Court File No.: A-39-16

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

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

APPLICANT'S RECORD
VOLUME 1

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
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Solicitor for the Respondent,
Canadian Transportation Agency

TABLE OF CONTENTS OF VOLUME 1

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NOTICE OF APPLICATION

TO THE RESPONDENT:

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

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

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

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

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

Date: January 22, 2016 Issued by: _____

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

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

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

APPLICATION

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

The Applicant makes application for:

1. a declaration that:

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

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

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

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

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

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

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

The grounds for the application are as follows:

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

A. Licensing requirements under the *CTA*

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

   (a) Operating an air service requires having:

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

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

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

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

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

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

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

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

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

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

B. The decision-making powers of the Agency

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

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

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

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

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

   (a) being a Canadian;

   (b) having a Canadian aviation document; and

   (c) having prescribed liability insurance coverage.

C. The regulation-making powers of the Agency

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

F. The "Approach under consideration" requires legislation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H. The Applicant

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

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

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

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

I. Statutory provisions

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

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

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

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

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

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

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

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

This application will be supported by the following material:

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

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

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

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

January 22, 2016

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Applicant

Court File No.: A-39-16

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: January 25, 2016)

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

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

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

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

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

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

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

airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;

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

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

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

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

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

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

5. I first learned about the the Consultation on January 8, 2016 from the email of Mr. Ghislain Blanchard, Director General, Industry Regulations and Determinations at the Agency, a copy of which is attached and marked as **Exhibit "B"**.

6. On January 8, 2016, I wrote to Mr. John Toulipoulos, the contact person for the Consultation at the Agency, and requested that he provide me with information about the legal basis for the consultation and the Agency's jurisdiction to make generic, legislative-like determinations with respect to domestic service. A copy of my email to Mr. Toulipoulos is attached and marked as **Exhibit "C"**.

7. On January 15, 2016 the Secretary of the Agency wrote to me, among other things, that:

> [...] while this review is underway, the Agency will not require persons to apply for a licence as long as the service offered to the public meets all of the following conditions:
>
> i. The person does not operate any aircraft;
>
> ii. The person charters the aircraft's entire capacity, for the purpose of resale to the public; and
>
> iii. The air carrier holds the appropriate Agency licence to operate the air service.

A copy of the Secretary's email is attached and mark as **Exhibit "D"**.

8. On January 15, 2016, I wrote to the Secretary of the Agency, and requested that my questions to Mr. Toulipoulos relating to the legality of the consultation and its outcome (Exhibit "C") be addressed. A copy of my email to the Secretary is attached and marked as **Exhibit "E"**.

9. The Agency acknowledged the receipt of my email of January 15, 2016 (Exhibit “E”), but my questions about the legality of the consultation and its outcome have not been addressed to this date.

10. On January 19, 2016, the Secretary of the Agency wrote to me, among other things, that:

> [...] the Agency Chair, acting in his capacity as CEO, also instructed staff to not seek a licence application from NewLeaf and other companies like it pending the completion of this consultation and the issuance of an Agency decision on the issue, provided they met three criteria. These criteria were detailed in my email to you of Friday, January 15, 2016.

A copy of the Secretary’s email is attached and marked as **Exhibit “F”**.

11. On January 20, 2016, the Secretary of the Agency wrote to me in reference to the Agency Chair’s aforementioned instructions that:

> We are unable to provide you with a copy of these instructions as they were provided verbally to Agency staff.

A copy of the Secretary’s email is attached and mark as **Exhibit “G”**.

12. On January 21, 2016, the Secretary of the Agency wrote to me in reference to the Agency Chair’s aforementioned instructions that:

> I can advise that the meeting at which these instructions were given took place on October 29, 2015, but that no minutes were produced for this meeting.

A copy of the Secretary’s email is attached and mark as **Exhibit “H”**.

13. On or around January 21, 2016, the Agency released an announcement entitled "Key facts on the Agency's review of licensing requirements for certain air travel companies," which reads as follows:

> Business models in the airline industry are rapidly evolving. To ensure that users of transportation services are protected, while still allowing innovative approaches that can increase consumer choice in the market, the Agency is currently reviewing whether companies that bulk purchase all seats on planes and then resell those seats to the public, but do not operate any aircraft, should be required to hold a licence.
>
> In December, the Agency advised these companies that while this review was ongoing, they would not be required to seek a license, so long as they met certain conditions This approach has been consistent since the beginning.
>
> Once consultations are complete, the Agency will review and carefully consider the submissions received and issue a determination on which companies are required to hold licences. This will be done as quickly as possible while ensuring that all relevant information is taken into account.
>
> [Emphasis added.]

A copy of the announcement is attached and marked as **Exhibit "I"**.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on January 25, 2016.

_____

_____
Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

_____

Signature

Consultation on the requirement to hold a licence

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

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

Date modified:
2015-12-23

Consultation on the requirement to hold a licence

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

Background

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

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

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

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

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

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

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

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

Approach under consideration

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

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

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

Call for comments

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

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

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

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

How to Participate

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

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

Latest Milestones

Title	Date
Deadline for submissions	January 22, 2016

Date modified:

2015-12-21

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

_____

Signature

RE: URGENT: Possible unlicensed operation / violation of s. 67(1) of the CTA

Ghislain Blanchard <Ghislain.Blanchard@otc-cta.gc.ca> Fri, Jan 8, 2016 at 5:15 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>, secretariat <Secretariat.Secretariat@otc-cta.gc.ca>

Dear Dr. Luckas,

As promised yesterday, I am following up on your request for information regarding the NewLeaf Travel Company, and specifically in regards to your questions below and subsequent ones raised during our discussion.

We confirm that NewLeaf Travel Company Inc. (NewLeaf) does not hold any Agency licences nor does it have an application for a licence before the Agency. We also confirm that the Agency is aware of NewLeaf's recently advertised business venture, wherein Newleaf promotes itself as an air travel company that will partner with Flair Airlines, a licenced air carrier, who will operate the aircraft on the air service.

The Agency is reviewing whether persons who have commercial control over an air service, but do not operate any aircraft (Indirect Air Service Providers), such as NewLeaf, should be required to hold a licence. The Agency is now consulting with Canadians on this matter. Information on the Agency's consultation and how to participate can be found at: https://www.otc-cta.gc.ca/eng/consultation/consultation-requirement-hold-a-licence. Interested persons may submit written comments no later than the end of the business day on January 22, 2016.

As NewLeaf does not have a licence, they do not have a tariff pursuant to the Air Transportation Regulations. Flair Airlines is a licenced air carrier and, as such, they are required pursuant to section 67(4) of the Canada Transportation Act, to make a copy of their tariff available upon request and on payment of a fee not exceeding the cost of making a copy.

Flair Airlines holds Licence No. 050100 and No. 050114 granting the authority to operate domestic and non-scheduled international air services using small, medium, large, and all cargo aircraft.

I trust the above will address the questions that you have raised.

Sincerely,

Ghislain Blanchard
Director General
Industry Regulation and Determinations

-----Original Message-----
From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
Sent: January-06-16 11:57 AM
To: secretariat
Subject: URGENT: Possible unlicensed operation / violation of s. 67(1) of the CTA

Dear Madam Secretary,

I am writing to you concerning NewLeaf Travel Company Inc., which announced today that it is offering domestic service between various cities in Canada.

1. I conducted a search among the Agency's decisions, but I was unable to locate any one relating to granting the company a license.

2. I visited the company's website used for selling tickets, and found that it does not display the tariff, contrary s. 67(1)(a.1) of the Canada Transportation Act.

3. I spoke to a reservation agent of New Leaf, and she not aware of the company having a tariff. Thus, the company may be in breach of s. 67(1)(a) of the Canada Transportation Act.

I am requesting that the Agency confirm whether this company has been licensed (and if so, provide me with a copy of the decision granting license), and whether the Agency is aware of the issues identified above.

Kindly please confirm the receipt of this message.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

_____

Signature

From lukacs@AirPassengerRights.ca Fri Jan 8 19:03:12 2016
Date: Fri, 8 Jan 2016 19:03:06 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: john.touliopoulos@otc-cta.gc.ca
Subject: Question concerning "Consultation on the requirement to hold a licence"

Dear Mr. Touliopoulos,

I am writing to seek further information about the nature of the above-noted consultation.

1. Based on what provision of the Canada Transportation Act or the Air Transportation Regulations does the Agency engage in this consultation exercise?

2/a. At the end of the consultation, will the Agency issue a decision or order?

2/b. If so, what provision(s) of the Canada Transportation Act or the Air Transportation Regulations permits the Agency to make a generic (legislative-like) determination with respect to domestic service, without a complaint or application about a specific business?

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

_____

Signature

From Secretariat.Secretariat@otc-cta.gc.ca Fri Jan 15 16:17:14 2016
Date: Fri, 15 Jan 2016 20:17:05 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Question concerning "Consultation on the requirement to hold a licence"

[The following text is in the "utf-8" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some characters may be displayed incorrectly.]

Dr. Lukacs,

This is in response to your e-mail to Mr. Blanchard and separate e-mail to Mr. Touliopoulos, both dated January 8, 2016. Your two e?mails have been reproduced at the end of this response.

A panel has been assigned to review whether NewLeaf Travel Company Inc. (NewLeaf) is required, pursuant to section 57 of the Canada Transportation Act (CTA), to hold a licence to operate the proposed air transportation business venture between NewLeaf and Flair Airlines Inc. (Flair). The Agency is, pursuant to section 81 of the CTA, conducting an inquiry into this matter. Next steps, including whether to issue a formal decision, order, or any other action is to be taken is entirely at the discretion of the panel.

The Agency is also currently consulting with Canadians on whether persons who bulk purchase all seats on planes and then resell those seats to the public, such as NewLeaf, should be required to hold a licence. Consultations serve as a means to collect information from key and interested stakeholders. If you have views on whether persons who bulk purchase all seats on planes and then resell those seats to the public should be required to hold a licence, I encourage you to submit your comments, as part of the consultation process, by end of day January 22nd, which is the deadline.

NewLeaf, like other persons who bulk purchase all seats on planes and then resell those seats to the public, that hold an Agency licence or have a pending application, has been informed that while this review is underway, the Agency will not require persons to apply for a licence as long as the service offered to the public meets all of the following conditions:

i. The person does not operate any aircraft;

ii. The person charters the aircraft’s entire capacity, for the purpose of resale to the public; and

iii. The air carrier holds the appropriate Agency licence to operate the air service.

There is no enforcement action in place with NewLeaf with respect to sections 57 and 59 of the CTA. Should the Agency’s review conclude that persons that market

and sell an air service to the public, but do not operate any aircraft, are required to hold a licence, they will be informed of such a decision and will be required to apply for a licence from the Agency.

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

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]

Sent: January-08-16 6:03 PM

To: John Touliopoulos

Subject: Question concerning "Consultation on the requirement to hold a licence"

Dear Mr. Touliopoulos,

I am writing to seek further information about the nature of the above-noted consultation.

1. Based on what provision of the Canada Transportation Act or the Air Transportation Regulations does the Agency engage in this consultation exercise?

2/a. At the end of the consultation, will the Agency issue a decision or order?

2/b. If so, what provision(s) of the Canada Transportation Act or the Air Transportation Regulations permits the Agency to make a generic

(legislative-like) determination with respect to domestic service, without a complaint or application about a specific business?

I look forward to hearing from you.

Best wishes,

Dr. Gabor Lukacs

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

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]

Sent: January-08-16 4:44 PM

To: Ghislain Blanchard

Cc: secretariat

Subject: RE: URGENT: Possible unlicensed operation / violation of s. 67(1) of the CTA

Dear Mr. Blanchard,

Thank you for your answer. According to the consultation website that you sent me:

> The Agency’s current approach [...] requires the person with commercial control to hold the licence, irrespective of whether the person operates any aircraft.

Thus, on its face, it appears that NewLeaf is required to hold a license, and its operation is contrary to ss. 57 and/or 59 of the Canada Transportation Act (the "CTA").

1. Is there any proceeding currently before the Agency to bring NewLeaf into compliance with ss. 57 and/or 59 of the CTA?

2/a. Has the Agency taken or contemplates to take any steps in terms of enforcement with respect to NewLeaf’s non-compliance with ss. 57 and/or 59 of the CTA?

2/b. If not, why not?

As per our telephone call today, I would appreciate if you could confirm when you will be able to answer these questions.

I look forward to hearing from you.

Best wishes,

Dr. Gabor Lukacs

This is **Exhibit "E"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

_____

Signature

From lukacs@AirPassengerRights.ca Fri Jan 15 16:34:28 2016
Date: Fri, 15 Jan 2016 16:34:22 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
Subject: Re: Question concerning "Consultation on the requirement to hold a licence"

[The following text is in the "utf-8" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some characters may be displayed incorrectly.]

Dear Madam Secretary:

Unfortunately, your letter did not address my questions relating to the ongoing "Consultation," and focused only on the specific case of NewLeaf.

My questions with respect to the ongoing "Consultation" were and are:

1. Based on what provision of the Canada Transportation Act or the Air Transportation Regulations does the Agency engage in this consultation exercise?

2/a. At the end of the consultation, will the Agency issue a decision or order about its conclusions?

2/b. If so, what provision(s) of the Canada Transportation Act or the Air Transportation Regulations permits the Agency to make a generic (legislative-like) determination with respect to domestic service, without a complaint or application about a specific business?

I would be most grateful if you were so kind to answer these questions.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

On Fri, 15 Jan 2016, secretariat wrote:

> Dr. Lukacs,
>
> This is in response to your e-mail to Mr. Blanchard and separate e-mail to Mr. Touliopoulos, both dated January 8, 2016. Your two e?mails have been reproduced at the end of this response.
>
> A panel has been assigned to review whether NewLeaf Travel Company Inc. (NewLeaf) is required, pursuant to section 57 of the Canada Transportation Act (CTA), to hold a licence to operate the proposed air transportation business venture between NewLeaf and Flair Airlines Inc. (Flair). The Agency is, pursuant to section 81 of the CTA, conducting an inquiry into this matter. Next steps, including whether to issue a formal decision,

> order, or any other action is to be taken is entirely at the discretion of
> the panel.
>
>
>
> The Agency is also currently consulting with Canadians on whether persons
> who bulk purchase all seats on planes and then resell those seats to the
> public, such as NewLeaf, should be required to hold a licence. Consultations
> serve as a means to collect information from key and interested
> stakeholders. If you have views on whether persons who bulk purchase all
> seats on planes and then resell those seats to the public should be required
> to hold a licence, I encourage you to submit your comments, as part of the
> consultation process, by end of day January 22nd, which is the deadline.
>
>
>
> NewLeaf, like other persons who bulk purchase all seats on planes and then
> resell those seats to the public, that hold an Agency licence or have a
> pending application, has been informed that while this review is underway,
> the Agency will not require persons to apply for a licence as long as the
> service offered to the public meets all of the following conditions:
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>
>
> i. The person does not operate any aircraft;
>
> ii. The person charters the aircraft’s entire capacity, for the purpose
> of resale to the public; and
>
> iii. The air carrier holds the appropriate Agency licence to operate the
> air service.
>
>
>
> There is no enforcement action in place with NewLeaf with respect to
> sections 57 and 59 of the CTA. Should the Agency’s review conclude that
> persons that market and sell an air service to the public, but do not
> operate any aircraft, are required to hold a licence, they will be informed
> of such a decision and will be required to apply for a licence from the
> Agency.
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>
> -----Original Message-----
>
> From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
>
> Sent: January-08-16 6:03 PM
>
> To: John Touliopoulos
>
> Subject: Question concerning "Consultation on the requirement to hold a
> licence"
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>
>
> Dear Mr. Touliopoulos,
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> I am writing to seek further information about the nature of the above-noted
> consultation.
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> 1. Based on what provision of the Canada Transportation Act or the Air
> Transportation Regulations does the Agency engage in this consultation
> exercise?
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>
> 2/a. At the end of the consultation, will the Agency issue a decision or
> order?
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> 2/b. If so, what provision(s) of the Canada Transportation Act or the Air
> Transportation Regulations permits the Agency to make a generic
>
> (legislative-like) determination with respect to domestic service, without a
> complaint or application about a specific business?
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> I look forward to hearing from you.
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>
> Best wishes,
>
> Dr. Gabor Lukacs
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>
> -----Original Message-----
>
> From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
>
> Sent: January-08-16 4:44 PM
>
> To: Ghislain Blanchard
>
> Cc: secretariat
>
> Subject: RE: URGENT: Possible unlicensed operation / violation of s. 67(1)
> of the CTA
>
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>
> Dear Mr. Blanchard,
>
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>
> Thank you for your answer. According to the consultation website that you
> sent me:
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>
>   The Agency’s current approach [...] requires the person with
>

> commercial control to hold the licence, irrespective of whether
>
> the person operates any aircraft.
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>
> Thus, on its face, it appears that NewLeaf is required to hold a license,
> and its operation is contrary to ss. 57 and/or 59 of the Canada
> Transportation Act (the "CTA").
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> 1. Is there any proceeding currently before the Agency to bring NewLeaf into
> compliance with ss. 57 and/or 59 of the CTA?
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>
> 2/a. Has the Agency taken or contemplates to take any steps in terms of
> enforcement with respect to NewLeaf’s non-compliance with ss. 57 and/or 59
> of the CTA?
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> 2/b. If not, why not?
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>
> As per our telephone call today, I would appreciate if you could confirm
> when you will be able to answer these questions.
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> I look forward to hearing from you.
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> Best wishes,
>
> Dr. Gabor Lukacs
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This is **Exhibit "F"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

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Signature

From Secretariat.Secretariat@otc-cta.gc.ca Tue Jan 19 17:52:08 2016
Date: Tue, 19 Jan 2016 21:51:58 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Response to your telephone inquiry of January 18, 2016

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dr. Lukacs,

Further to our telephone conversation yesterday morning and your request for a copy of the Agency?s decision granting an exemption to NewLeaf Travel Company Inc. (NewLeaf) from the licensing requirements of the Canada Transportation Act, I can confirm that the Agency has not, in fact, issued an exemption or any other decision with respect to NewLeaf at this time. Rather, in the context of the emergence of this new business model and a discussion between the Panel assigned to the NewLeaf matter and Agency staff, the Panel instructed staff to conduct broad consultations with industry as expeditiously as possible to inform the Agency?s consideration of this new model. At this same meeting, the Agency Chair, acting in his capacity as CEO, also instructed staff to not seek a licence application from NewLeaf and other companies like it pending the completion of this consultation and the issuance of an Agency decision on the issue, provided they met three criteria. These criteria were detailed in my email to you of Friday, January 15, 2016.

