. She neither considered nor informed me about the liability of Air Canada under Article 19 of the
Montreal Convention, which is incorporated in Air Canada's International Tariff Rule 105(B)(5).

In these circumstances, I am requesting that:

(a) you investigate why I was mislead by Gaetano about my rights;

(b) take steps to ensure that complainants, such as myself, are not misled as to our rights and the Agency's procedures; and

(c) you assign another officer to conduct facilitation of my complaint properly.

Sincerely yours,

Gerard Cooke

Re: CTA Officer Complaint

Gerard Cooke <gerardcooke@hotmail.com> Wed, Jan 11, 2017 at 9:30 PM
To: Douglas Smith <Douglas.Smith@otc-cta.gc.ca>
Cc: "Marc.Garneau@parl.gc.ca" <Marc.Garneau@parl.gc.ca>, "lukacs@airpassengerrights.ca" <lukacs@airpassengerrights.ca>

Mr. Smith:

I am in receipt of your email of January 9, 2017 and the email of Ms. Gaetano of the same date.

I dispute the authenticity of Ms. Gaetano's email purporting to be dated October 14, 2015. I have grounds to believe that this document has been fabricated recently and backdated to fraudulently cover up the misconduct of Ms. Gaetano.

1. I have no record of said email and substantial portions of its content have never been communicated to me.

2. Ms. Gaetano communicated to me orally the opposite, namely, that the closing of my case is final, and the end of the road. She did not advise me about the possibility of taking my issue to mediation or formal adjudication.

3. The document's format appears to follow a recent template of the Agency, not the one that was used by case officers in 2015 or early 2016.

On a going forward basis, I am requesting that you provide me with:

(a) logs from the Agency's email servers relating to the transmission of the document purporting to be an email from October 14, 2015;

(b) all emails purportedly sent or received by Ms. Gaetano in relation to my complaint.

Sincerely yours,
Gerard Cooke

From: Douglas Smith <Douglas.Smith@otc-cta.gc.ca>
Sent: January 6, 2017 12:49 PM

To: Gerard Cooke
Cc: Paul Kelly
Subject: RE: CTA Officer Complaint

Mr. Cooke:

I have had an opportunity to personally review your file and most especially the email correspondence of Oct. 14, 2017. I anticipation of our speaking with one another, it would be beneficial if you took the time to once again review this rather fullsome email from Ms. Gaetano.

As indicated in my initial email, I am more than willing to review your file with you. That said, it is apparent that your most recent e-mail correspondence to our offices was little more than a 'cut and paste' of a generic form letter that was posted on-line. Because the 'form letter' was not drafted in response to your specific fact situation, I would ask that you take the time to more clearly identify those issues you would like to have addressed. I am making this request in light of the express content of Ms. Gaetano's email of October 14th which would appear to me as to not have 'mislead' you in any manner whatsoever as to her role, your rights and your options to pursue the matter further.

I would ask that you provide me with a telephone number with which I can reach you and a time either today or early next week that we may be able to talk.

Thank you and I look forward to our conversation.

Douglas W. Smith, LL.B.

Dirigeant principal, Direction générale du règlement des différends
Office des transports du Canada / Gouvernement du Canada
douglas.smith@otc-cta.gc.ca Tél. : 819-953-5074

Chief Dispute Officer, Dispute Resolution Branch

Canadian Transportation Agency / Government of Canada
douglas.smith@otc-cta.gc.ca Tel: 819-953-5074

From: Douglas Smith
Sent: January-03-17 9:14 AM
To: Gerard Cooke
Cc: Paul Kelly
Subject: Re: CTA Officer Complaint

Good morning Mr. Cooke.

Thank you for your email message.

I am just returning to the office today from the Christmas holiday period.

As you can imagine, I have no knowledge whatsoever of either your complaint of this past May or of the actions of Ms. Gaetano. I will state at the outset that Ms. Gaetano is a excellent case officer and I am not inclined to engage in any sort of investigation as to the 'alleged' misbehavior of Ms. Gaetano or any of my staff simply because you may not have been satisfied with the resolution of your complaint against Air Canada.

That said, I am more than willing to have a look at your file and discuss it with you at a later date. I will endeavor to have a look at the file later this week and reach out to you again early next week.

I trust that this is satisfactory.