Elizabeth C. Barker

Secretary of the Canadian Transportation Agency

Office des transports du Canada | Canadian Transportation Agency

Gouvernement du Canada | Government of Canada

Ottawa, Canada K1A 0N9

Courriel | Email : secretariat@otc-cta.gc.ca

Site Web | Website : www.otc-cta.gc.ca

Téléphone | Telephone 819-997-0099

Télécopieur | Facsimile 819-953-5253

Téléimprimeur | Teletypewriter 1-800-669-5575

This is **Exhibit "G"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

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Signature

From Secretariat.Secretariat@otc-cta.gc.ca Wed Jan 20 18:11:32 2016
Date: Wed, 20 Jan 2016 22:11:23 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: RE: The "instructions" of the Agency Chair

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dr. Lukacs,

We are unable to provide you with a copy of these instructions as they were provided verbally to Agency staff.

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

-----Original Message-----
From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
Sent: January-19-16 6:28 PM
To: secretariat
Subject: The "instructions" of the Agency Chair

Dear Madam Secretary,

Thank you for your message.

Due to the absence of a formal order or decision, I am requesting that you provide me with a copy of the "instructions" of the Agency Chair, acting in his capacity as CEO, referenced in your email below.

Best wishes,
Dr. Gabor Lukacs

On Tue, 19 Jan 2016, secretariat wrote:

> Dr. Lukacs,
>
>
>
> Further to our telephone conversation yesterday morning and your
> request for a copy of the Agency?s decision granting an exemption to
> NewLeaf Travel Company Inc. (NewLeaf) from the licensing requirements
> of the Canada Transportation Act, I can confirm that the Agency has
> not, in fact, issued an exemption or any other decision with respect to NewLeaf at this time.
> Rather, in the context of the emergence of this new business model

> and a discussion between the Panel assigned to the NewLeaf matter and
> Agency staff, the Panel instructed staff to conduct broad
> consultations with industry as expeditiously as possible to inform the
> Agency?s consideration of this new model. At this same meeting, the
> Agency Chair, acting in his capacity as CEO, also instructed staff to
> not seek a licence application from NewLeaf and other companies like
> it pending the completion of this consultation and the issuance of an
> Agency decision on the issue, provided they met three criteria. These
> criteria were detailed in my email to you of Friday, January 15, 2016.
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>
> Elizabeth C. Barker
>
> Secretary of the Canadian Transportation Agency
>
>
>
> Office des transports du Canada | Canadian Transportation Agency
>
> Gouvernement du Canada | Government of Canada
>
> Ottawa, Canada K1A 0N9
>
> Courriel | Email : secretariat@otc-cta.gc.ca
>
> Site Web | Website : www.otc-cta.gc.ca
>
> Téléphone | Telephone 819-997-0099
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> Télécopieur | Facsimile 819-953-5253
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> Téléimprimeur | Teletypewriter 1-800-669-5575
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This is **Exhibit "H"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

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Signature

From Secretariat.Secretariat@otc-cta.gc.ca Thu Jan 21 17:30:45 2016
Date: Thu, 21 Jan 2016 21:30:36 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: RE: The "verbal instructions" of the Agency Chair

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dr. Lukacs,

I can advise that the meeting at which these instructions were given took place on Oc
tober 29, 2015, but that no minutes were produced for this meeting.

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

-----Original Message-----
From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
Sent: January-20-16 5:30 PM
To: secretariat
Subject: The "verbal instructions" of the Agency Chair

Dear Madam Secretary,

Thank you for your message below.

Kindly please clarify on what date these verbal instructions were made, whether they
were recorded in the minutes of the meeting, and if so, kindly please provide me with
a copy of the relevant portion of the minutes.

Best wishes,
Dr. Gabor Lukacs

On Wed, 20 Jan 2016, secretariat wrote:

> Dr. Lukacs,
>
> We are unable to provide you with a copy of these instructions as they
> were provided verbally to Agency staff.
>
>
> 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
>
>
> -----Original Message-----
> From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
> Sent: January-19-16 6:28 PM
> To: secretariat
> Subject: The "instructions" of the Agency Chair
>
> Dear Madam Secretary,
>
> Thank you for your message.
>
> Due to the absence of a formal order or decision, I am requesting that
> you provide me with a copy of the "instructions" of the Agency Chair,
> acting in his capacity as CEO, referenced in your email below.
>
> Best wishes,
> Dr. Gabor Lukacs
>
>
>
> On Tue, 19 Jan 2016, secretariat wrote:
>
>>
>> Dr. Lukacs,
>>
>>
>>
>> Further to our telephone conversation yesterday morning and your
>> request for a copy of the Agency?s decision granting an exemption to
>> NewLeaf Travel Company Inc. (NewLeaf) from the licensing requirements
>> of the Canada Transportation Act, I can confirm that the Agency has
>> not, in fact, issued an exemption or any other decision with respect to NewLeaf at
 this time.
>> Rather, in the context of the emergence of this new business model
>> and a discussion between the Panel assigned to the NewLeaf matter and
>> Agency staff, the Panel instructed staff to conduct broad
>> consultations with industry as expeditiously as possible to inform
>> the Agency?s consideration of this new model. At this same meeting,
>> the Agency Chair, acting in his capacity as CEO, also instructed
>> staff to not seek a licence application from NewLeaf and other
>> companies like it pending the completion of this consultation and the
>> issuance of an Agency decision on the issue, provided they met three
>> criteria. These criteria were detailed in my email to you of Friday, January 15,
2016.
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>>
>> Elizabeth C. Barker
>>
>> Secretary of the Canadian Transportation Agency
>>
>>

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>> Office des transports du Canada | Canadian Transportation Agency
>>
>> Gouvernement du Canada | Government of Canada
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>> Ottawa, Canada K1A 0N9
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>> Courriel | Email : secretariat@otc-cta.gc.ca
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>> Téléimprimeur | Teletypewriter 1-800-669-5575
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This is **Exhibit "I"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on January 25, 2016

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Signature

Key facts on the Agency's review of licensing requirements for certain air travel companies

Business models in the airline industry are rapidly evolving. To ensure that users of transportation services are protected, while still allowing innovative approaches that can increase consumer choice in the market, the Agency is currently reviewing whether companies that bulk purchase all seats on planes and then resell those seats to the public, but do not operate any aircraft, should be required to hold a licence (/eng/consultation/consultation-requirement-hold-a-licence).

In December, the Agency advised these companies that while this review was ongoing, they would not be required to seek a license, so long as they met certain conditions (/eng/consultation/consultation-requirement-hold-a-licence). This approach has been consistent since the beginning.

Once consultations are complete, the Agency will review and carefully consider the submissions received and issue a determination on which companies are required to hold licences. This will be done as quickly as possible while ensuring that all relevant information is taken into account.

Date modified:
2016-01-21

CERTIFICATION

I, **Elizabeth C. Barker,** of the city of Ottawa, province of Ontario, Secretary of the Canadian Transportation Agency, **DO HEREBY CERTIFY** that attached hereto are true and correct copies of the following documents which are in the custody of the Secretary:

Decision No. 232-A-1996 dated April 18, 1996 with Erratum dated April 19, 1996.

Letter dated April 12, 1996.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Official Seal of the Canadian Transportation Agency at Gatineau, province of Quebec, this 11th day of February, 2016.

Elizabeth C. Barker
Secretary

ERRATUM

ERRATUM

le 19 avril 1996

Décision nº 232-A-1996 du 18 avril 1996 - Plainte déposée par WestJet Airlines Ltd. contre Greyhound Lines of Canada Ltd. et Kelowna Flightcraft Air Charter Ltd.

Référence nº M4205/K14/6052

Nº 960315 au rôle

À la page 1 de la décision susmentionnée, deuxième paragraphe, huitième ligne, remplacer «16 mars 1996» par «18 mars 1996».

April 19, 1996

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

File No. M4205/K14/6052

Docket No. 960315

On page 1 of the above-noted Decision, second paragraph, eighth line, "March 16, 1996" should read "March 18, 1996".

(signature) (signed)

Cathy Murphy
pour/for
Marie-Paule Scott, c.r. - Q.C.
Secrétaire Secretary

Canada

DÉCISION N° 232-A-1996

DECISION NO. 232-A-1996

le 18 avril 1996

RELATIVE à une plainte déposée par WestJet Airlines Ltd. contre Greyhound Lines of Canada Ltd. et Kelowna Flightcraft Air Charter Ltd.

Référence n° M4205/K14/6052

N° 960315 au rôle

WestJet Airlines Ltd. (ci-après WestJet) a déposé une plainte auprès de l'Office national des transports le 22 février 1996. Copie de la plainte a été transmise à Greyhound Lines of Canada Ltd. (ci-après Greyhound) et à Kelowna Flightcraft Air Charter Ltd. (ci-après Kelowna) pour commentaires.

Le 11 mars 1996, Greyhound et Kelowna ont déposé leurs réponses à la plainte de WestJet. Le 15 mars 1996, WestJet a répliqué aux réponses de Greyhound et de Kelowna. Après examen de la réplique de WestJet, l'Office a déterminé qu'elle comportait de nouveaux éléments de preuve. Par conséquent, dans une lettre du 16 mars 1996, l'Office a accordé à Greyhound et à Kelowna la possibilité de présenter leurs observations à cet égard et à WestJet d'y répliquer. Cependant, Greyhound et Kelowna n'ont déposé aucun commentaire.

Dans une lettre du 26 février 1996, WestJet a fourni d'autres commentaires à l'appui de sa plainte. L'Office a reçu cette lettre le 13 mars 1996 et l'a signifiée à Greyhound et à Kelowna pour commentaires. Le 18 mars 1996, Greyhound et Kelowna ont déposé leurs réponses à la lettre du 26 février 1996 et WestJet y a répliqué le 19 mars 1996.

April 18, 1996

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

File No. M4205/K14/6052

Docket No. 960315

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

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

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

Lors de l'examen de la réplique du 19 mars 1996, l'Office a déterminé que WestJet a apporté des faits nouveaux et, par conséquent, par lettres du 21 mars 1996, l'Office a avisé les parties que Greyhound et Kelowna avaient le droit de faire part de leurs observations et que WestJet aurait alors l'occasion de répliquer aux observations que pourraient présenter Greyhound et Kelowna. L'Office a aussi informé les parties qu'après réception de tous les mémoires portant sur les nouveaux éléments de preuve, les plaidoiries en ce qui concerne la plainte seraient closes. Greyhound et Kelowna ont déposé leurs réponses à cet égard le 25 mars 1996 et WestJet y a répliqué le 26 mars 1996.

Dans une lettre du 29 mars 1996, l'Office a avisé les parties que les plaidoiries relatives à la plainte étaient closes. Il les a de plus informées qu'il ne disposait pas de renseignements suffisants pour statuer sur la plainte de WestJet et qu'il avait sommé Kelowna et Greyhound de déposer auprès de l'Office copie de toute entente et de tout accord ou contrat qui ont été conclus, ou qui le seront, entre Kelowna et Greyhound et les personnes qui leur sont affiliées concernant les activités projetées afin que l'Office puisse les examiner en toute confidentialité. Ces documents, attestés par affidavit, ont été déposés le 3 avril 1996.

POSITION DE WESTJET

WestJet fait valoir que Greyhound a l'intention de contourner la *Loi de 1987 sur les transports nationaux*, L.R.C. (1985), ch. 28 (3e suppl.) (ci-après la LTN 1987). WestJet estime que Greyhound Air est effectivement contrôlée par Greyhound et que celle-ci, selon WestJet, est contrôlée par The Dial Corp. Elle ajoute que le lien commercial entre Kelowna et Greyhound a pour but de contourner les exigences de la LTN 1987 en matière de propriété canadienne.

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

By letter dated March 29, 1996, the Agency advised the parties that pleadings in respect of the complaint were closed. The Agency further advised the parties that it had concluded that insufficient information and documentation had been filed in order for the Agency to dispose of WestJet's complaint and that Kelowna and Greyhound were required to file copies with the Agency of "... all agreements, arrangements and contracts that have been or are to be entered into between Kelowna and Greyhound and their affiliates concerning proposed operations, for the Agency's review in confidence.". These documents were filed and attested to by affidavit on April 3, 1996.

POSITION OF WESTJET

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

Selon WestJet, étant donné que l'Office n'autoriserait pas Greyhound à exploiter l'équipement lui-même, cette dernière a confié par contrat tous les vols à Kelowna. WestJet fait valoir que Greyhound serait responsable de toutes les routes, des horaires, de la planification, de l'établissement des prix, du contrôle de marchandises, du marketing et des normes de service. Celle-ci devra également affronter la concurrence sur le marché. WestJet ajoute que Kelowna exploiterait tout simplement les aéronefs de Greyhound Air à un prix par siège-mille offert aux termes d'un contrat, sans encourir de risques sur le marché.

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

WestJet fait valoir qu'elle a été tenue de satisfaire à des critères stricts de l'Office afin d'assurer que la propriété et le contrôle de l'industrie aérienne demeurent entre les mains de Canadiens. Elle estime que l'entente entre Greyhound et Kelowna constitue un moyen détourné de pénétrer le marché qui est très préjudiciable.

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

Dans sa réplique du 15 mars 1996, WestJet prétend que certaines démarches entreprises par Greyhound avant la conclusion de l'entente avec Kelowna montrent que Greyhound savait qu'il lui serait impossible d'obtenir une licence car cette dernière ne satisfaisait pas aux exigences en matière de propriété canadienne. Néanmoins, Greyhound se serait quand même empressée de conclure une entente avec Kelowna. Comme il a été rapporté dans les journaux, Greyhound fait de la publicité sur un service aérien et vend des billets pour ensuite confier le contrat d'exploitation des vols à Kelowna. Il s'agit là, soutient-elle, d'un moyen de ne pas se conformer aux exigences de délivrance de licence en matière de propriété canadienne et de contrôle. WestJet allègue qu'une simple flotte d'aéronefs ne constitue pas en soi une société aérienne; celle-ci doit également compter sur des ressources humaines et financières pour promouvoir, commercialiser et éventuellement vendre des sièges et de l'espace de chargement. Certes, les aéronefs seront exploités physiquement par Kelowna, par contre, ce sont les activités de Greyhound qui en font une société aérienne. Greyhound Air n'existe pas sans Greyhound. WestJet soutient même que la gestion et le contrôle de Greyhound Air relèvent

In its reply dated March 15, 1996, WestJet alleges that certain of Greyhound's actions prior to entering into an agreement with Kelowna indicate Greyhound's awareness that it would not be able to obtain a licence from the Agency as it would not meet Canadian ownership requirements and yet Greyhound pressed ahead and entered into an arrangement with Kelowna. WestJet states that Greyhound's current plan, as reported in the press, is to market and sell tickets for an airline service, then contract the flying to Kelowna. This, according to WestJet, is an attempt to circumvent the Canadian ownership and control requirements of the domestic licensing process. WestJet submits that an airline is considerably more than the sum of its inanimate aircraft; it is rather the sum total of the human and financial capital required to promote, market and ultimately sell seat inventory and cargo capacity on the aircraft. WestJet argues that, although Kelowna intends to physically operate the aircraft, what transforms those aircraft into an airline are the activities of Greyhound. WestJet asserts that without Greyhound, there is no Greyhound Air and maintains that the mind and control of Greyhound Air lies with Greyhound. It is submitted by WestJet that all marketing efforts, advertising,

de Greyhound. Celle-ci contrôle manifestement tous les efforts de commercialisation, la publicité, le choix des uniformes, les systèmes de réservations, la gestion des inventaires, le contrôle de marchandises, le choix des routes, les horaires et autres éléments importants.

POSITION DE GREYHOUND

Greyhound soutient que l'entente conclue avec Kelowna constitue en fait une entente entre un affréteur et un transporteur exploitant des vols d'affrètement. Greyhound déclare que les allégations de WestJet concernant le contrôle du service aérien sont sans fondement et que le service aérien sera entièrement exploité et contrôlé par Kelowna.

Greyhound ajoute qu'aucune loi ou politique de l'aviation empêche une société sous contrôle étranger de conclure des contrats d'affrètement avec des transporteurs aériens canadiens.

En réponse à WestJet, Greyhound affirme que Kelowna et elle-même ont prouvé clairement que Greyhound ne contrôle pas Kelowna. Greyhound ajoute qu'elle n'a pas d'investissement dans le capital-action de Kelowna. De plus, elle n'est pas représentée au sein du conseil d'administration et n'exerce aucun contrôle sur la sélection, l'emploi et la rémunération des cadres et des membres de la direction de Kelowna. Greyhound fait également valoir que ce sont les cadres, les membres de la direction et les employés de Kelowna qui dirigent cette dernière et qui dirigeront les activités aériennes de Greyhound Air sur une base quotidienne. Greyhound a déclaré que les ententes financières relatives à Greyhound Air ont été conclues suivant les pratiques établies.

Pour conclure, Greyhound affirme que les allégations de WestJet sont sans fondement et ne peuvent être justifiées.

uniform selection, reservations systems, inventory management, payload control, route selection and scheduling and other key elements are clearly controlled by Greyhound.

POSITION OF GREYHOUND

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

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

In response to WestJet's allegations that Greyhound controls Kelowna, Greyhound asserts that both it and Kelowna have demonstrably shown that Greyhound does not control Kelowna. Greyhound further submits that it has no equity investment in Kelowna and has no representation on the board of directors nor does it have any control over the selection, retention and compensation of Kelowna's officers and executives. Additionally, Greyhound states that it is the officers, executives and employees of Kelowna that run and manage Kelowna and that will run and manage the air operations of Greyhound Air on a day-to-day basis. Greyhound maintains that the financial arrangements in connection with Greyhound Air are highly conventional and standard.

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

POSITION DE KELOWNA

Kelowna fait valoir que l'entente d'affrètement conclue avec Greyhound ne cède pas le contrôle de Kelowna, directement ou indirectement, à Greyhound. Kelowna ajoute que Greyhound n'acquerra aucun intérêt dans Kelowna et n'aura aucun représentant au sein de son conseil d'administration ou parmi ses dirigeants. En outre, Kelowna fait valoir qu'elle aura en tout temps le plein contrôle de l'exploitation des aéronefs et le pouvoir décisionnaire sur celle-ci; seuls ses employés pourront exploiter les aéronefs.