Doug Smith

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Gerard Cooke

Sent: Monday, January 2, 2017 12:42 PM

To: Douglas Smith

Cc: Marc.Garneau@parl.gc.ca; lukacs@airpassengerrights.ca

Subject: CTA Officer Complaint

Dear Mr Smith,

I am writing to complaint about the conduct of Angela Gaetano who was assigned to my complaint case No. 15-50516 against Air Canada, dated May 5,
2015.

First, Gaetano created the false impression that she was a decision-maker at the Canadian Transportation Agency and that my complaint has been dismissed
by the Agency.

I have recently found out that this was clearly not the case. Gaetano is not a Member of the Agency within the meaning of s. 7(2) of the

Canada Transportation Act, and
as such she has no authority to rule on my complaint.

Second, Gaetano misrepresented to me the obligations of Air Canada under its Tariff. She neither considered nor informed me about the liability of
Air Canada under Article 19 of the *Montreal Convention*,
which is incorporated in Air Canada's International Tariff Rule 105(B)(5).

In these circumstances, I am requesting that:

(a) you investigate why I was mislead by Gaetano about my rights;

(b) take steps to ensure that complainants, such as myself, are not misled as to our rights and the Agency's procedures; and

(c) you assign another officer to conduct facilitation of my complaint properly.

Sincerely yours,

Gerard Cooke

Angela Gaetano

From: Services ministériels - Corporate services <TrackIt-autorep@otc-cta.gc.ca>
Sent: February-06-17 3:22 PM
To: Angela Gaetano
Subject: Mise à jour / Update - Reopen - [[WO#48937]]

***** Vous pouvez répondre à ce courriel pour rajouter de l'information au billet # [[WO#48937]]. Ceci avisera le technicien qu'une mise à jour est disponible. Prière de toujours utiliser la fonction "Répondre" et non "Transférer".

You can reply to this email to add information to work order # [[WO#48937]]. This will also advise the technician that an update is available. Please always use the "Reply" function rather the "Forward" function.
---------- *****

Hi Angela,

It's closed now! :)

Regards,
Isabelle

****
TECHNICIEN / TECHNICIAN
****

Isabelle Lacroix

****
COURRIELS ÉCHANGÉS PRÉCÉDEMMENT / PREVIOUSLY EXCHANGED EMAILS
****

Monday, February 06, 2017 1:58:32 PM by MailMonitor-VW-APPS-02
Additional information submitted 06/02/2017 1:58:25 PM by Angela Gaetano < Angela.Gaetano@otc-cta.gc.ca >:

This can now be closed. Thank you.

From: Services ministériels - Corporate services [mailto:TrackIt-autorep@otc-cta.gc.ca]
Sent: February-03-17 9:10 AM
To: Angela Gaetano
Subject: Fermé/Closed - Reopen - [[WO#48937]]

****
TECHNICIEN / TECHNICIAN
****

Isabelle Lacroix

****
COURRIELS ÉCHANGÉS PRÉCÉDEMMENT / PREVIOUSLY EXCHANGED EMAILS
****

Friday, February 03, 2017 9:06:45 AM by ILacroix
Hi Angela,

It's now re-open. :)

Cheers,
Isabelle L.

****
DESCRIPTION INITIALE / INITIAL DESCRIPTION
****

Wednesday, February 01, 2017 9:46:03 AM by EmailRequestManagement
Work Order created via E-mail Monitor Policy: Services-GI-IM

From: Angela.Gaetano@otc-cta.gc.ca

To: Services-GI-IM@otc-cta.gc.ca <+Services-GI-IM>

CC:

Subject: Reopen

Information submitted 01/02/2017 9:45:09 AM by Angela Gaetano < Angela.Gaetano@otc-cta.gc.ca >:

Hello,

Are you able to open my case (15-50516-Cooke) that has already been certified, so that I can save some more documents into it.

Thank you,

Angela Gaetano

Agente principale aux plaintes - Senior Complaints Officer

Direction des MARC relatifs au transport aérien et aux transports accessibles —

Air & Accessibility ADR Directorate

Office des transports du Canada — Canadian Transportation Agency

Gouvernement du Canada — Government of Canada

T. : (819) 994-7687/ Télécopieur/facsimile:(819) 997-6727/ATS/TTY 800-669-5575

courriel/e-mail: angela.gaetano@otc-cta.gc.ca

E-mail received with no Attachments

(Edited Monday, February 06, 2017 3:20:23 PM by ILacroix)

Friday, February 03, 2017 9:06:45 AM by ILacroix
Hi Angela,

It's now re-open. :)

Cheers,
Isabelle L.