Kelowna fait valoir également que les modalités de l'entente d'affrètement sont pratique courante dans l'industrie et, même si elles sont confidentielles, elles sont semblables à celles de l'entente d'affrètement qui a été conclue entre Kelowna et Purolator Courier Ltd.

Kelowna affirme que son seul et unique directeur, M. Barry Lapointe, n'a pas l'intention de céder le contrôle de la société ou de ses activités, ni de contourner la loi canadienne sur les transports ou d'aider quiconque à cette fin.

CONCLUSION

L'Office a examiné attentivement tous les mémoires et tous les éléments de preuve qui ont été déposés. En outre, l'Office a soigneusement examiné les documents déposés qu'il avait enjoint à Kelowna et Greyhound suite de déposer à sa lettre du 29 mars 1996. Dans sa décision communiquée par lettre du 12 avril 1996, l'Office a déterminé que ces documents étaient de nature confidentielle.

L'Office a également déterminé que, dans cette instance, le point à aborder est le suivant : Si Greyhound exploite un service aérien intérieur, doit-elle détenir une licence intérieure?

En se fondant principalement sur le lien financier, opérationnel et commercial entre Greyhound et Kelowna décrit dans les documents confidentiels, l'Office détermine qu'advenant l'instauration des services aériens proposés, Greyhound exploitera

POSITION OF KELOWNA

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

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

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

FINDINGS

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

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

Based primarily on the financial, operational and business relationships between Greyhound and Kelowna described in the confidential documents, the Agency determines that, if the air services commence as proposed therein, Greyhound will

un service aérien intérieur offert au public. Par conséquent, en vertu du paragraphe 71(1) de la LTN 1987, Greyhound doit détenir une licence intérieure avant de commencer à exploiter les services aériens proposés. Afin d'obtenir cette licence, elle devra établir à la satisfaction de l'Office qu'elle est canadienne comme il est précisé à l'article 67 de la LTN 1987, qu'elle détient un document d'aviation canadien et une assurance responsabilité réglementaire, ou une preuve d'assurabilité, à l'égard des services aériens visés par la licence.

L'Office note que Greyhound ne détient pas actuellement une licence intérieure. Par conséquent, advenant qu'elle commence à exploiter les services aériens proposés, l'Office prendra toute mesure prévue dans la loi l'autorisant à empêcher une telle exploitation, y compris, si nécessaire, la prise d'un arrêté enjoignant à Greyhound de cesser ses activités. En conséquence, l'Office déconseille à Greyhound de commencer à exploiter les services aériens proposés.

À la lumière de ce qui précède et afin de protéger les voyageurs, il est recommandé que Greyhound cesse immédiatement le marketing des services aériens proposés et mette fin à la publicité dans les divers médias et à la vente de billets au public.

En raison de la nature confidentielle des documents déposés par Kelowna et Greyhound, comme l'Office l'a déterminé dans sa lettre communiquant sa décision le 12 avril 1996, les motifs de la décision de l'Office devaient être transmis sous le sceau du secret à Greyhound et à Kelowna, ce qui a été fait le 16 avril 1996.

be operating a publicly available domestic air service. Accordingly, pursuant to subsection 71(1) of the NTA, 1987 in order for the proposed air services to commence, Greyhound will be required to hold a domestic licence. In order to obtain a domestic licence, Greyhound would have to establish to the satisfaction of the Agency that it is Canadian as defined in section 67 of the NTA, 1987, holds a Canadian aviation document, and has prescribed liability insurance coverage or evidence of such insurability in respect of the air services to be provided under the licence.

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

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

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

La présente décision entre en vigueur le 12 avril 1996, date à laquelle elle a été communiquée par lettre.

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

(signature) (signed)

Gilles Rivard, c.r. - Q.C.
Membre Member

(signature) (signed)

Keith Penner
Membre Member

(signature) (signed)

Marian L. Robson
Membre Member

1996-04-12

File No. M4205/K14
Docket No. 960315
April 12, 1996

TO:
WestJet Airlines Ltd.
c/o Burnet, Duckworth & Palmer
Barristers and Solicitors
First Canadian Centre
1400, 350 - 7th Avenue SW
Calgary, Alberta
T2P 3N9

Attention: Mr. Daryl S. Fridhandler

Fax No. (403) 260-0332

TO:
Greyhound Lines of Canada Ltd.
c/o Osler, Hoskin & Harcourt
Barristers & Solicitors
Suite 1500
50 O'Connor Street
Ottawa, Ontario
K1P 6L2

Attention: Mr. Michael L. Phelan

Fax No (613) 235-2867

TO:
Kelowna Flightcraft Air Charter Ltd.
c/o McMillan Binch
Barristers & Solicitors
Suite 3800 - South Tower
Royal Bank Plaza
Toronto, Ontario
M5J 2J7

Attention: Mr. Vernon V. Kakoschke

Fax No. (416) 865-7048

Dear Sirs:

Re: Complaint filed by WestJet Airlines Ltd. Against Kelowna Flightcraft Air Charter Ltd./Greyhound Lines of Canada Ltd.

Prior to rendering its decision in respect of this complaint, the Agency has a number of procedural matters before it to consider and determine.

.../2

By letter dated March 19, 1996 WestJet Airlines Ltd. (WestJet) requested by notice of motion that (a) all documentation relating to the Greyhound Lines of Canada Ltd. (Greyhound) and Kelowna Flightcraft Air Charter Ltd. (Kelowna) venture be deposited with the Agency for review; and (b) WestJet have access to such information for review and oral submissions to the Agency on behalf of WestJet. By letters dated March 21, 1996, the Agency requested submissions from the parties on WestJet's notice of motion. By letters dated March 27, 1996 Kelowna and Greyhound responded to the notice of motion, and on March 28, 1996 WestJet replied.

Kelowna and Greyhound by letters dated March 29, 1996 submitted that parts of WestJet's reply of March 28, 1996 should be stricken from the record on the grounds that those parts constitute further pleadings and arguments filed after the close of pleadings.

The Agency has carefully reviewed the submissions of Kelowna and Greyhound in support of their request to strike out Parts 2 and 3 and the first paragraph of Part 7 (Kelowna only) of WestJet's reply of March 28, 1996, and is of the opinion that those parts of WestJet's reply constitute further pleadings and arguments received by the Agency after the close of pleadings. Therefore, the Agency strikes from the record the text and headings of Parts 2 and 3 as well as the first paragraph of Part 7 of WestJet's March 28, 1996 reply.

In addition, by letter dated March 29, 1996, the Agency advised the parties that it required further information to dispose of WestJet's motion and required Kelowna and Greyhound to jointly file with the Agency "... all agreements, arrangements and contracts that have been or are to be entered into between Kelowna and Greyhound and their affiliates concerning the proposed operations for the Agency's review in confidence.".

On April 3, 1996 the Agency received the requested documents attested to by affidavit.

The Agency has reviewed the submissions of the parties and the documents and is of the opinion that specific direct harm would likely result to Greyhound and Kelowna from public disclosure of the documents filed on April 3, 1996. Therefore, these documents will not be disclosed and will be maintained by the Agency in confidence.

The documents concerning the proposed operations contain commercially sensitive information that if disclosed could be prejudicial to the commercial interest of Kelowna and Greyhound and could provide a competitive advantage to any competitor. In addition, the financial information and arrangements, if disclosed, could cause specific direct harm and monetary loss to Kelowna and Greyhound. Therefore, the request for disclosure or access by WestJet to the documents filed by Kelowna and Greyhound on April 3, 1996 is denied .

.../3

With respect to WestJet's request to make oral submissions to the Agency, the Agency is of the opinion that it has all the necessary information before it in order to render a decision in this matter. Accordingly, the request for an oral hearing is hereby denied.

In respect of the letter filed by WestJet of March 20, 1996 and the letter filed by Greyhound dated March 22, 1996, the Agency accepts both documents into the record.

Sincerely,

Original Signed by
Original signé par
Marie-Paule Scott, Q.C./c.r.

Marie-Paule Scott, Q.C.
Secretary
Ottawa, Ontario
K1A ON9

Court File No.: A-39-16

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Applicant challenges the legality of the new "approach" of the Canadian Transportation Agency ("Agency") that purports to exclude and/or exempt certain types of airlines from the statutory requirement of holding a licence, set out in s. 57(a) of the *Canada Transportation Act* ("*CTA*"). The new "approach" effectively removes all consumer protection measures that were put in place by Parliament by enacting the *CTA*. The Agency wishes to implement this new "approach" using its decision-making powers, contrary to s. 80(2) of the *CTA*.

2. The Applicant is seeking a declaration that the Agency lacks jurisdiction to make a decision or order that has the effect of exempting and/or excluding certain types of airlines from the statutory requirement of holding a licence, and that the implementation of the new "approach" requires legislative amendments. The Applicant is also seeking a prohibition enjoining the Agency from making such orders and decisions.

3. The Applicant, Dr. Gábor Lukács, is a Canadian air passenger rights advocate, whose work and public interest advocacy has been widely recognized in Canada, including in a number of judgments of this Honourable Court.

Lukács Affidavit, paras. 1-3 **Tab 2, p. 12**
***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 43** **Vol. II, Tab 11, p. 323**
***Lukács v. Canada (CTA)*, 2015 FCA 140, para. 1** **Vol. II, Tab 10, p. 287**
***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62** **Vol. II, Tab 9, p. 284**

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

B. THE LEGISLATIVE SCHEME

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

***Canada Transportation Act*, ss. 55(1) & 57(a)** **App. A, pp. 108 & 112**

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

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

(b) prescribed liability insurance coverage; and

(c) prescribed financial fitness requirements.

***Canada Transportation Act*, s. 61** **App. A, p. 113**

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

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

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

***Air Transportation Regulations*, ss. 7 & 8.1** **App. A, pp. 91 & 93**
***Canada Transportation Act*, ss. 36 & 86** **App. A, pp. 106 & 128**

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

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

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

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

***Canada Transportation Act*, ss. 67, 62.1, 67.2** **App. A, pp. 118-119**
***Air Transportation Regulations*, s. 107** **App. A, p. 100**

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

***Canada Transportation Act*, s. 58** **App. A, p. 112**

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

***Canada Transportation Act*, s. 174** **App. A, p. 131**

(i) Decision-making powers of the Agency with respect to licensing

11. The decision-making powers of the Agency under the *CTA* with respect to the licensing of domestic air service providers include:

(a) issuing, suspension, and cancellation of licences (ss. 61 and 63);

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

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

***Canada Transportation Act*, ss. 61, 63, 80, 81** **App. A, pp. 113, 126**

12. The decision-making powers of the Agency to grant exemptions from licensing requirements are not open-ended. First, before an exemption is granted, the Agency must be satisfied that certain conditions, set out in s. 80(1), are met. Second, and more importantly, by virtue of s. 80(2) of the *CTA*:

(a) only the Minister of Transport, and not the Agency, can grant an exemption from the Canadian ownership requirement; and

(b) the Agency cannot grant an exemption from the requirement of having prescribed liability insurance coverage.

***Canada Transportation Act*, ss. 62 & 80** **App. A, pp. 113 & 126**

(ii) Regulation-making powers of the Agency with respect to licensing

13. Subsection 86(1) of the *CTA* confers broad regulation-making powers on the Agency, including defining words and expressions for the purposes of Part II, and excluding a person from any of the requirements of Part II of the *CTA*.

***Canada Transportation Act*, s. 86(1)(k)-(l)** **App. A, p. 128**

14. Nevertheless, Parliament saw it fit to impose some restrictions on the Agency's regulation-making powers:

(a) pursuant to s. 36 of the *CTA*, the Agency can exercise these powers only after it has sought and obtained the approval of the Governor in Council; and

(b) by virtue of s. 86(2) of the *CTA*, the Agency cannot make regulations having the effect of relieving anyone from the Canadian ownership or liability insurance coverage requirements.

***Canada Transportation Act*, ss. 36 & 86(2)** **App. A, pp. 106 & 130**

C. THE "CONSULTATION ON THE REQUIREMENT TO HOLD A LICENCE"

(i) Indirect Air Services Providers

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

Girard Affidavit, para. 3 **Agency's Record**

16. IASPs substantially differ from travel agents. First, an IASP contracts to transport passengers in its own name, while travel agents act as mere agents, and are not parties to the contract of carriage. Second, travel agents have no commercial control over the air service that they sell, and in particular, assume no risks relating to the air services sold.

17. It is common ground that since 1996 and up until recently, the Agency had consistently held that a person with commercial control over a domestic air service "operates" it within the meaning of the *CTA*, and thus requires them to hold a domestic licence. In doing so, the Agency had been following the so-called *1996 Greyhound Decision*. As of February 2016, there are approximately 14 IASPs in Canada that hold a domestic licence.

Girard Affidavit, paras. 4-7 **Agency's Record**
Decision No. 232-A-1996 (public version) **Tab 3, p. 48**

(ii) The "Approach under consideration"

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

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

[Emphasis added.]

Lukács Affidavit, Exhibit "A" **Tab 2A, p. 17**
Girard Affidavit, para. 12 **Agency's Record**

19. On January 21, 2016, the Agency released an announcement that confirms that the Agency intends to exercise its decision-making powers following the consultation:

> Business models in the airline industry are rapidly evolving. To ensure that users of transportation services are protected, while still allowing innovative approaches that can increase consumer choice in the market, the Agency is currently reviewing whether companies that bulk purchase all seats on planes and then resell those seats to the public, but do not operate any aircraft, should be required to hold a licence.
>
> In December, the Agency advised these companies that while this review was ongoing, they would not be required to seek a license, so long as they met certain conditions This approach has been consistent since the beginning.
>
> Once consultations are complete, the Agency will review and carefully consider the submissions received and issue a determination on which companies are required to hold licences. This will be done as quickly as possible while ensuring that all relevant information is taken into account.
>
> [Emphasis added.]

Lukács Affidavit, Exhibit "I" **Tab 2I, p. 46**

20. The Agency misled the public in the January 21, 2016 announcement, and did not disclose that the real reason the Consultation was created was for the sake of a specific new IASP. The truth is that the IASP business model is neither new nor innovative, and has been known in Canada at least since the time of the *1996 Greyhound Decision*, for at least 20 years. As the Agency has acknowledged, there are approximately 14 IASPs in Canada that hold a domestic licence.

Girard Affidavit, paras. 7-10 **Agency's Record**

21. On January 22, 2016, the present application for judicial review with respect to the "Approach under consideration" was commenced.

Notice of Application **Tab 1, p. 1**

D. EVIDENCE OF UNLAWFUL CONDUCT OF THE AGENCY AND/OR ITS CHAIR

22. On October 29, 2015, almost two months before the Consultation was announced, the Chair of the Agency unlawfully instructed the staff of the Agency to not require IASPs to hold a licence pending the outcome of the Consultation. The Secretary of the Agency, whose duties under ss. 21-22 of the *CTA* include record keeping for the Agency, confirmed that:

(a) no order or decision was made to reflect the Chair's instructions;

(b) the Chair's instructions were made orally; and

(c) no minutes were taken for the meeting where the instructions were given.

Canada Transportation Act, ss. 21-22, App. A, pp. 104-105
Lukács Affidavit, Exhibits "F"-"H" Tabs 2F-2H, pp. 37-42

PART II – STATEMENT OF THE POINTS IN ISSUE

23. The question to be decided on the present application is whether the Agency has jurisdiction to make a decision or order to the effect that Indirect Air Service Providers are no longer required to hold a domestic licence.

PART III – STATEMENT OF SUBMISSIONS

24. The crux of the case at bar is that the Agency attempts to circumvent the will of Parliament, and engages in an impermissible legislative exercise under the guise of decision-making. The Agency pretends that the requirement to hold a licence is a mere policy choice of itself as a regulator, and that it can change its mind about it. This is clearly not the case.

25. It was Parliament, and not the Agency, that chose to impose a regulatory scheme on air transportation to establish commercial standards and consumer protection measures. The requirement that all air service providers hold a licence is an inherent part of the regulatory scheme, and it serves as an enforcement mechanism to protect the the travelling public.

26. Since 1996, the time that the *CTA* was enacted, and until recently, the Agency had consistently and correctly been interpreting s. 57(a) of the *CTA* as requiring all IASPs providing domestic service to hold a domestic licence. The IASP business model is not new, and the relevant provisions of the *CTA* have not been amended by Parliament.

27. Dr. Lukács submits that:

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

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

A. INDIRECT AIR SERVICE PROVIDERS ARE REQUIRED TO HOLD A LICENCE

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

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

***Canada Transportation Act*, s. 57** **App. A, p. 112**

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

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

***Canada Transportation Act*, s. 55(1)** **App. A, p. 108**

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

31. Although the *CTA* has a built-in mechanism for the review of the Act every eight years, and the *CTA* was amended on a number of occasions, Parliament chose not to amend the domestic licensing provisions. In these circumstances, it is submitted that considerable weight should be given to the jurisprudence developed by the Agency in the 19 years from 1996 to 2015.

***Canada Transportation Act*, s. 53** **App. A, p. 107**
***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 40** **Vol. II, Tab 11, p. 322**

(i) 1996-2015: the Agency's jurisprudence for the past 19 years

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

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

CTA Decision No. 222-A-2010, p. 2 **Vol. II, Tab 1, p. 172**

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

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

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

Decision No. 42-A-2013, p. 2 **Vol. II, Tab 2, p. 174**
Decision No. 152-A-2014 **Vol. II, Tab 7, p. 208**

34. Dr. Lukács submits that the aforementioned longstanding interpretation of the *CTA* by the Agency adequately reflects the intent of Parliament and the purpose for which the *CTA* was enacted. Items 1, 2, and 4 are precisely what characterize IASPs, and set them apart from a travel agent or businesses that rent out aircraft and flight crew, and thus IASPs are required to hold a licence.

(ii) Textual and contextual analysis

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

***Canada Transportation Act*, ss. 55(1) & 57(a)** **App. A, pp. 108 & 112**

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

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

***Canada Transportation Act*, s. 60(1)** **App. A, p. 112**

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

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 41** **Vol. II, Tab 9, p. 280**

(iii) Purposive analysis

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

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

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

(c) restricting foreign control over domestic air service.

Decision No. 390-A-2013, paras. 20-25 **Vol. II, Tab 3, pp. 181-182**

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

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

Lukács Affidavit, Exhibit "A" **Tab 2A, p. 17**

40. Therefore, the Agency's interpretation of the licensing requirement in the "Approach under consideration" is unreasonable, because it circumvents the very purpose for which Parliament enacted the *CTA*.

B. THE AGENCY LACKS JURISDICTION TO OVERRIDE THE REQUIREMENT TO HOLD A LICENCE

41. The effect of exempting IASPs from the requirement of holding a domestic licence is that they would not be subject to the requirement of Canadian ownership or of maintaining a prescribed liability insurance coverage.

***Canada Transportation Act*, s. 81** **App. A, p. 127**

42. However, the Agency lacks jurisdiction to do so. In enacting s. 80(2) of the *CTA*, Parliament chose to explicitly withhold these powers from the Agency:

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

***Canada Transportation Act*, s. 80** **App. A, p. 126**

C. REMEDIES

43. In the case at bar, the Agency intends to make decisions and/or orders that are in both unlawful and expose the public to significant risks which Parliament intended to eliminate:

(a) IASPs selling tickets to the public without having the capital necessary to pay for costs associated with operating the air service that consumers have paid for in advance;

(b) IASPs stranding passengers by overbooking, delaying, or cancelling flights for economic reasons, and without any compensation to passengers; and

(c) IASPs being unable to meet their financial obligations to passengers and the public in the case of an accident.

Lukács Affidavit, Exhibits "A" and "I" **Tabs 2A and 2I, pp. 17 and 46**

44. These risks are significantly higher in the case of domestic air service, where consumers are not protected by the comprehensive liability regime of the *Montreal Convention* that imposes liability both on the "contracting carrier" (IASP) and the "actual carrier" (the operator of the aircraft).

***Montreal Convention*, Chapter V** **App. A, p. 150**

45. Pursuant to s. 28 of the *Federal Courts Act*, judicial review powers with respect to the Agency are assigned to this Honourable Court, which has jurisdiction to grant a declaratory relief and/or a prohibition against the Agency.

***Federal Courts Act*, ss. 28, 18, and 18.1(3)** **App. A, pp. 133 and 136**

46. The unlawful conduct of the Agency and/or its Chair, summarized in paragraph 22, lend further support to the need for this Honourable Court to provide guidance to the Agency by way of the sought declarations and prohibition in order to prevent further harm to the public.

D. COSTS

47. In *Lukács v. Canada (Transportation Agency)*, this Honourable Court awarded the appellant disbursements even though the appeal was dismissed:

> In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62** **Vol. II, Tab 9, p. 284**

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

(a) the application is in the nature of public interest litigation, challenging a public body for excess of jurisdiction on a matter that affects the travelling public at large;

(b) the issue raised in the application is not frivolous; and

(c) the application raises novel questions of law relating to the *CTA* that have not yet been addressed by this Honourable Court.

PART IV – ORDER SOUGHT

49. The Applicant, Dr. Gábor Lukács, is seeking an Order:

(a) declaring that:

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

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

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

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

(b) enjoining the Canadian Transportation Agency from making a decision or order that purports to exempt and/or exclude Indirect Air Service Providers from the statutory requirement of holding a license;

(c) granting disbursements and a moderate allowance for the time and effort the Applicant devoted to the present application; and

(d) such further and other relief or directions that the Applicant may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 15, 2016

DR. GÁBOR LUKÁCS

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Applicant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

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

Canada Transportation Act, S.C. 1996, c. 10,
ss. 36, 53, 55, 57-61, 67, 67.1, 67.2, 80, 86, 174

Federal Courts Act, R.S.C. 1985, c. F-7,
ss. 18, 18.1, 28

Montreal Convention (Schedule VI to the *Carriage by Air Act*,
R.S.C. 1985, c. C-26)

Statutory Instruments Act, R.S.C. 1985, c. S-22
ss. 1-12

CASE LAW

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

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

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

Determination of whether Angel Flight of British Columbia Society is operating an air service within the meaning of subsection 55(1) of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 462-A-2013

CASE LAW (CONTINUED)

Determination of whether Angel Flight of Alberta Society is operating an air service within the meaning of subsection 55(1) of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 41-A-2014

Determination of whether Hope Air is operating an air service within the meaning of subsection 55(1) of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 129-A-2014

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

Dunsmuir v. New Brunswick, 2008 SCC 9

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

Lukács v. Canada (Canadian Transportation Agency), 2015 FCA 140

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

WestJet v. Greyhound et al., Canadian Transportation Agency,
Decision No. 232-A-1996 (public version)

WestJet v. Greyhound et al., Order in Council, P.C. 1996-849

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Appendix A

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

Current to February 15, 2016

Last amended on December 14, 2012

À jour au 15 février 2016

Dernière modification le 14 décembre 2012

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Regulations Respecting Air Transportation

Règlement concernant les transports aériens

Short Title

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

Titre abrégé

1 *Règlement sur les transports aériens*.

Interpretation

2 In these Regulations and Part II of the Act,

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

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

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

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

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

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

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

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

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

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

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

Définitions

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

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

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

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

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

base [Abrogée, DORS/96-335, art. 1]

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

capacité maximale certifiée Selon le cas :

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

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

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

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

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

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

certificated maximum carrying capacity means

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

point [Abrogée, DORS/96-335, art. 1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

price per seat means the amount, expressed in Canadian dollars, by the payment of which round-trip air transportation may be purchased from a charterer or the charterer's agent for a passenger on an ABC or CPC; (*prix par place*)

public liability means legal liability of an air carrier, arising from the air carrier's operation, ownership or possession of an aircraft, for

(a) injury to or death of persons other than the air carrier's passengers, air crew or employees, and

secrétaire Le secrétaire de l'Office. (*Secretary*)

série [Abrogée, DORS/96-335, art. 1]

service de messageries Entreprise de transport de porte-à-porte d'envois pour livraison le lendemain au plus tard. (*courier service*)

taxe [Abrogée, DORS/2012-298, art. 1]

territoire S'entend des étendues de terre, y compris les eaux territoriales adjacentes, qui sont placées sous la souveraineté, la compétence ou la tutelle d'un État. Toute mention d'un État doit s'interpréter, le cas échéant, comme une mention du territoire de cet État, et toute mention d'une zone géographique qui comprend plusieurs États doit s'interpréter, le cas échéant, comme une mention de l'ensemble des territoires des États qui composent cette zone géographique. (*territory*)

trafic Les personnes ou les marchandises transportées par la voie aérienne. (*traffic*)

transport À l'égard d'un vol affrété pour voyage à forfait, le transport par air ou par tout autre mode :

a) entre tous les points de l'itinéraire du voyage;

b) entre les aéroports ou les terminaux terrestres et l'endroit où le logement est fourni aux points de l'itinéraire du voyage autres que le point d'origine. (*transportation*)

transport de porte-à-porte Transport d'envois entre les points de ramassage et de livraison déterminés par l'expéditeur, le destinataire ou les deux. La présente définition comprend la partie du transport de surface. (*door-to-door transportation*)

transporteur aérien Personne qui exploite un service intérieur ou un service international. (*air carrier*)

transporteur fréteur licencié des États-Unis Citoyen des États-Unis, au sens de la définition de ***citizen of the United States*** à la partie 204 du règlement intitulé *Federal Aviation Regulations*, publié par le gouvernement des États-Unis, qui détient une licence internationale service à la demande valable pour les vols affrétés entre le Canada et les États-Unis. (*United States charter carrier licensee*)

transporteur fréteur licencié du Canada Personne qui est un Canadien et qui détient une licence internationale service à la demande valable pour les vols affrétés. (*Canadian charter carrier licensee*)

(b) damage to property other than property in the air carrier's charge; (*responsabilité civile*)

Secretary means the Secretary of the Agency; (*secrétaire*)

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

territory means the land areas under the sovereignty, jurisdiction or trusteeship of a state, as well as territorial waters adjacent thereto, and any reference to a state shall be construed, where applicable, as a reference to the territory of that state and any reference to a geographical area comprising several states shall be construed, where applicable, as a reference to the aggregate of the territories of the states constituting that geographical area; (*territoire*)

third freedom means the privilege of a non-Canadian air carrier, where operating a charter flight, of disembarking in Canada passengers who, or goods that, originated in the territory of the country of the non-Canadian air carrier and includes the privilege of re-embarking such passengers in Canada for the purpose of returning them to that territory; (*troisième liberté*)

toll [Repealed, SOR/2012-298, s. 1]

tour features means all goods, services, facilities and benefits, other than accommodation and transportation, that are included in an ITC program at the inclusive tour price or made available to tour participants as optional extras at an additional charge; (*particularités du voyage*)

tour operator means a charterer with whom an air carrier has contracted to charter an aircraft in whole or in part for the purpose of operating an inclusive tour; (*voyagiste*)

traffic means any persons or goods that are transported by air; (*trafic*)

transborder goods charter or ***TGC*** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry goods, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire payload capacity of an aircraft; (*vol affrété transfrontalier de marchandises or VAM*)

troisième liberté Privilège d'un transporteur aérien non canadien qui effectue un vol affrété de débarquer au Canada des passagers ou des marchandises provenant du territoire de son pays, y compris le privilège de rembarquer les passagers au Canada pour les retourner dans ce territoire. (*third freedom*)

VARA/VAFO Vol passagers affrété transportant des passagers avec réservation anticipée et des participants à un voyage à forfait, qui est effectué conformément à la section IV de la partie III. (*ABC/ITC*)

VARA/VAFO (intérieur) [Abrogée, DORS/96-335, art. 1]

vol affrété à but commun ou ***VABC*** Vol passagers aller-retour en provenance du Canada, effectué aux termes d'un contrat passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour fournir le transport à un prix par place à des passagers qui :

a) soit se rendent à un événement VABC et en reviennent;

b) soit participent à un programme éducatif VABC. (*common purpose charter or CPC*)

vol affrété à but commun (intérieur) ou ***VABC (intérieur)*** [Abrogée, DORS/96-335, art. 1]

vol affrété avec réservation anticipée ou ***VARA*** Vol passagers aller-retour en provenance du Canada, effectué aux termes d'un contrat passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour les revendre au public à un prix par place avant un certain nombre de jours précédant la date de départ du vol du point d'origine au Canada. (*advance booking charter or ABC*)

vol affrété avec réservation anticipée (intérieur) ou ***VARA (intérieur)*** [Abrogée, DORS/96-335, art. 1]

vol affrété pour voyage à forfait ou ***VAFO*** Vol passagers effectué aux termes d'un contrat passé entre un transporteur aérien et un ou plusieurs voyagistes, selon lequel le ou les voyagistes s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour les revendre au public à un prix de voyage à forfait par place. (*inclusive tour charter or ITC*)

vol affrété pour voyage à forfait (intérieur) ou ***VAFO (intérieur)*** [Abrogée, DORS/96-335, art. 1]

transborder passenger charter or ***TPC*** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry passengers, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire passenger seating capacity of an aircraft, for resale by the charterer or charterers; (*vol affrété transfrontalier de passagers or VAP*)

transborder passenger non-resaleable charter or ***TPNC*** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry passengers, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire passenger seating capacity of an aircraft and do not resell that passenger seating capacity; (*vol affrété transfrontalier de passagers non revendable or VAPNOR*)

transborder United States charter or ***TUSC*** means a charter originating in the United States that is destined for Canada; (*vol affrété transfontalier des États-Unis or VAEU*)

transportation, in respect of an inclusive tour charter, means transportation by air or any other mode

(a) between all points in the tour itinerary, and

(b) between airports or land terminals and the location where accommodation is provided at any point in the tour itinerary, other than the point of origin; (*transport*)

United States charter carrier licensee means a person who is a citizen of the United States, as defined in Part 204 of the *Federal Aviation Regulations*, published by the Government of the United States, and who holds a non-scheduled international licence that is valid for charters between Canada and the United States; (*transporteur fréteur licencié des États-Unis*)

United States charterer means a person who has entered into an arrangement with an air carrier to provide charter air transportation originating in the United States; (*affréteur des États-Unis*)

working day, in respect of the filing of a document with the Agency, at its head office or a regional office, means a day on which offices of the Public Service of Canada are generally open in the province where the head office or regional office is situated. (*jour ouvrable*)

SOR/90-740, s. 1; SOR/93-253, s. 2; SOR/94-379, s. 4; SOR/96-335, s. 1; SOR/2012-298, s. 1.

vol affrété sans participation Vol effectué aux termes d'un contrat d'affrètement selon lequel :

a) le coût du transport des passagers ou des marchandises est payé par une seule personne, une seule société ou un seul organisme et n'est partagé, directement ou indirectement, par aucune autre personne;

b) nuls frais ni autre obligation financière ne sont imposés aux passagers comme condition de transport ou autrement pour le voyage. (*entity charter*)

vol affrété transfrontalier de marchandises ou ***VAM*** Vol affrété aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de marchandises passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toute la capacité payante de l'aéronef. (*transborder goods charter or TGC*)

vol affrété transfrontalier de passagers ou ***VAP*** Vol affrété aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de passagers passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers en vue de les revendre. (*transborder passenger charter or TPC*)

vol affrété transfrontalier de passagers non revendable ou ***VAPNOR*** Vol affrété aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de passagers passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers et à ne pas les revendre. (*transborder passenger non-resaleable charter or TPNC*)

vol affrété transfrontalier des États-Unis ou ***VAEU*** Vol affrété en provenance des États-Unis dont la destination est le Canada. (*transborder United States charter or TUSC*)

voyage à forfait Voyage aller-retour ou voyage circulaire effectué en totalité ou en partie par aéronef, à un prix de voyage à forfait, pour la période comprise entre le départ des participants et leur retour au point de départ. (*inclusive tour or tour*)

(ii) scheduled international service, medium aircraft,

(iii) scheduled international service, large aircraft, and

(iv) scheduled international service, all-cargo aircraft; and

(b) with respect to services operated by a non-Canadian air carrier, scheduled international service.

(3) The following classes of air services that may be operated under a non-scheduled international licence are hereby established:

(a) with respect to services operated by a Canadian air carrier,

(i) non-scheduled international service, small aircraft,

(ii) non-scheduled international service, medium aircraft,

(iii) non-scheduled international service, large aircraft, and

(iv) non-scheduled international service, all-cargo aircraft; and

(b) with respect to services operated by a non-Canadian air carrier, non-scheduled international service.

(4) Where an air carrier holds a licence that authorizes the operation of an air service of a class established by subsection (1), (2) or (3), that air carrier and that licence shall be assigned the same designation as that of the class of air service.

SOR/96-335, s. 2.

Liability Insurance

6 In section 7 and Schedule I, "passenger seat" means a seat on board an aircraft that may be permanently occupied by a passenger for the period during which the aircraft is being used for a domestic service or an international service.

7 (1) No air carrier shall operate a domestic service or an international service unless, for every accident or incident related to the operation of that service, it has

(a) liability insurance covering risks of injury to or death of passengers in an amount that is not less than the amount determined by multiplying $300,000 by

(ii) service international régulier (aéronefs moyens),

(iii) service international régulier (gros aéronefs),

(iv) service international régulier (aéronefs tout-cargo);

b) quant aux services exploités par le transporteur aérien non canadien, le service international régulier.

(3) Sont établies les catégories suivantes de services aériens qui peuvent être exploités aux termes d'une licence internationale service à la demande :

a) quant aux services exploités par le transporteur aérien canadien :

(i) service international à la demande (petits aéronefs),

(ii) service international à la demande (aéronefs moyens),

(iii) service international à la demande (gros aéronefs),

(iv) service international à la demande (aéronefs tout-cargo);

b) quant aux services exploités par le transporteur aérien non canadien, le service international à la demande.

(4) Le transporteur aérien qui détient une licence pour l'exploitation d'un service aérien d'une catégorie visée aux paragraphes (1), (2) ou (3) de même que cette licence sont désignés par la même appellation que la catégorie de service aérien.

DORS/96-335, art. 2.

Assurance responsabilité

6 Aux fins de l'article 7 et de l'annexe I, «siège passager» désigne un siège d'un aéronef qui peut être occupé en permanence par un passager pendant que l'aéronef est affecté à un service intérieur ou à un service international.

7 (1) Il est interdit au transporteur aérien d'exploiter un service intérieur ou un service international à moins de posséder les assurances suivantes couvrant tout accident ou incident lié à l'exploitation du service :

a) une assurance responsabilité couvrant les blessures et le décès de passagers pour un montant au moins

the number of passenger seats on board the aircraft engaged in the service; and

(b) insurance covering risks of public liability in an amount that is not less than

(i) $1,000,000, where the MCTOW of the aircraft engaged in the service is not greater than 7,500 pounds,

(ii) $2,000,000, where the MCTOW of the aircraft engaged in the service is greater than 7,500 pounds but not greater than 18,000 pounds, and

(iii) where the MCTOW of the aircraft engaged in the service is greater than 18,000 pounds, $2,000,000 plus an amount determined by multiplying $150 by the number of pounds by which the MCTOW of the aircraft exceeds 18,000 pounds.

(2) The insurance coverage required by paragraph (1)(a) need not extend to any passenger who is an employee of an air carrier if workers' compensation legislation governing a claim for damages against that air carrier by the employee is applicable.

(3) No air carrier shall take out liability insurance to comply with subsection (1) that contains an exclusion or waiver provision reducing insurance coverage for any accident or incident below the applicable minima determined pursuant to that subsection, unless that provision

(a) consists of standard exclusion clauses adopted by the international aviation insurance industry dealing with

(i) war, hijacking and other perils,

(ii) noise and pollution and other perils, or

(iii) aviation radioactive contamination;

(b) is in respect of chemical drift;

(c) is to the effect that the insurance does not apply to liability assumed by the air carrier under any contract or agreement unless such liability would have attached to the air carrier even in the absence of such contract or agreement; or

(d) is to the effect that the entire policy shall be void if the air carrier has concealed or misrepresented any material fact or circumstance concerning the insurance or the subject thereof or if there has been any fraud, attempted fraud or false statement by the air carrier touching any matter relating to the insurance or the subject thereof, whether before or after a loss.

égal au produit de 300 000 $ multiplié par le nombre de sièges passagers à bord de l'aéronef affecté au service;

b) une assurance couvrant la responsabilité civile pour un montant au moins égal à :

(i) 1 000 000 $ si la MMHD de l'aéronef affecté au service ne dépasse pas 7 500 livres,

(ii) 2 000 000 $ si la MMHD de l'aéronef affecté au service est supérieure à 7 500 livres sans dépasser 18 000 livres,

(iii) si la MMHD de l'aéronef affecté au service est supérieure à 18 000 livres, 2 000 000 $ plus le produit de 150 $ multiplié par l'excédent de la MMHD.