****
DESCRIPTION INITIALE / INITIAL DESCRIPTION
****

Wednesday, February 01, 2017 9:46:03 AM by EmailRequestManagement
Work Order created via E-mail Monitor Policy: Services-GI-IM

From: Angela.Gaetano@otc-cta.gc.ca

To: Services-GI-IM@otc-cta.gc.ca <+Services-GI-IM>

CC:

Subject: Reopen

Information submitted 01/02/2017 9:45:09 AM by Angela Gaetano < Angela.Gaetano@otc-cta.gc.ca >:

Hello,

Are you able to open my case (15-50516-Cooke) that has already been certified, so that I can save some more documents into it.

Thank you,

Angela Gaetano

Agente principale aux plaintes - Senior Complaints Officer

Direction des MARC relatifs au transport aérien et aux transports accessibles —

Air & Accessibility ADR Directorate

Office des transports du Canada — Canadian Transportation Agency

Gouvernement du Canada — Government of Canada

T. : (819) 994-7687/ Télécopieur/facsimile:(819) 997-6727/ATS/TTY 800-669-5575

courriel/e-mail: angela.gaetano@otc-cta.gc.ca

WITHOUT PREJUDICE

E-mail received with no Attachments

From: Robert Armitage <Robert.Armitage@otc-cta.gc.ca>
Date: May 13, 2016 at 9:56:43 AM CDT
To: TONY MARIANI <tonymariani@shaw.ca>
Subject: RE: Canadian Transportation Agency-Case No.:-15-61084

Dear Mr. Tony Mariani:

This is a follow-up to the closing letter sent to you on April 1, 2016 and our phone conversation today May 4, 2016 regarding case no.:15-61084 you had filed with the Canadian Transportation Agency (Agency) regarding the difficulties you experienced with Air Canada on September 8, 2015.

We had previously discussed the Agency's role and mandate. The law in Canada requires that air carriers operating air services to and from Canada file a tariff with the Agency clearly outlining their terms and conditions of carriage. These terms and conditions of carriage cover a number of topics including the carrier's procedures with respect to, among others, flight cancellations and delays, refunds, check-in time limits, etc.. While air carriers are free to set their own terms and conditions of carriage as they see fit, the law requires that each carrier file a tariff and apply it at all times. Part of our mandate is to ensure that each carrier does so.

When reviewing a consumer travel complaint, the Agency's role is neutral and an assessment on whether or not a carrier has properly applied its tariff is based on the information provided by both parties and the carrier's provision as outlined in its tariff with the Agency.

Regarding your case, your flight AC8406 from Kelowna to Calgary was scheduled to leave at 9:30 on September 8 and was delayed, due to late arrival of equipment caused by a systems issue, until 11:40 and as a result you would have missed your connecting flight in Calgary to Winnipeg. Air Canada re-protected you and your wife to fly out the following morning September 9 at 7:30 AC 8128 to Calgary connecting with AC8334 Calgary to Winnipeg. Per the airline's domestic tariff related to flight delays, flight times and schedules are not guaranteed, their obligation is to fly the passenger from point A to point B. For flight delays lasting longer than 4 hours, the airline will provide food vouchers for use , where available, in the airport. Air Canada did provide you and your wife food vouchers, and as you overnighted in Kelowna, Air Canada offered as well to review for re-imbursement any receipts you had for out of pocket expenses related to the delay and the over- night stay in Kelowna. You have advised that you did not incur additional expenses. You and your wife were flown to your final destination, albeit later than originally scheduled. As such, it would appear that the airline has respected the provisions of its tariff regarding schedule irregularities and flight delays. By Air Canada's goodwill offer to you of Air Canada gift cards or non-status Aeroplan points they appear to have exceeded their responsibilities.

You have indicated in your complaint your discontent related to the way your situation was handled by the Air Canada employees in Kelowna. This would be considered a quality service issue which falls strictly under the purview of the airline's management as it does not form any part of the airline tariff.

In light of the above, it would appear that the airline has acted in a manner that is consistent with the provisions and regulations which the Agency has the authority to enforce. Because the Agency's role in the review of an air travel complaint is to ensure that your air carrier has applied the terms and conditions

in its tariff, the complaint you filed with the Agency has been closed.

Sincerely,

Robert Armitage

Agent principal aux plaintes - Senior Complaints Officer

Direction des MARC relatifs au transport aérien et aux transports accessibles —

Air & Accessibility ADR Directorate

Office des transports du Canada — Canadian Transportation Agency

Gouvernement du Canada — Government of Canada

T. : (819) 953-9905

Robert.Armitage@otc-cta.gc.ca

From: Robert Armitage
Sent: May-13-16 10:33 AM
To: 'TONY MARIANI'
Subject: RE: Canadian Transportation Agency-Case No.:-15-61084

Hello Mr. Mariani, I will send you the explanation you requested in an e-mail to follow and therefore do not require an additional conversation with you.

Thank you,

Robert

From: Robert Armitage
Sent: May-13-16 8:02 AM
To: 'TONY MARIANI'
Subject: RE: Canadian Transportation Agency-Case No.:-15-61084

Thank you for your e-mail, I will certainly send this out but as indicated last week I would like to speak with you again first. Please let me know if today will work for you. I am in the office until about 15:00EST.

Best regards,

Robert

From: TONY MARIANI [mailto:tonymariani@shaw.ca]
Sent: May-12-16 6:02 PM
To: Robert Armitage
Subject: Re: Canadian Transportation Agency-Case No.:-15-61084

Robert

I am still waiting for that further explanation.

Sent from my iPhone

Tony Mariani

On May 5, 2016, at 12:14 PM, Robert Armitage <Robert.Armitage@otc-cta.gc.ca> wrote:

Hello Mr. Mariani,

I have left you a message a few minutes ago and would like to speak with you briefly if possible. I am scheduled for a meeting from 1:30pm your time to the end of the day today but if you were available earlier or perhaps tomorrow, if that works better for you, that would be great.

Thank you in advance

Robert

From: Robert Armitage
Sent: May-04-16 2:33 PM
To: 'TONY MARIANI'
Subject: RE: Canadian Transportation Agency-Case No.:-15-61084

Thank you, I will call you.

Robert

From: TONY MARIANI [mailto:tonymariani@shaw.ca]
Sent: May-04-16 2:31 PM
To: Robert Armitage
Subject: Re: Canadian Transportation Agency-Case No.:-15-61084

I have a 10 minute window now.

Sent from my iPhone

Tony Mariani

On May 4, 2016, at 9:05 AM, Robert Armitage <Robert.Armitage@otc-cta.gc.ca> wrote:

Mr. Mariani,

Please let me know the best time to call you.

Thanks very much,

Robert

From: Robert Armitage
Sent: May-04-16 9:47 AM
To: 'tonymariani@shaw.ca'
Subject: RE: Canadian Transportation Agency-Case No.:-15-61084

Dear Mr. Mariani,

Thank you for your e-mail. I will give you a call before sending you the explanation by e-mail.

Best regards,

Robert

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From: tonymariani@shaw.ca [mailto:tonymariani@shaw.ca]
Sent: May-03-16 6:12 PM
To: Robert Armitage
Subject: Re: Canadian Transportation Agency-Case No.:-15-61084

Dear Mr. Armitage,

I remained puzzled about the reasons that you believe that "Air Canada has acted in a manner that is consistent with the provisions of the legislation and regulations which the Agency has the authority to enforce."

Kindly please provide further explanation by email, so that I will have an opportunity to study your reasons.

Sincerely yours,
Tony Mariani

From: Robert Armitage

Sent: Friday, April 1, 2016 12:53 PM

To: tonymariani@shaw.ca

Subject: Canadian Transportation Agency-Case No.:-15-61084

Dear Mr. Tony Mariani:

This is with reference to our telephone conversation of today, April 1, 2016, regarding the complaint you filed with the Canadian Transportation Agency (Agency) about the difficulties you encountered with Air Canada on September 8, 2015

For the reasons discussed, it would appear that Air Canada has acted in a manner that is consistent with the provisions of the legislation and regulations which the Agency has the authority to enforce. As the Agency's role in its review of an air travel complaint is to ensure that your air carrier has applied the terms and conditions of carriage in its domestic tariff, the complaint you filed with the Agency will be closed.

Thank you for bringing your concerns to the Agency's attention.