(2) Il n'est pas nécessaire que l'assurance prescrite à l'alinéa (1)a) s'étende aux passagers qui sont les employés du transporteur aérien si les réclamations en dommages des employés contre ce transporteur aérien sont régies par une loi sur les accidents de travail.

(3) Il est interdit au transporteur aérien de souscrire, pour se conformer au paragraphe (1), une assurance responsabilité comportant une clause d'exclusion ou de renonciation qui réduit l'étendue des risques assurés en cas d'accident ou d'incident en deçà des montants minimaux prévus à ce paragraphe, sauf si cette clause, selon le cas :

a) est une clause d'exclusion usuelle adoptée par les compagnies d'assurance en aviation internationale, qui vise :

(i) soit la guerre, la piraterie aérienne et d'autres dangers,

(ii) soit le bruit, la pollution et d'autres dangers,

(iii) soit la contamination radioactive aérienne;

b) porte sur l'épandage de produits chimiques;

c) précise que l'assurance ne s'applique pas à la responsabilité assumée par le transporteur aérien aux termes d'un contrat ou d'une entente, sauf si le transporteur aérien avait à s'acquitter de pareille responsabilité même en l'absence du contrat ou de l'entente;

d) précise que la police devient nulle si le transporteur aérien a caché ou faussé un fait ou une circonstance pertinents concernant l'assurance ou le sujet assuré, ou s'il y a eu fraude, tentative de fraude ou fausse déclaration de la part du transporteur aérien relative-

(4) An air carrier may have a comprehensive single limit liability coverage where liability risks are covered by a single policy or a combination of primary and excess policies, but no single limit liability coverage of that air carrier shall be for an amount that is less than the applicable combined insurance minima determined pursuant to paragraphs (1)(a) and (b).

SOR/96-335, s. 3.

8 (1) Every applicant for a licence or for an amendment to or renewal of a licence, and every licensee, shall file with the Agency, in respect of the service to be provided or being provided, as the case may be, a valid certificate of insurance in the form set out in Schedule I.

(2) A person referred to in subsection (1) who files a certificate of insurance electronically shall, on the request of the Agency, file forthwith a certified true copy of the certificate.

SOR/96-335, s. 4.

Financial Requirements

8.1 (1) In this section, "applicant" means a Canadian who applies for

(a) a domestic licence, non-scheduled international licence or scheduled international licence that authorizes the operation of an air service using medium aircraft, or for the reinstatement of such a licence that has been suspended for 60 days or longer; or

(b) a domestic licence, non-scheduled international licence or scheduled international licence that authorizes the operation of an air service using large aircraft, or for the reinstatement of such a licence that has been suspended for 60 days or longer.

(2) Subject to subsection (3), an applicant shall

(a) in respect of the air service specified in the application, provide the Agency with a current written statement of the start-up costs that the applicant has incurred in the preceding 12 months, with written estimates of start-up costs that the applicant expects to incur and with written estimates of operating and overhead costs for a 90-day period of operation of the air service, and establish that

ment à toute question se rapportant à l'assurance ou au sujet assuré, que ce soit avant ou après une perte.

(4) Le transporteur aérien peut souscrire une assurance tous risques à limite d'indemnité unique lorsque sa responsabilité est couverte par une seule police ou par un ensemble de polices primaires et complémentaires, auquel cas cette assurance doit prévoir une protection pour un montant au moins égal aux montants minimaux d'assurance combinés prévus aux alinéas (1)a) et b).

DORS/96-335, art. 3.

8 (1) Toute personne qui demande la délivrance, la modification ou le renouvellement d'une licence ainsi que tout licencié doivent déposer auprès de l'Office un certificat d'assurance valide, conforme à l'annexe I, à l'égard du service projeté ou fourni, selon le cas.

(2) En cas de dépôt par voie électronique, l'intéressé doit, à la demande de l'Office, déposer sans délai une copie certifiée conforme du certificat d'assurance.

DORS/96-335, art. 4.

Exigences financières

8.1 (1) Dans le présent article, « demandeur » s'entend d'un Canadien qui demande :

a) soit une licence intérieure, une licence internationale service à la demande ou une licence internationale service régulier qui autorise l'exploitation d'un service aérien utilisant des aéronefs moyens, ou le rétablissement d'une telle licence suspendue depuis au moins 60 jours;

b) soit une licence intérieure, une licence internationale service à la demande ou une licence internationale service régulier qui autorise l'exploitation d'un service aérien utilisant des gros aéronefs, ou le rétablissement d'une telle licence suspendue depuis au moins 60 jours.

(2) Sous réserve du paragraphe (3), le demandeur doit :

a) quant au service aérien visé par la demande, remettre à l'Office, par écrit, un relevé à jour des frais de démarrage qu'il a engagés au cours des 12 mois précédents, une estimation des frais de démarrage qu'il prévoit d'engager ainsi qu'une estimation des frais d'exploitation et des frais généraux qu'il prévoit d'engager pendant une période de 90 jours d'exploitation du service aérien, et démontrer :

(i) que le relevé est complet et exact et que l'estimation est raisonnable quant aux frais de démarrage,

(i) in respect of the start-up costs, the statement is complete and accurate and the estimates are reasonable,

(ii) in respect of the operating and overhead costs, the estimates are reasonable and are based on utilization of the aircraft solely on the specified air service under conditions of optimum demand, which utilization shall be no less than that which is necessary for the air service to be profitable,

(iii) subject to subparagraph (b)(i), the applicant has acquired or can acquire funds in an amount at least equal to the total costs included in the statement and in the estimates,

(iv) the funds are not encumbered and are comprised of liquid assets that have been acquired or that can be acquired by way of a line of credit issued by a financial institution or by way of a similar financial instrument,

(v) the terms and conditions under which those funds have been acquired or can be acquired are such that the funds are available and will remain available to finance the air service,

(vi) subject to paragraph (b), where the applicant is a corporation, at least 50% of the funds required by subparagraph (iii) have been acquired by way of capital stock that has been issued and paid for and that cannot be redeemed for a period of at least one year after the date of the issuance or reinstatement of the licence, and

(vii) subject to paragraph (b), where the applicant is a proprietorship or partnership, at least 50% of the funds required by subparagraph (iii) have been acquired by way of the proprietor's or partners' capital that has been injected into the proprietorship or partnership and that cannot be withdrawn for a period of at least one year after the date of the issuance or reinstatement of the licence;

(b) where the applicant is or has been in operation,

(i) increase the amount of funds required by subparagraph (a)(iii) by the amount of any shareholders', proprietor's or partners' deficit that is disclosed in the applicant's current audited financial statements which are prepared in accordance with generally accepted accounting principles in Canada, and those additional funds shall be acquired by way of capital stock that has been issued and paid for in the case of a corporation, or by way of the proprietor's or partners' invested capital in the case of a proprietorship or partnership, which capital stock

(ii) que l'estimation des frais d'exploitation et des frais généraux est raisonnable et fondée sur l'utilisation des aéronefs uniquement pour ce service aérien dans des conditions de demande optimale, laquelle utilisation représente au moins le minimum nécessaire pour assurer la rentabilité du service aérien,

(iii) sous réserve du sous-alinéa b)(i), qu'il a acquis ou est en mesure d'acquérir des fonds au moins équivalents au total des frais inscrits dans le relevé et dans les estimations,

(iv) que les fonds ne sont pas grevés et qu'ils sont constitués de liquidités acquises ou pouvant l'être au moyen d'une marge de crédit accordée par une institution financière ou au moyen de tout instrument financier semblable,

(v) que les modalités selon lesquelles ces fonds ont été acquis ou peuvent l'être sont telles que les fonds sont disponibles et continueront de l'être pour financer le service aérien,

(vi) sous réserve de l'alinéa b), s'il s'agit d'une société, qu'au moins 50 pour cent des fonds exigés par le sous-alinéa (iii) ont été acquis au moyen d'actions du capital-actions émises et libérées qui ne peuvent être rachetées pendant une période minimale d'un an après la date de délivrance ou de rétablissement de la licence,

(vii) sous réserve de l'alinéa b), s'il s'agit d'une entreprise individuelle ou d'une société de personnes, qu'au moins 50 pour cent des fonds exigés par le sous-alinéa (iii) ont été acquis au moyen du capital investi par le propriétaire ou les associés dans l'entreprise ou la société qui ne peut en être retiré pendant une période minimale d'un an après la date de délivrance ou de rétablissement de la licence;

b) s'il est en exploitation ou l'a été :

(i) augmenter le montant des fonds exigés par le sous-alinéa a)(iii) du montant du déficit des actionnaires, du propriétaire ou des associés figurant dans ses états financiers courants vérifiés, établis conformément aux principes comptables généralement reconnus au Canada; ces fonds additionnels doivent être acquis au moyen d'actions du capital-actions émises et libérées, dans le cas d'une société, ou au moyen du capital investi par le propriétaire ou les associés, dans le cas d'une entreprise individuelle ou d'une société de personnes, et ces actions ou ce capital investi sont assujettis à la condition prévue aux sous-alinéas a)(vi) ou (vii),

or invested capital is to be subject to the condition prescribed in subparagraph (a)(vi) or (vii), and

(ii) decrease the amount of the capital stock that is required by subparagraph (a)(vi) to be issued and paid for in the case of a corporation, or the amount of the proprietor's or partners' capital that is required by subparagraph (a)(vii) to be invested in the case of a proprietorship or partnership, by the amount of any shareholders', proprietor's or partners' equity that is disclosed in the applicant's current audited financial statements which are prepared in accordance with generally accepted accounting principles in Canada; and

(c) file with the Agency, on request, any information that the Agency requires to determine whether the applicant has complied with the requirements of paragraphs (a) and (b).

(3) Subsection (2) does not apply to

(a) an applicant that, at the proposed time of the issuance or reinstatement of the licence, operates an air service using medium or large aircraft in the case of an applicant referred to in paragraph (1)(a), or using large aircraft in the case of an applicant referred to in paragraph (1)(b), pursuant to

(i) a non-scheduled international licence or a scheduled international licence, or

(ii) a domestic licence in respect of which the applicant has, within 12 months before the proposed time of issuance or reinstatement of the licence, complied with subsection (2); and

(b) an applicant for the renewal of a licence referred to in paragraph (1)(a) or (b).

SOR/96-335, s. 4.

(ii) diminuer le montant des actions du capital-actions qui, selon le sous-alinéa a)(vi), doivent être émises et libérées, dans le cas d'une société, ou le montant du capital du propriétaire ou des associés qui doit être investi selon le sous-alinéa a)(vii), dans le cas d'une entreprise individuelle ou d'une société de personnes, du montant de tout avoir des actionnaires, du propriétaire ou des associés figurant dans ses états financiers courants vérifiés, établis conformément aux principes comptables généralement reconnus au Canada;

c) déposer auprès de l'Office, sur demande, les renseignements dont celui-ci a besoin pour vérifier si les exigences des alinéas a) et b) sont respectées.

(3) Le paragraphe (2) ne s'applique pas :

a) au demandeur qui, à la date prévue pour la délivrance ou le rétablissement de la licence, exploite un service aérien utilisant des aéronefs moyens ou des gros aéronefs, s'il s'agit du demandeur visé à l'alinéa (1)a), ou des gros aéronefs, s'il s'agit du demandeur visé à l'alinéa (1)b), aux termes :

(i) soit d'une licence internationale service à la demande ou d'une licence internationale service régulier,

(ii) soit d'une licence intérieure à l'égard de laquelle il s'est conformé aux exigences du paragraphe (2) dans les 12 mois précédant cette date;

b) au demandeur qui demande le renouvellement d'une licence visée aux alinéas (1)a) ou b).

DORS/96-335, art. 4.

Provision of Aircraft with Flight Crew

8.2 (1) For the purposes of section 60 of the Act and subject to section 8.3, approval of the Agency is required before a person may provide all or part of an aircraft, with a flight crew, to a licensee for the purpose of providing an air service pursuant to the licensee's licence and before a licensee may provide an air service using all or part of an aircraft, with flight crew, provided by another person.

(2) The person who provides an aircraft to a licensee and the licensee shall apply to the Agency for an approval referred to in subsection (1) at least 45 days before the first planned flight.

Fourniture d'aéronefs avec équipage

8.2 (1) Pour l'application de l'article 60 de la Loi, la fourniture de tout ou partie d'un aéronef, avec équipage, à un licencié en vue de la prestation d'un service aérien conformément à sa licence et la fourniture, par un licencié, d'un service aérien utilisant tout ou partie d'un aéronef, avec équipage, appartenant à un tiers sont, sous réserve de l'article 8.3, assujetties à l'autorisation préalable de l'Office.

(2) Le licencié et la personne qui lui fournit l'aéronef doivent demander cette autorisation à l'Office au moins 45 jours avant le premier vol prévu.

(3) The application shall include the following:

(a) in respect of the proposed air service, evidence that the appropriate licence authority, charter permit and Canadian aviation document and the liability insurance coverage referred to in subsection (4) and, where applicable, subsection (5) are in effect;

(b) the name of the licensee;

(c) if applicable, the name of the charterer or charterers and the charter program permit or authorization number;

(d) the name of the person providing the aircraft with flight crew;

(e) the aircraft type to be provided;

(f) the maximum number of seats and the cargo capacity of the aircraft to be provided and, where applicable, the maximum number of seats and the cargo capacity to be provided for use by the licensee;

(g) the points to be served;

(h) the frequency of service;

(i) the period covered by the proposed air service; and

(j) an explanation of why the use by the licensee of all or part of an aircraft with a flight crew provided by another person is necessary.

(4) The licensee shall maintain passenger and third party liability insurance coverage for a service for which another person provides an aircraft with flight crew, at least in the amounts set out in section 7,

(a) by means of its own policy; or

(b) subject to subsection (5), by being named as an additional insured under the policy of the other person.

(5) Where the licensee is named as an additional insured under the policy of the person referred to in subsection (4), there must be a written agreement between the licensee and the person to the effect that, for all flights for which the person provides aircraft with flight crew, the person will hold the licensee harmless from, and indemnify the licensee for, all passenger and third party liabilities while passengers or cargo transported under contract with the licensee are under the control of the person.

(3) La demande d'autorisation doit contenir les renseignements suivants :

a) quant au service aérien projeté, la preuve que la licence requise, le cas échéant, le permis d'affrètement et le document d'aviation canadien requis ainsi que la police d'assurance responsabilité visée au paragraphe (4) et, s'il y a lieu, au paragraphe (5) sont en vigueur;

b) le nom du licencié;

c) le cas échéant, le nom de l'affréteur ou des affréteurs et le numéro du permis-programme ou de la permission;

d) le nom de la personne qui fournit l'aéronef avec équipage;

e) le type d'aéronef qui sera fourni;

f) le nombre maximal de places de l'aéronef et sa capacité pour le transport de marchandises et, s'il y a lieu, le nombre maximal de places et sa capacité pour le transport de marchandises offerts au licencié pour son usage;

g) les points à desservir;

h) la fréquence du service;

i) la période visée par le service aérien projeté;

j) les raisons pour lesquelles le licencié doit utiliser tout ou partie d'un aéronef, avec équipage, fourni par un tiers.

(4) Le licencié doit maintenir l'assurance responsabilité à l'égard des passagers et autres personnes, selon les montants minimaux prévus à l'article 7, pour tout service utilisant un aéronef, avec équipage, fourni par un tiers :

a) soit par l'intermédiaire de sa propre police;

b) soit, sous réserve du paragraphe (5), en étant inscrit à titre d'assuré additionnel dans la police du tiers.

(5) Si le licencié est inscrit à titre d'assuré additionnel dans la police du tiers, les deux doivent avoir conclu une entente par écrit portant que, pour tous les vols pour lesquels le tiers fournit un aéronef avec équipage, il exonérera le licencié de toute responsabilité à l'égard des réclamations des passagers et autres personnes pendant que les passagers ou les marchandises transportés aux termes du contrat avec celui-ci sont sous sa responsabilité.

(6) The licensee and the person who provides the aircraft with flight crew shall notify the Agency in writing forthwith if the liability insurance coverage referred to in subsection (4) and, where applicable, subsection (5) has been cancelled or altered in any manner that results in failure by the licensee or the person to maintain the coverage.

SOR/96-335, s. 4.

8.3 (1) The approval referred to in section 8.2 is not required if, in respect of the air service to be provided, the appropriate licence authority, charter permit and Canadian aviation document and the liability insurance coverage referred to in subsection 8.2(4) and, where applicable, subsection 8.2(5), are in effect and

(a) both the person providing an aircraft to the licensee and the licensee are Canadian, the person is a licensee and the air service to be provided is a domestic service or an air service between Canada and the United States; or

(b) where the air service to be provided is an international service, a temporary and unforeseen circumstance has transpired within 72 hours before the planned departure time of a flight or the first flight of a series of flights that has forced the use of all or part of an aircraft, with a flight crew, provided by another person for a period of not more than one week, and the licensee

(i) has notified the Agency of the proposed flight or the first flight of a series of flights covering a period of not more than one week in accordance with subsection (2), and

(ii) has received an acknowledgement that the conditions of this paragraph have been met.

(2) The notification referred to in paragraph (1)(b) shall be given before the proposed flight or flights and shall contain

(a) a description of the temporary and unforeseen circumstance and an explanation of why it requires the use of all or part of an aircraft with a flight crew provided by another person;

(b) in respect of the air service to be provided,

(i) a statement that the appropriate licence authority, charter permit and Canadian aviation document and the liability insurance coverage referred to in subsection 8.2(4) and, where applicable, subsection 8.2(5) are in effect and that the liability insurance coverage is available for inspection by the Agency on request, or

(6) Le licencié et le tiers doivent aviser l'Office par écrit dès que la police d'assurance responsabilité visée au paragraphe (4) et, s'il y a lieu, au paragraphe (5) est annulée ou modifiée de façon qu'elle n'est plus maintenue par l'un ou l'autre.

DORS/96-335, art. 4.