Sincerely,

Robert Armitage

Robert Armitage

Agent responsable du cas, Direction générale du règlement des différends

Office des transports du Canada / Gouvernement du Canada
robert.armitage@otc-cta.gc.ca / Tél. : 819-953-9905 / ATS : 1-800-669-5575

Case Officer, Dispute Resolution Branch
Canadian Transportation Agency / Government of Canada
robert.armitage@otc-cta.gc.ca / Tel: 819-953-9905 / TTY: 1-800-669-5575

c.c.'d: Air Canada Customer Relations- Reference no: ABDA-15YB9LH

(under separate cover)

From: Debra Orr <Debra.Orr@otc-cta.gc.ca>
Date: July 29, 2016 at 1:39:46 PM EDT
To: "f.morris@eastlink.ca" <f.morris@eastlink.ca>
Subject: Canadian Transportation Agency / Case # 16-61579

Dear Mr. Morris,

This is further to the complaint you filed with the Canadian Transportation Agency (Agency) concerning the difficulties you encountered with Westjet Airlines Ltd. (Westjet) in March of this year. While I was unable to reach you by telephone on July 27, I have completed my review and am providing the outcome to you by email. If you have any questions, I can be reached either by email or telephone.

With respect to your request for denied boarding compensation, allow me to explain that part of the Agency's mandate when reviewing a consumer air travel complaint is to ensure that the air carrier resolves the passengers concerns in a manner consistent with the carriers terms and conditions of carriage outlined in its tariff. The tariff is the contract of carriage between the passenger and their carrier – it covers the rights and responsibilities of an airline passenger and the air carrier's rights and obligations to the passenger. The terms and conditions of carriage outlined include matters such as schedule irregularities, refusal to transport, denied boarding, and baggage claims.

On that note, Westjet's tariff defines denied boarding as a flight that is overbooked with the result that a ticketed passenger is not transported on a flight for which he held confirmed space. In this instance Westjet has confirmed that flight WS2651 from Puerto Vallarta to Toronto on March 2, 2016 was not oversold and further that due to a booking error, you and Mrs. Morris were never confirmed on the flight in question.

While we understand you are of a different opinion, as it would appear that this was not a case of denied boarding, we have no basis on which to request that Westjet consider your request for compensation. We note, however that Westjet in recognizing this error has offered each of you $350.00 Westjet dollars.

As the Agency's role in its review of an air travel complaint is to ensure that your air carrier has applied the terms and conditions of carriage in its international tariff, the complaint you filed with the Agency will be closed.

Thank you for bringing your concerns to the Agency's attention.

Kind regards,

Debra Orr

Agente principale aux plaintes - Senior Complaints Officer

Direction des MARC relatifs au transport aérien et aux transports accessibles —

Air & Accessibility ADR Directorate

Office des transports du Canada — Canadian Transportation Agency

Gouvernement du Canada — Government of Canada

T. : (819) 934-2774

c.c.: Westjet Airlines Customer Relations (under separate email)

Reference: HPNR VCCOCS

From: Robert Armitage <Robert.Armitage@otc-cta.gc.ca>
Subject: Canadian Transportation Agency Case No.:-16-62696
Date: October 6, 2016 at 5:54:43 AM PDT
To: "jonathan.hislop@gmail.com" <jonathan.hislop@gmail.com>

Dear Dr. Jonathan Hislop:.

Subject: Your complaint about Air Transat-Case No.:-16-62696

This is further to your air travel complaint filed with the Canadian Transportation Agency (Agency) regarding your travel booked with Air Transat for travel November 5, 2016, concerning the schedule and routing changes the carrier applied to your itinerary .

Despite our efforts to resolve your complaint with Air Transat, we were unable to facilitate a resolution to your full satisfaction. In light of this outcome, we are closing your facilitation complaint file.

Having said this, should you wish to pursue your complaint further, you may consider requesting the Agency deal with the matter through mediation.

Mediation is a collaborative process that enables parties, with the aid of an Agency mediator, to come to a mutually agreeable solution. Both parties to a dispute must agree to mediation before the Agency initiates the mediation process. If one party is agreeable to try mediation and sends in a mediation request, the Agency will contact the other party to gain its consent. The outcome of mediation must be kept strictly confidential.

Information about the mediation process is available on the Agency's web site at: https://services.otc-cta.gc.ca/eng/mediation.

I hope you will find this information useful.

Please advise by October 14, 2016 whether you are interested in attempting to resolve your complaint through the Agency's mediation process.

Yours truly,

Robert Armitage
Agent principal aux plaintes - Senior Complaints Officer
Direction des MARC relatifs au transport aérien et aux transports accessibles — Air & Accessibility ADR Directorate
Office des transports du Canada — Canadian Transportation Agency
Gouvernement du Canada — Government of Canada
T. : (819) 953-9905

Robert.Armitage@otc-cta.gc.ca