8.3 (1) L'autorisation visée à l'article 8.2 n'est pas obligatoire pour le service aérien projeté si la licence requise, le cas échéant, le permis d'affrètement et le document d'aviation canadien requis ainsi que la police d'assurance responsabilité visée au paragraphe 8.2(4) et, s'il y a lieu, au paragraphe 8.2(5) sont en vigueur et si, selon le cas :

a) le tiers et le licencié sont des Canadiens, le tiers est un licencié et le service aérien est un service intérieur ou un service aérien entre le Canada et les États-Unis;

b) lorsqu'il s'agit d'un service international, une situation temporaire et imprévue est survenue dans les 72 heures précédant l'heure de départ prévue d'un vol ou du premier vol d'une série de vols et rend nécessaire l'utilisation, pour une période maximale d'une semaine, de tout ou partie d'un aéronef, avec équipage, fourni par un tiers, et le licencié :

(i) a avisé l'Office, conformément au paragraphe (2), du vol proposé ou du premier vol de la série de vols s'étendant sur une période maximale d'une semaine,

(ii) a reçu confirmation que les conditions énoncées au présent alinéa sont remplies.

(2) L'avis visé à l'alinéa (1)b) doit être donné avant le vol ou les vols proposés et doit contenir les renseignements suivants :

a) une description de la situation temporaire et imprévue et les raisons pour lesquelles il est nécessaire d'utiliser tout ou partie d'un aéronef, avec équipage, fourni par un tiers;

b) quant au service aérien projeté :

(i) une déclaration portant que la licence requise, le cas échéant, le permis d'affrètement et le document d'aviation canadien requis ainsi que la police d'assurance responsabilité visée au paragraphe 8.2(4) et, s'il y a lieu, au paragraphe 8.2(5) sont en vigueur et que la police peut, sur demande, être mise à la disposition de l'Office pour examen,

(ii) where use of the aircraft and flight crew does not require an Agency licence, a copy of the Canadian aviation document and the certificate of liability insurance;

(c) where the aircraft to be used is larger than that authorized in the charter permit, a statement that the number of seats sold will not be greater than the number authorized in the charter permit;

(d) the name of the licensee;

(e) the name of the person providing the aircraft with a flight crew;

(f) the aircraft type to be provided;

(g) the number of seats and the cargo capacity of the aircraft to be provided;

(h) the date of each flight; and

(i) the routing of each flight.

SOR/96-335, s. 4.

8.4 Where the Agency has granted an approval, or no approval is required pursuant to section 8.3, the licensee is not required to

(a) notwithstanding paragraph 18(a), furnish the services, equipment and facilities that are necessary for the purposes of the provision of the air service; or

(b) satisfy the condition set out in paragraph 18(c).

SOR/96-335, s. 4.

Public Disclosure

8.5 (1) Subject to subsection (4), a licensee that intends to provide an air service described in subsection 8.2(1) shall so notify the public in accordance with subsection (2).

(2) The licensee shall give notification that the air service referred to in subsection (1) is being operated using an aircraft and a flight crew provided by another person, and shall identify that person and specify the aircraft type

(a) on all service schedules, timetables, electronic displays and any other public advertising of the air service; and

(b) to travellers

(ii) dans les cas où l'utilisation de l'aéronef et de l'équipage exige l'obtention d'une licence de l'Office, une copie du document d'aviation canadien et du certificat d'assurance responsabilité;

c) lorsque l'aéronef à utiliser est plus gros que celui autorisé par le permis d'affrètement, une déclaration portant que le nombre de places vendues ne dépassera pas le nombre autorisé par ce permis;

d) le nom du licencié;

e) le nom du tiers fournissant l'aéronef avec équipage;

f) le type d'aéronef devant être fourni;

g) le nombre de places de l'aéronef et sa capacité pour le transport de marchandises;

h) la date de chaque vol;

i) l'itinéraire de chaque vol.

DORS/96-335, art. 4.

8.4 Dans le cas où l'Office a donné son autorisation ou dans le cas visé à l'article 8.3 où cette autorisation n'est pas obligatoire, le licencié n'est pas tenu :

a) malgré l'alinéa 18a), de fournir les services, le matériel et les installations nécessaires à la prestation du service aérien;

b) de remplir la condition énoncée à l'alinéa 18c).

DORS/96-335, art. 4.

Divulgation au public

8.5 (1) Sous réserve du paragraphe (4), le licencié qui a l'intention de fournir un service aérien visé au paragraphe 8.2(1) doit en informer le public de la manière prévue au paragraphe (2).

(2) Le licencié doit annoncer que ce service aérien est exploité au moyen d'un aéronef, avec équipage, fourni par un tiers et préciser le nom du tiers et le type d'aéronef :

a) sur tous les indicateurs, horaires et systèmes d'affichage électronique et dans toute autre publicité concernant le service aérien;

b) aux voyageurs, aux moments suivants :

(i) avant la réservation, ou après celle-ci si l'entente relative au service aérien a été conclue après qu'une réservation a été faite,

(i) before reservation, or after reservation if the arrangement for the air service has been entered into after a reservation has been made, and

(ii) on check-in.

(3) A licensee shall identify the person providing the aircraft and specify the aircraft type for each segment of the journey on all travel documents, including, if issued, itineraries.

(4) Where paragraph 8.3(1)(b) applies, a licensee is exempt from having to comply with the requirements of subsection (1), paragraph (2)(a), subparagraph (2)(b)(i) and subsection (3) only if the licensee has made every effort to comply with them.

(5) Where an approval is required by subsection 8.2(1) or an acknowledgement is required by paragraph 8.3(1)(b), the licensee may give the notification referred to in subsection (2) before receipt of the approval or acknowledgement if the notification contains a statement that the provision of the air service using all or part of an aircraft, with a flight crew, provided by a person other than the licensee is subject to the consent of the Agency.

SOR/96-335, s. 4.

9 [Repealed, SOR/96-335, s. 4]

PART II

Domestic and International Licences and Reduction in Domestic Services

[SOR/96-335, s. 5]

Domestic Licensing

10 (1) An applicant for a domestic licence, or for an amendment to or a renewal of such a licence, shall submit to the Agency documentary evidence to establish that the applicant

(a) is a Canadian or is exempted from that requirement under section 62 of the Act;

(b) holds a Canadian aviation document that is valid in respect of the air service to be provided under the licence;

(c) has the liability insurance coverage required by section 7 in respect of the air service to be provided under the licence and has complied with section 8; and

(ii) au moment de l'enregistrement.

(3) Le licencié doit indiquer sur tous les documents de voyage, y compris l'itinéraire, s'il y a lieu, le nom du tiers fournissant l'aéronef et le type d'aéronef pour chaque segment du voyage.

(4) Dans le cas où l'alinéa 8.2(1)b) s'applique, le licencié n'est exempté de l'application du paragraphe (1), de l'alinéa (2)a), du sous-alinéa (2)b)(i) et du paragraphe (3) que s'il a fait tout son possible pour s'y conformer.

(5) Dans les cas où l'autorisation visée au paragraphe 8.2(1) ou la confirmation visée à l'alinéa 8.3(1)b) est exigée, le licencié peut faire l'annonce mentionnée au paragraphe (2) avant d'avoir reçu l'autorisation ou la confirmation, pourvu qu'il y précise que la prestation du service aérien au moyen de tout ou partie d'un aéronef, avec équipage, fourni par un tiers est subordonnée au consentement de l'Office.

DORS/96-335, art. 4.

9 [Abrogé, DORS/96-335, art. 4]

PARTIE II

Licences intérieures et internationales et réduction des services intérieurs

[DORS/96-335, art. 5]

Licences intérieures

10 (1) Le demandeur qui désire obtenir, modifier ou renouveler une licence intérieure doit déposer auprès de l'Office une preuve documentaire établissant à la fois :

a) qu'il est Canadien ou qu'il est exempté de l'obligation de justifier de cette qualité en vertu de l'article 62 de la Loi;

b) qu'il détient un document d'aviation canadien valable pour le service aérien visé par la licence;

c) qu'il détient une police d'assurance responsabilité conforme à l'article 7 à l'égard du service aérien visé par la licence et qu'il s'est conformé à l'article 8;

local tariff means a tariff containing the local tolls of the air carrier named therein; (*tarif unitransporteur*)

local toll means a toll that applies to traffic between points served by one air carrier; (*taxe unitransporteur*)

through toll means the aggregate toll from a point of origin to a point of destination. (*taxe totale*)

SOR/93-253, s. 2(E).

taxe pluritransporteur Taxe applicable au trafic acheminé par deux transporteurs aériens ou plus, qui est publiée en tant que taxe unique. (*joint toll*)

taxe spécifique Taux ou frais applicables à des marchandises spécifiquement désignées dans le tarif. (*commodity toll*)

taxe totale Taxe globale applicable au trafic acheminé d'un point d'origine et à un point de destination. (*through toll*)

taxe unitransporteur Taxe applicable au trafic acheminé entre les points desservis par un seul transporteur aérien. (*local toll*)

DORS/93-253, art. 2(A).

DIVISION I

Domestic

Application

105 A tariff referred to in section 67 of the Act shall include the information required by this Division.

SOR/96-335, s. 53.

Exception

106 The holder of a domestic licence in respect of a domestic service that serves the transportation needs of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees or workers, is excluded, in respect of the service of those needs, from the requirements of section 67 of the Act.

SOR/96-335, s. 53.

Contents of Tariffs

107 (1) Every tariff shall contain

(a) the name of the issuing air carrier and the name, title and full address of the officer or agent issuing the tariff;

(b) the tariff number, and the title that describes the tariff contents;

(c) the dates of publication, coming into effect and expiration of the tariff, if it is to expire on a specific date;

(d) a description of the points or areas from and to which or between which the tariff applies;

SECTION I

Service intérieur

Application

105 Les tarifs visés à l'article 67 de la Loi doivent contenir les renseignements exigés par la présente section.

DORS/96-335, art. 53.

Exception

106 Le titulaire d'une licence intérieure pour l'exploitation d'un service intérieur servant à répondre aux besoins de transport des véritables clients, employés et travailleurs d'un hôtel pavillonnaire, y compris le transport de leurs bagages, matériel et fournitures, est exempté des exigences de l'article 67 de la Loi à l'égard de ce service.

DORS/96-335, art. 53.

Contenu des tarifs

107 (1) Tout tarif doit contenir :

a) le nom du transporteur aérien émetteur ainsi que le nom, le titre et l'adresse complète du dirigeant ou de l'agent responsable d'établir le tarif;

b) le numéro du tarif et son titre descriptif;

c) les dates de publication et d'entrée en vigueur ainsi que la date d'expiration s'il s'applique à une période donnée;

d) la description des points ou des régions en provenance et à destination desquels ou entre lesquels il s'applique;

(e) in the case of a joint tariff, a list of all participating air carriers;

(f) a table of contents showing the exact location where information under general headings is to be found;

(g) where applicable, an index of all goods for which commodity tolls are specified, with reference to each item or page of the tariff in which any of the goods are shown;

(h) an index of points from, to or between which tolls apply, showing the province or territory in which the points are located;

(i) a list of the airports, aerodromes or other facilities used with respect to each point shown in the tariff;

(j) where applicable, information respecting prepayment requirements and restrictions and information respecting non-acceptance and non-delivery of goods, unless reference is given to another tariff number in which that information is contained;

(k) a full explanation of all abbreviations, notes, reference marks, symbols and technical terms used in the tariff and, where a reference mark or symbol is used on a page, an explanation of it on that page or a reference thereon to the page on which the explanation is given;

(l) the terms and conditions governing the tariff, generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

(m) any special terms and conditions that apply to a particular toll and, where the toll appears on a page, a reference on that page to the page on which those terms and conditions appear;

(n) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(i) the carriage of persons with disabilities,

(ii) acceptance of children,

(iii) compensation for denial of boarding as a result of overbooking,

(iv) passenger re-routing,

(v) failure to operate the service or failure to operate on schedule,

e) s'il s'agit d'un tarif pluritransporteur, la liste des transporteurs aériens participants;

f) une table des matières donnant un renvoi précis aux rubriques générales;

g) s'il y a lieu, un index de toutes les marchandises pour lesquelles des taxes spécifiques sont prévues, avec renvoi aux pages ou aux articles pertinents du tarif;

h) un index des points en provenance et à destination desquels ou entre lesquels s'appliquent les taxes, avec mention de la province ou du territoire où ils sont situés;

i) la liste des aérodromes, aéroports ou autres installations utilisés pour chaque point mentionné dans le tarif;

j) s'il y a lieu, les renseignements concernant les exigences et les restrictions de paiement à l'avance ainsi que le refus et la non-livraison des marchandises; toutefois, ces renseignements ne sont pas nécessaires si un renvoi est fait au numéro d'un autre tarif qui contient ces renseignements;

k) l'explication complète des abréviations, notes, appels de notes, symboles et termes techniques employés dans le tarif et, lorsque des appels de notes ou des symboles figurent sur une page, leur explication sur la page même ou un renvoi à la page qui en donne l'explication;

l) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

m) les conditions particulières qui s'appliquent à une taxe donnée et, sur la page où figure la taxe, un renvoi à la page où se trouvent les conditions;

n) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes ayant une déficience,

(ii) l'admission des enfants,

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

(iv) le réacheminement des passagers,

(v) l'inexécution du service et le non-respect de l'horaire,

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

(vii) ticket reservation, cancellation, confirmation, validity and loss,

(viii) refusal to transport passengers or goods,

(ix) method of calculation of charges not specifically set out in the tariff,

(x) limits of liability respecting passengers and goods,

(xi) exclusions from liability respecting passengers and goods, and

(xii) procedures to be followed, and time limitations, respecting claims;

(o) the tolls, shown in Canadian currency, together with the names of the points from, to or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified;

(p) the routings related to the tolls unless reference is made in the tariff to another tariff in which the routings appear; and

(q) the official descriptive title of each type of passenger fare, together with any name or abbreviation thereof.

(vi) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(vii) la réservation, l'annulation, la confirmation, la validité et la perte des billets,

(viii) le refus de transporter des passagers ou des marchandises,

(ix) la méthode de calcul des frais non précisés dans le tarif,

(x) les limites de responsabilité à l'égard des passagers et des marchandises,

(xi) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xii) la marche à suivre ainsi que les délais fixés pour les réclamations;

o) les taxes, exprimées en monnaie canadienne, et les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

p) les itinéraires visés par les taxes; toutefois, ces itinéraires n'ont pas à être indiqués si un renvoi est fait à un autre tarif qui les contient;

q) le titre descriptif officiel de chaque type de prix passagers, ainsi que tout nom ou abréviation servant à désigner ce prix.

(2) Every original tariff page shall be designated "Original Page", and changes in, or additions to, the material contained on the page shall be made by revising the page and renumbering it accordingly.

(3) Where an additional page is required within a series of pages in a tariff, that page shall be given the same number as the page it follows but a letter shall be added to the number.

(4) and (5) [Repealed, SOR/96-335, s. 54]

SOR/93-253, s. 2; SOR/93-449, s. 1; SOR/96-335, s. 54.

(2) Les pages originales du tarif doivent porter la mention «page originale» et, lorsque des changements ou des ajouts sont apportés, la page visée doit être révisée et numérotée en conséquence.

(3) S'il faut intercaler une page supplémentaire dans une série de pages d'un tarif, cette page doit porter le même numéro que la page qui la précède, auquel une lettre est ajoutée.

(4) et (5) [Abrogés, DORS/96-335, art. 54]

DORS/93-253, art. 2; DORS/93-449, art. 1; DORS/96-335, art. 54.

Interest

107.1 Where the Agency, by order, directs an air carrier to refund specified amounts to persons that have been

Intérêts

107.1 Dans le cas où, en vertu de l'alinéa 66(1)c) de la Loi, l'Office enjoint, par ordonnance, à un transporteur

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to February 15, 2016

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Rules

Rules

17 The Agency may make rules respecting

(a) the sittings of the Agency and the carrying on of its work;

(b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and

(c) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

Head Office

Head office

18 (1) The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Residence of members

(2) The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

Staff

Secretary, officers and employees

19 The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the Agency shall be appointed in accordance with the *Public Service Employment Act*.

Technical experts

20 The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

Records

Duties of Secretary

21 (1) The Secretary of the Agency shall

Règles

Règles

17 L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

Siège de l'Office

Siège

18 (1) Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

Lieu de résidence des membres

(2) Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

Personnel

Secrétaire et personnel

19 Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

Experts

20 L'Office peut nommer des experts ou autres spécialistes compétents pour le conseiller sur des questions dont il est saisi, et, sous réserve des instructions du Conseil du Trésor, fixer leur rémunération.

Registre

Attributions du secrétaire

21 (1) Le secrétaire est chargé :

(a) maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

(b) keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

a) de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;

b) de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

Entries in record

(2) The entry of a document in the record referred to in paragraph (1)(a) shall constitute the original record of the document.

Original

(2) Le document enregistré en application de l'alinéa (1)a) en constitue l'original.

Copies of documents obtainable

22 On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

Copies conformes

22 Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

Judicial notice of documents

23 (1) Judicial notice shall be taken of a document issued by the Agency under its seal without proof of the signature or official character of the person appearing to have signed it.

Admission d'office

23 (1) Les documents délivrés par l'Office sous son sceau sont admis d'office en justice sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Evidence of deposited documents

(2) A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

Preuve

(2) Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

Powers of Agency

Policy governs Agency

24 The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

Agency powers in general

25 The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property,

Attributions de l'Office

Directives

24 Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec les directives générales qui lui sont données en vertu de l'article 43.

Pouvoirs généraux

25 L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

Procedure

(2) To make a decision or order an order of a court, either the usual practice and procedure of the court in such matters may be followed or the Secretary of the Agency may file with the registrar of the court a certified copy of the decision or order, signed by the Chairperson and sealed with the Agency's seal, at which time the decision or order becomes an order of the court.

Effect of variation or rescission

(3) Where a decision or order that has been made an order of a court is rescinded or varied by a subsequent decision or order of the Agency, the order of the court is deemed to have been cancelled and the subsequent decision or order may be made an order of the court.

Option to enforce

(4) The Agency may, before or after one of its decisions or orders is made an order of a court, enforce the decision or order by its own action.

1996, c. 10, s. 33; 2002, c. 8, s. 122; 2006, c. 11, s. 17; 2007, c. 19, s. 6.

Fees

34 (1) The Agency may, by rule, fix the fees that are to be paid to the Agency in respect of applications made to it, including applications for licences or permits and applications for amendments to or for the renewal of licences or permits, and any other matters brought before or dealt with by the Agency.

Advance notice to Minister

(2) The Agency shall give the Minister notice of every rule proposed to be made under subsection (1).

Fees for witnesses

35 Every person summoned to attend before the Agency under this Part or before a person making an inquiry under this Part shall receive the fees and allowances for so doing that the Agency may, by regulation, prescribe.

Approval of regulations required

36 (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

Advance notice of regulations

(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

Procédure

(2) L'homologation peut se faire soit selon les règles de pratique et de procédure de la cour saisie applicables en l'occurrence, soit au moyen du dépôt, auprès du greffier de la cour par le secrétaire de l'Office, d'une copie certifiée conforme de la décision ou de l'arrêté en cause, signée par le président et revêtue du sceau de l'Office.

Annulation ou modification

(3) Les décisions ou arrêtés de l'Office qui annulent ou modifient des décisions ou arrêtés déjà homologués par une cour sont réputés annuler ces derniers et peuvent être homologués selon les mêmes modalités.

Faculté d'exécution

(4) L'Office peut toujours faire exécuter lui-même ses décisions ou arrêtés, même s'ils ont été homologués par une cour.

1996, ch. 10, art. 33; 2002, ch. 8, art. 122; 2006, ch. 11, art. 17; 2007, ch. 19, art. 6.

Droits

34 (1) L'Office peut, par règle, établir les droits à lui verser relativement aux questions ou demandes dont il est saisi, notamment les demandes de licences ou de permis et les demandes de modification ou de renouvellement de ceux-ci.

Préavis

(2) L'Office fait parvenir au ministre un avis relativement à toute règle qu'il entend prendre en vertu du paragraphe (1).

Indemnité des témoins

35 Il est alloué à toute personne qui se rend à la convocation de l'Office ou d'un enquêteur, dans le cadre de la présente partie, les indemnités que l'Office peut fixer par règlement.

Agrément du gouverneur en conseil

36 (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.

Préavis au ministre

(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

Review of Act

Statutory review

53 (1) The Minister shall, no later than eight years after the day this subsection comes into force, appoint one or more persons to carry out a comprehensive review of the operation of this Act and any other Act of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament.

Objective of review

(2) The person or persons conducting the review shall assess whether the legislation referred to in subsection (1) provides Canadians with a transportation system that is consistent with the national transportation policy set out in section 5 and, if necessary or desirable, may recommend amendments to

(a) the national transportation policy; and

(b) the legislation referred to in subsection (1).

Consultations

(3) The review shall be undertaken in consultation with purchasers and suppliers of transportation services and any other persons whom the Minister considers appropriate.

Powers on review

(4) Every person appointed to carry out the review has, for the purposes of the review, the powers of a commissioner under Part I of the *Inquiries Act* and may engage the services of experts, professionals and other staff deemed necessary for making the review at the rates of remuneration that the Treasury Board approves.

Report

(5) The review shall be completed and a report of the review submitted to the Minister within 18 months after the appointment referred to in subsection (1).

Tabling of report

(6) The Minister shall have a copy of the report laid before each House of Parliament on any of the first thirty days on which that House is sitting after the Minister receives it.

1996, c. 10, s. 53; 2007, c. 19, s. 12.

Examen de la loi

Examen complet

53 (1) Le ministre nomme, dans les huit ans suivant la date d'entrée en vigueur du présent paragraphe, une ou plusieurs personnes chargées de procéder à un examen complet de l'application de la présente loi et de toute autre loi fédérale dont le ministre est responsable et qui porte sur la réglementation économique d'un mode de transport ou sur toute activité de transport assujettie à la compétence législative du Parlement.

But de l'examen

(2) Les personnes qui effectuent l'examen vérifient si les lois visées au paragraphe (1) fournissent aux Canadiens un système de transport qui est conforme à la politique nationale des transports énoncée à l'article 5. Si elles l'estiment utile, elles peuvent recommander des modifications :

a) à cette politique;

b) aux lois visées au paragraphe (1).

Consultations

(3) L'examen doit être effectué en consultation avec les acheteurs et les fournisseurs de services de transport et les autres personnes que le ministre estime indiquées.

Pouvoirs

(4) Chaque personne nommée pour effectuer l'examen dispose à cette fin des pouvoirs d'un commissaire nommé aux termes de la partie I de la *Loi sur les enquêtes* et peut, conformément au barème de rémunération approuvé par le Conseil du Trésor, engager le personnel — experts, professionnels et autres — nécessaire pour effectuer l'examen.

Rapport

(5) L'examen doit être terminé, et le rapport sur celui-ci présenté au ministre, dans les dix-huit mois suivant la date de la nomination prévue au paragraphe (1).

Dépôt du rapport

(6) Le ministre fait déposer une copie du rapport devant chaque chambre du Parlement dans les trente premiers jours de séance de celle-ci suivant sa réception.

1996, ch. 10, art. 53; 2007, ch. 19, art. 12.

with the orders, regulations and directions made or issued under this Act, notwithstanding the fact that the receiver, manager, official or person has been appointed by or acts under the authority of a court.

Adaptation orders

(2) Wherever by reason of insolvency, sale under mortgage or any other cause, a transportation undertaking or a portion of a transportation undertaking is operated, managed or held otherwise than by the carrier, the Agency or the Minister may make any order it considers proper for adapting and applying the provisions of this Act.

en vertu de la présente loi, en dépit du fait que sa nomination a été faite par le tribunal ou que ses attributions lui ont été confiées par celui-ci.

Modification

(2) L'Office ou le ministre peut, par arrêté, adapter les dispositions de la présente loi si, notamment pour insolvabilité ou vente hypothécaire, une entreprise de transport échappe, en tout ou en partie, à la gestion, à l'exploitation ou à la possession du transporteur en cause.

PART II

Air Transportation

Interpretation and Application

Definitions

55 (1) In this Part,

aircraft has the same meaning as in subsection 3(1) of the *Aeronautics Act*; (*aéronef*)

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

basic fare means

(a) the fare in the tariff of the holder of a domestic licence that has no restrictions and represents the lowest amount to be paid for one-way air transportation of an adult with reasonable baggage between two points in Canada, or

(b) where the licensee has more than one such fare between two points in Canada and the amount of any of those fares is dependent on the time of day or day of the week of travel, or both, the highest of those fares; (*prix de base*)

Canadian means a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, a government in Canada or an agent of such a government or a corporation or other entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, of the voting interests are owned and controlled by Canadians; (*Canadien*)

PARTIE II

Transport aérien

Définitions et champ d'application

Définitions

55 (1) Les définitions qui suivent s'appliquent à la présente partie.

aéronef S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*. (*aircraft*)

Canadien Citoyen canadien ou résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*; la notion englobe également les administrations publiques du Canada ou leurs mandataires et les personnes ou organismes, constitués au Canada sous le régime de lois fédérales ou provinciales et contrôlés de fait par des Canadiens, dont au moins soixante-quinze pour cent — ou tel pourcentage inférieur désigné par règlement du gouverneur en conseil — des actions assorties du droit de vote sont détenues et contrôlées par des Canadiens. (*Canadian*)

document d'aviation canadien S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*. (*Canadian aviation document*)

licencié Titulaire d'une licence délivrée par l'Office en application de la présente partie. (*licensee*)

prix de base

a) Prix du tarif du titulaire d'une licence intérieure qui est sans restriction et qui constitue le montant le moins élevé à payer pour le transport aller, entre deux points situés au Canada, d'un adulte accompagné d'une quantité normale de bagages;

Canadian aviation document has the same meaning as in subsection 3(1) of the *Aeronautics Act*; (*document d'aviation canadien*)

domestic licence means a licence issued under section 61; (*Version anglaise seulement*)

domestic service means an air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country; (*service intérieur*)

international service means an air service between Canada and a point in the territory of another country; (*service international*)

licensee means the holder of a licence issued by the Agency under this Part; (*licencié*)

non-scheduled international licence means a licence issued under subsection 73(1); (*Version anglaise seulement*)

non-scheduled international service means an international service other than a scheduled international service; (*service international à la demande*)

prescribed means prescribed by regulations made under section 86; (*règlement*)

scheduled international licence means a licence issued under subsection 69(1); (*Version anglaise seulement*)

scheduled international service means an international service that is a scheduled service pursuant to

(a) an agreement or arrangement for the provision of that service to which Canada is a party, or

(b) a determination made under section 70; (*service international régulier*)

tariff means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services. (*tarif*)

b) dans les cas où un tel prix peut varier selon le moment du jour ou de la semaine, ou des deux, auquel s'effectue le voyage, le montant le plus élevé de ce prix. (*basic fare*)

règlement Règlement pris au titre de l'article 86. (*prescribed*)

service aérien Service offert, par aéronef, au public pour le transport des passagers, des marchandises, ou des deux. (*air service*)

service intérieur Service aérien offert soit à l'intérieur du Canada, soit entre un point qui y est situé et un point qui lui est extérieur sans pour autant faire partie du territoire d'un autre pays. (*domestic service*)

service international Service aérien offert entre le Canada et l'étranger. (*international service*)

service international à la demande Service international autre qu'un service international régulier. (*non-scheduled international service*)

service international régulier Service international exploité à titre de service régulier aux termes d'un accord ou d'une entente à cet effet dont le Canada est signataire ou sous le régime d'une qualification faite en application de l'article 70. (*scheduled international service*)

tarif Barème des prix, taux, frais et autres conditions de transport applicables à la prestation d'un service aérien et des services connexes. (*tariff*)

texte d'application Arrêté ou règlement pris en application de la présente partie ou de telle de ses dispositions. (*French version only*)

Affiliation

(2) For the purposes of this Part,

(a) one corporation is affiliated with another corporation if

(i) one of them is a subsidiary of the other,

(ii) both are subsidiaries of the same corporation, or

Groupe

(2) Pour l'application de la présente partie :

a) des personnes morales sont du même groupe si l'une est la filiale de l'autre, si toutes deux sont des filiales d'une même personne morale ou si chacune d'elles est contrôlée par la même personne;

(iii) both are controlled by the same person;

(b) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership or sole proprietorship if both are controlled by the same person;

(d) a corporation is affiliated with a partnership or a sole proprietorship if both are controlled by the same person;

(e) a corporation is a subsidiary of another corporation if it is controlled by that other corporation or by a subsidiary of that other corporation;

(f) a corporation is controlled by a person other than Her Majesty in right of Canada or a province if

(i) securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and

(ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;

(g) a corporation is controlled by Her Majesty in right of Canada or a province if

(i) the corporation is controlled by Her Majesty in the manner described in paragraph (f), or

(ii) in the case of a corporation without share capital, a majority of the directors of the corporation, other than *ex officio* directors, are appointed by

(A) the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or

(B) a Minister of the government of Canada or the province, as the case may be; and

(h) a partnership is controlled by a person if the person holds an interest in the partnership that entitles the person to receive more than 50% of the profits of the partnership or more than 50% of its assets on dissolution.

b) si deux personnes morales sont du groupe d'une même personne morale au même moment, elles sont réputées être du même groupe;

c) une société de personnes ou une entreprise individuelle est du groupe d'une autre société de personnes ou d'une autre entreprise individuelle si toutes deux sont contrôlées par la même personne;

d) une personne morale est du groupe d'une société de personnes ou d'une entreprise individuelle si toutes deux sont contrôlées par la même personne;

e) une personne morale est une filiale d'une autre personne morale si elle est contrôlée par cette autre personne morale ou par une filiale de celle-ci;

f) une personne morale est contrôlée par une personne autre que Sa Majesté du chef du Canada ou d'une province si :

(i) des valeurs mobilières de la personne morale conférant plus de cinquante pour cent des votes qui peuvent être exercés lors de l'élection des administrateurs de la personne morale en question sont détenues, directement ou indirectement, notamment par l'intermédiaire d'une ou de plusieurs filiales, autrement qu'à titre de garantie uniquement, par cette personne ou pour son bénéfice,

(ii) les votes que comportent ces valeurs mobilières sont suffisants, en supposant leur exercice, pour élire une majorité des administrateurs de la personne morale;

g) une personne morale est contrôlée par Sa Majesté du chef du Canada ou d'une province si :

(i) la personne morale est contrôlée par Sa Majesté de la manière décrite à l'alinéa f),

(ii) dans le cas d'une personne morale sans capital-actions, une majorité des administrateurs de la personne morale, autres que les administrateurs d'office, sont nommés par :

(A) soit le gouverneur en conseil ou le lieutenant-gouverneur en conseil de la province, selon le cas,

(B) soit un ministre du gouvernement du Canada ou de la province, selon le cas;

h) contrôle une société de personnes la personne qui détient dans cette société des titres de participation lui donnant droit de recevoir plus de cinquante pour cent des bénéfices de la société ou plus de cinquante pour

cent des éléments d'actif de celle-ci au moment de sa dissolution.

Definition of "person"

(3) In subsection (2), *person* includes an individual, a partnership, an association, a corporation, a trustee, an executor, a liquidator of a succession, an administrator or a legal representative.

Définition de « personne »

(3) Au paragraphe (2), *personne* s'entend d'un particulier, d'une société de personnes, d'une association, d'une personne morale, d'un fiduciaire, d'un exécuteur testamentaire ou du liquidateur d'une succession, d'un tuteur, d'un curateur ou d'un mandataire.

Control in fact

(4) For greater certainty, nothing in subsection (2) shall be construed to affect the meaning of the expression "controlled in fact" in the definition "Canadian" in subsection (1).

1996, c. 10, s. 55; 2000, c. 15, s. 1; 2001, c. 27, s. 222.

Contrôle de fait

(4) Il demeure entendu que le paragraphe (2) n'a pas pour effet de modifier le sens de l'expression « contrôle de fait » dans la définition de « Canadien » au paragraphe (1).

1996, ch. 10, art. 55; 2000, ch. 15, art. 1; 2001, ch. 27, art. 222.

Non-application of Part

56 (1) This Part does not apply to a person that uses an aircraft on behalf of the Canadian Armed Forces or any other armed forces cooperating with the Canadian Armed Forces.

Exclusions — forces armées

56 (1) La présente partie ne s'applique pas aux personnes qui utilisent un aéronef pour le compte des Forces armées canadiennes ou des forces armées coopérant avec celles-ci.

Specialty service exclusion

(2) This Part does not apply to the operation of an air flight training service, aerial inspection service, aerial construction service, aerial photography service, aerial forest fire management service, aerial spraying service or any other prescribed air service.

Exclusion — services spécialisés

(2) La présente partie ne s'applique pas à l'exploitation d'un service aérien de formation en vol, d'inspection, de travaux publics ou de construction, de photographie, d'épandage, de contrôle des incendies de forêt ou autre service prévu par règlement.

Emergency service exclusion

(3) This Part does not apply to the provision of an air service if the federal government or a provincial or a municipal government declares an emergency under federal or provincial law, and that government directly or indirectly requests that the air service be provided to respond to the emergency.

Exclusion — urgences

(3) La présente partie ne s'applique pas à la fourniture d'un service aérien dans le cas où le gouvernement fédéral, le gouvernement d'une province ou une administration municipale déclare en vertu d'une loi fédérale ou provinciale qu'une situation de crise existe et présente directement ou indirectement une demande en vue d'obtenir ce service pour faire face à la situation de crise.

Public interest

(4) The Minister may, by order, prohibit the provision of an air service under subsection (3) or require the discontinuance of that air service if, in the opinion of the Minister, it is in the public interest to do so.

Intérêt public

(4) Le ministre peut, par arrêté, interdire la fourniture d'un service aérien au titre du paragraphe (3) ou exiger qu'il y soit mis fin s'il estime qu'il est dans l'intérêt public de le faire.

Not a statutory instrument

(5) The order is not a statutory instrument within the meaning of the *Statutory Instruments Act*.

1996, c. 10, s. 56; 2007, c. 19, s. 14.

Loi sur les textes réglementaires

(5) Les arrêtés ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

1996, ch. 10, art. 56; 2007, ch. 19, art. 14.

56.1 [Repealed, 2007, c. 19, s. 15]

56.1 [Abrogé, 2007, ch. 19, art. 15]

56.2 [Repealed, 2007, c. 19, s. 15]

56.2 [Abrogé, 2007, ch. 19, art. 15]

56.3 [Repealed, 2007, c. 19, s. 15]

56.4 [Repealed, 2007, c. 19, s. 15]

56.5 [Repealed, 2007, c. 19, s. 15]

56.6 [Repealed, 2007, c. 19, s. 15]

56.7 [Repealed, 2007, c. 19, s. 15]

56.3 [Abrogé, 2007, ch. 19, art. 15]

56.4 [Abrogé, 2007, ch. 19, art. 15]

56.5 [Abrogé, 2007, ch. 19, art. 15]

56.6 [Abrogé, 2007, ch. 19, art. 15]

56.7 [Abrogé, 2007, ch. 19, art. 15]

Prohibitions

Prohibition re operation

57 No person shall operate an air service unless, in respect of that service, the person

(a) holds a licence issued under this Part;

(b) holds a Canadian aviation document; and

(c) has the prescribed liability insurance coverage.

Licence not transferable

58 A licence issued under this Part for the operation of an air service is not transferable.

Prohibition re sale

59 No person shall sell, cause to be sold or publicly offer for sale in Canada an air service unless, if required under this Part, a person holds a licence issued under this Part in respect of that service and that licence is not suspended.

1996, c. 10, s. 59; 2007, c. 19, s. 16.

Provision of aircraft with flight crew

60 (1) No person shall provide all or part of an aircraft, with a flight crew, to a licensee for the purpose of providing an air service pursuant to the licensee's licence and no licensee shall provide an air service using all or part of an aircraft, with a flight crew, provided by another person except

(a) in accordance with regulations made by the Agency respecting disclosure of the identity of the operator of the aircraft and other related matters; and

(b) where prescribed, with the approval of the Agency.

Conditions and Ministerial directions

(2) Approval by the Agency under subsection (1) is subject to any directions to the Agency issued by the Minister and to any terms and conditions that the Agency may specify in the approval, including terms and conditions respecting routes to be followed, points or areas to be served, size and type of aircraft to be operated, schedules,

Interdictions

Conditions d'exploitation

57 L'exploitation d'un service aérien est subordonnée à la détention, pour celui-ci, de la licence prévue par la présente partie, d'un document d'aviation canadien et de la police d'assurance responsabilité réglementaire.

Incessibilité

58 Les licences d'exploitation de services aériens sont incessibles.

Opérations visant le service

59 La vente, directe ou indirecte, et l'offre publique de vente, au Canada, d'un service aérien sont subordonnées à la détention, pour celui-ci, d'une licence en règle délivrée sous le régime de la présente partie.

1996, ch. 10, art. 59; 2007, ch. 19, art. 16.

Fourniture d'aéronefs

60 (1) La fourniture de tout ou partie d'aéronefs, avec équipage, à un licencié en vue de la prestation, conformément à sa licence, d'un service aérien et celle, par un licencié, d'un service aérien utilisant tout ou partie d'aéronefs, avec équipage, appartenant à un tiers sont assujetties :

a) au respect des règlements, notamment en matière de divulgation de l'identité des exploitants d'aéronefs;

b) si les règlements l'exigent, à l'autorisation de l'Office.

Directives ministérielles et conditions

(2) L'autorisation est assujettie aux directives que le ministre peut lui donner et peut comporter, lors de la délivrance ou par la suite en tant que de besoin, les conditions qu'il estime indiqué d'imposer, notamment en ce qui concerne les routes aériennes à suivre, les points ou régions à desservir, la dimension et la catégorie des aéro-

places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and, subject to the *Canada Post Corporation Act*, carriage of goods.

Licence for Domestic Service

Issue of licence

61 On application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a domestic service to the applicant if

(a) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is a Canadian,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) meets prescribed financial requirements; and

(b) the Agency is satisfied that the applicant has not contravened section 59 in respect of a domestic service within the preceding twelve months.

Qualification exemption

62 (1) Where the Minister considers it necessary or advisable in the public interest that a domestic licence be issued to a person who is not a Canadian, the Minister may, by order, on such terms and conditions as may be specified in the order, exempt the person from the application of subparagraph 61(a)(i) for the duration of the order.

Statutory Instruments Act

(2) The order is not a regulation for the purposes of the *Statutory Instruments Act*.

Publication

(3) The Minister must, as soon as feasible, make the name of the person who is exempted and the exemption's duration accessible to the public through the Internet or by any other means that the Minister considers appropriate.

1996, c. 10, s. 62; 2013, c. 31, s. 5.

nefs à exploiter, les horaires, les escales, les tarifs, l'assurance, le transport des passagers et, sous réserve de la *Loi sur la Société canadienne des postes*, celui des marchandises.

Service intérieur

Délivrance de la licence

61 L'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service intérieur au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il est Canadien,

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement à un service intérieur.

Exemption

62 (1) Lorsqu'il estime souhaitable ou nécessaire dans l'intérêt public de délivrer une licence intérieure à une personne qui n'a pas la qualité de Canadien, le ministre peut, par arrêté assorti ou non de conditions, l'exempter de l'obligation de justifier de cette qualité, l'exemption restant valide tant que l'arrêté reste en vigueur.

Loi sur les textes réglementaires

(2) L'arrêté n'est pas un règlement pour l'application de la *Loi sur les textes réglementaires*.

Publication

(3) Dès que possible, le ministre rend le nom de la personne bénéficiant de l'exemption et la durée de celle-ci accessibles au public par Internet ou par tout autre moyen qu'il estime indiqué.

1996, ch. 10, art. 62; 2013, ch. 31, art. 5.

Mandatory suspension or cancellation

63 (1) The Agency shall suspend or cancel the domestic licence of a person where the Agency determines that, in respect of the service for which the licence was issued, the person ceases to meet any of the requirements of subparagraphs 61(a)(i) to (iii).

Discretionary suspension or cancellation

(2) The Agency may suspend or cancel a domestic licence

(a) where the Agency determines that, in respect of the service for which the domestic licence was issued, the licensee has contravened, or does not meet the requirements of, any regulation or order made under this Part or any provision of this Part other than subparagraphs 61(a)(i) to (iii); or

(b) subject to section 64, in accordance with a request from the licensee for the suspension or cancellation.

Reinstatement condition

(3) The Agency shall not reinstate a domestic licence that has been suspended for sixty days or longer unless the licensee establishes to the satisfaction of the Agency that the person meets the prescribed financial requirements.

Notice of discontinuance or reduction of certain services

64 (1) Where a licensee proposes to discontinue a domestic service or to reduce the frequency of such a service to a point to less than one flight per week and, as a result of the proposed discontinuance or reduction, there will be only one licensee or no licensee offering at least one flight per week to that point, the licensee shall give notice of the proposal in prescribed form and manner to such persons as are prescribed.

Notice of discontinuance of certain services

(1.1) If a licensee proposes to discontinue its year-round non-stop scheduled air service between two points in Canada and that discontinuance would result in a reduction, as compared to the week before the proposal is to take effect, of at least 50% of the weekly passenger-carrying capacity of all licensees operating year-round non-stop scheduled air services between those two points, the licensee shall give notice of the proposal in the prescribed form and manner to the prescribed persons.

Discussion with elected officials

(1.2) A licensee shall, as soon as practicable, provide an opportunity for elected officials of the municipal or local government of the community of the point or points, as

Suspension ou annulation obligatoire

63 (1) L'Office suspend ou annule la licence s'il est convaincu que le licencié ne répond plus à telle des conditions mentionnées aux sous-alinéas 61a)(i) à (iii).

Suspension ou annulation facultative

(2) L'Office peut suspendre ou annuler la licence :

a) s'il est convaincu que le licencié a, relativement au service, enfreint d'autres conditions que celles mentionnées au paragraphe (1) ou telle des dispositions de la présente partie ou de ses textes d'application;

b) sous réserve de l'article 64, sur demande du licencié.

Rétablissement de la licence

(3) L'Office ne peut rétablir une licence suspendue depuis au moins soixante jours que si l'intéressé justifie du fait qu'il remplit les exigences financières réglementaires.

Interruption ou réduction de services

64 (1) Le licencié qui se propose d'interrompre un service intérieur à un point ou d'en ramener la fréquence à moins d'un vol hebdomadaire est tenu, si cette mesure a pour effet qu'il y aura au plus un licencié offrant un service à une fréquence minimale d'un vol hebdomadaire, d'aviser, en la forme et selon les modalités réglementaires, les destinataires désignés par règlement.

Avis d'interruption de services

(1.1) Le licencié qui se propose d'interrompre un service aérien régulier sans escale offert à longueur d'année entre deux points au Canada, est tenu d'en aviser, selon les modalités réglementaires, les personnes désignées par règlement si l'interruption aurait pour effet de réduire d'au moins cinquante pour cent la capacité hebdomadaire de transport de passagers, par rapport à celle de la semaine précédant son entrée en vigueur, de l'ensemble des licenciés offrant à longueur d'année des services aériens réguliers sans escale entre ces deux points.

Consultation

(1.2) Le licencié offre dans les meilleurs délais aux représentants élus des administrations municipales ou locales de la collectivité où se trouvent le ou les points touchés la possibilité de le rencontrer et de discuter avec lui

the case may be, to meet and discuss with the licensee the impact of the proposed discontinuance or reduction.

Notice period

(2) A licensee shall not implement a proposal referred to in subsection (1) or (1.1) until the expiry of 120 days, or 30 days if the service referred to in that subsection has been in operation for less than one year, after the notice is given or until the expiry of any shorter period that the Agency may, on application by the licensee, specify by order.

Considerations re whether exemption to be granted

(3) In considering whether to specify a shorter period under subsection (2), the Agency shall have regard to

(a) the adequacy of alternative modes of public transportation available at or in the vicinity of the point referred to in subsection (1) or between the points referred to in subsection (1.1);

(b) other means by which air service to the point or between the points is or is likely to be provided;

(c) whether the licensee has complied with subsection (1.2); and

(d) the particular circumstances of the licensee.

Definition of "non-stop scheduled air service"

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

1996, c. 10, s. 64; 2000, c. 15, s. 3; 2007, c. 19, s. 17.

Complaints re non-compliance

65 Where, on complaint in writing to the Agency by any person, the Agency finds that a licensee has failed to comply with section 64 and that it is practicable in the circumstances for the licensee to comply with an order under this section, the Agency may, by order, direct the licensee to reinstate the service referred to in that section

(a) for such a period, not exceeding 120 days after the date of the finding by the Agency, as the Agency deems appropriate; and

(b) at such a frequency as the Agency may specify.

1996, c. 10, s. 65; 2007, c. 19, s. 18.

Unreasonable fares or rates

66 (1) If, on complaint in writing to the Agency by any person, the Agency finds that a licensee, including affiliated licensees, is the only person providing a domestic

de l'effet qu'auraient l'interruption ou la réduction du service.

Délai

(2) Le licencié ne peut donner suite au projet mentionné aux paragraphes (1) ou (1.1) avant l'expiration soit des cent vingt jours ou, dans le cas où le service visé à ces paragraphes est offert depuis moins d'un an, des trente jours suivant la signification de l'avis, soit du délai inférieur fixé, à sa demande, par ordonnance de l'Office.

Examen relatif à l'exemption

(3) Pour décider s'il convient de fixer un délai inférieur, l'Office tient compte :

a) du fait que les autres modes de transport desservant le point visé au paragraphe (1), ou ses environs, ou existant entre les points visés au paragraphe (1.1), sont satisfaisants ou non;

b) de l'existence ou de la probabilité d'autres liaisons aériennes à destination du point ou entre les points;

c) du fait que le licencié a respecté ou non les exigences du paragraphe (1.2);

d) de la situation particulière du licencié.

Définition de « service aérien régulier sans escale »

(4) Au présent article, *service aérien régulier sans escale* s'entend d'un service aérien sans escale offert entre deux points soit régulièrement, soit conformément à un horaire publié.

1996, ch. 10, art. 64; 2000, ch. 15, art. 3. ; 2007, ch. 19, art. 17.

Plaintes relatives aux infractions

65 L'Office, saisi d'une plainte formulée par écrit à l'encontre d'un licencié, peut, s'il constate que celui-ci ne s'est pas conformé à l'article 64 et que les circonstances permettent à celui-ci de se conformer à l'arrêté, ordonner à celui-ci de rétablir le service pour la période, d'au plus cent vingt jours après la date de son constat, qu'il estime indiquée, et selon la fréquence qu'il peut fixer.

1996, ch. 10, art. 65; 2007, ch. 19, art. 18.

Prix ou taux excessifs

66 (1) S'il conclut, sur dépôt d'une plainte, qu'un licencié, y compris les licenciés de son groupe, est la seule personne à offrir un service intérieur entre deux points,

service between two points and that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of the service is unreasonable, the Agency may, by order,

(a) disallow the fare, rate or increase;

(b) direct the licensee to amend its tariff by reducing the fare, rate or increase by the amounts and for the periods that the Agency considers reasonable in the circumstances; or

(c) direct the licensee, if practicable, to refund amounts specified by the Agency, with interest calculated in the prescribed manner, to persons determined by the Agency to have been overcharged by the licensee.

Complaint of inadequate range of fares or rates

(2) If, on complaint in writing to the Agency by any person, the Agency finds that a licensee, including affiliated licensees, is the only person providing a domestic service between two points and that it is offering an inadequate range of fares or cargo rates in respect of that service, the Agency may, by order, direct the licensee, for a period that the Agency considers reasonable in the circumstances, to publish and apply in respect of that service one or more additional fares or cargo rates that the Agency considers reasonable in the circumstances.

Relevant information

(3) When making a finding under subsection (1) or (2) that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of a domestic service between two points is unreasonable or that a licensee is offering an inadequate range of fares or cargo rates in respect of a domestic service between two points, the Agency may take into consideration any information or factor that it considers relevant, including

(a) historical data respecting fares or cargo rates applicable to domestic services between those two points;

(b) fares or cargo rates applicable to similar domestic services offered by the licensee and one or more other licensees, including terms and conditions related to the fares or cargo rates, the number of seats available at those fares and the cargo capacity and cargo container types available at those rates;

(b.1) the competition from other modes of transportation, if the finding is in respect of a cargo rate, an increase in a cargo rate or a range of cargo rates; and

d'une part, et qu'un prix ou un taux, ou une augmentation de prix ou de taux, publiés ou appliqués à l'égard de ce service sont excessifs, d'autre part, l'Office peut, par ordonnance :

a) annuler le prix, le taux ou l'augmentation;

b) enjoindre au licencié de modifier son tarif afin de réduire d'une somme, et pour une période, qu'il estime indiquées dans les circonstances le prix, le taux ou l'augmentation;

c) lui enjoindre de rembourser, si possible, les sommes qu'il détermine, majorées des intérêts calculés de la manière réglementaire, aux personnes qui, selon lui, ont versé des sommes en trop.

Gamme de prix insuffisante

(2) S'il conclut, sur dépôt d'une plainte, qu'un licencié, y compris les licenciés de son groupe, est la seule personne à offrir un service intérieur entre deux points, d'une part, et que celui-ci offre une gamme de prix ou de taux insuffisante à l'égard de ce service, d'autre part, l'Office peut, par ordonnance, enjoindre au licencié, pour la période qu'il estime indiquée dans les circonstances, de publier et d'appliquer à l'égard de ce service un ou plusieurs prix ou taux supplémentaires qu'il estime indiqués dans les circonstances.

Facteurs à prendre en compte

(3) Pour décider, au titre des paragraphes (1) ou (2), si le prix, le taux ou l'augmentation de prix ou de taux publiés ou appliqués à l'égard d'un service intérieur entre deux points sont excessifs ou si le licencié offre une gamme de prix ou de taux insuffisante à l'égard d'un service intérieur entre deux points, l'Office peut tenir compte de tout renseignement ou facteur qu'il estime pertinent, notamment :

a) de renseignements relatifs aux prix ou aux taux appliqués antérieurement à l'égard des services intérieurs entre ces deux points;

b) des prix ou des taux applicables à l'égard des services intérieurs similaires offerts par le licencié et un ou plusieurs autres licenciés, y compris les conditions relatives aux prix ou aux taux applicables, le nombre de places offertes à ces prix et la capacité de transport et les types de conteneurs pour le transport disponibles à ces taux;

b.1) de la concurrence des autres moyens de transport, si la décision vise le taux, l'augmentation de taux ou la gamme de taux;

(c) any other information provided by the licensee, including information that the licensee is required to provide under section 83.

(c) des autres renseignements que lui fournit le licencié, y compris ceux qu'il est tenu de fournir au titre de l'article 83.

Alternative domestic services

(4) The Agency may find that a licensee is the only person providing a domestic service between two points if every alternative domestic service between those points is, in the Agency's opinion, unreasonable, taking into consideration the number of stops, the number of seats offered, the frequency of service, the flight connections and the total travel time and, more specifically, in the case of cargo, the cargo capacity and cargo container types available.

Services insuffisants

(4) L'Office peut conclure qu'un licencié est la seule personne à offrir un service intérieur entre deux points s'il estime que tous les autres services intérieurs offerts entre ces points sont insuffisants, compte tenu du nombre d'escales, de correspondances ou de places disponibles, de la fréquence des vols et de la durée totale du voyage et, plus précisément, dans le cas du transport de marchandises, de la capacité de transport et des types de conteneurs disponibles.

Alternative service

(4.1) The Agency shall not make an order under subsection (1) or (2) in respect of a licensee found by the Agency to be the only person providing a domestic service between two points if, in the Agency's opinion, there exists another domestic service that is not between the two points but is a reasonable alternative taking into consideration the convenience of access to the service, the number of stops, the number of seats offered, the frequency of service, the flight connections and the total travel time and, more specifically, in the case of cargo, the cargo capacity and cargo container types available.

Autres services

(4.1) L'Office ne rend pas l'ordonnance prévue aux paragraphes (1) ou (2) à l'égard du licencié s'il conclut que celui-ci est la seule personne à offrir un service intérieur entre deux points et s'il estime qu'il existe un autre service intérieur, qui n'est pas offert entre ces deux points, mais qui est suffisant compte tenu de la commodité de l'accès au service, du nombre d'escales, de correspondances ou de places disponibles, de la fréquence des vols et de la durée totale du voyage et, plus précisément, dans le cas du transport de marchandises, de la capacité de transport et des types de conteneurs disponibles.

Consideration of representations

(5) Before making a direction under paragraph (1)(b) or subsection (2), the Agency shall consider any representations that the licensee has made with respect to what is reasonable in the circumstances.

Représentations

(5) Avant de rendre l'ordonnance mentionnée à l'alinéa (1)b) ou au paragraphe (2), l'Office tient compte des observations du licencié sur les mesures qui seraient justifiées dans les circonstances.

(6) and (7) [Repealed, 2007, c. 19, s. 19]

(6) et (7) [Abrogés, 2007, ch. 19, art. 19]

Confidentiality of information

(8) The Agency may take any measures or make any order that it considers necessary to protect the confidentiality of any of the following information that it is considering in the course of any proceedings under this section:

(a) information that constitutes a trade secret;

(b) information the disclosure of which would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and

(c) information the disclosure of which would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.

1996, c. 10, s. 66; 2000, c. 15, s. 4; 2007, c. 19, s. 19.

Confidentialité des renseignements

(8) L'Office peut prendre toute mesure, ou rendre toute ordonnance, qu'il estime indiquée pour assurer la confidentialité des renseignements ci-après qu'il examine dans le cadre du présent article :

a) les renseignements qui constituent un secret industriel;

b) les renseignements dont la divulgation risquerait vraisemblablement de causer des pertes financières importantes à la personne qui les a fournis ou de nuire à sa compétitivité;

c) les renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations — contractuelles ou autres — menées par la personne qui les a fournis.

1996, ch. 10, art. 66; 2000, ch. 15, art. 4; 2007, ch. 19, art. 19.

Tariffs to be made public

67 (1) The holder of a domestic licence shall

(a) display in a prominent place at the business offices of the licensee a sign indicating that the tariffs for the domestic service offered by the licensee, including the terms and conditions of carriage, are available for public inspection at the business offices of the licensee, and allow the public to make such inspections;

(a.1) publish the terms and conditions of carriage on any Internet site used by the licensee for selling the domestic service offered by the licensee;

(b) in its tariffs, specifically identify the basic fare between all points for which a domestic service is offered by the licensee; and

(c) retain a record of its tariffs for a period of not less than three years after the tariffs have ceased to have effect.

Prescribed tariff information to be included

(2) A tariff referred to in subsection (1) shall include such information as may be prescribed.

No fares, etc., unless set out in tariff

(3) The holder of a domestic licence shall not apply any fare, rate, charge or term or condition of carriage applicable to the domestic service it offers unless the fare, rate, charge, term or condition is set out in a tariff that has been published or displayed under subsection (1) and is in effect.

Copy of tariff on payment of fee

(4) The holder of a domestic licence shall provide a copy or excerpt of its tariffs to any person on request and on payment of a fee not exceeding the cost of making the copy or excerpt.

1996, c. 10, s. 67; 2000, c. 15, s. 5; 2007, c. 19, s. 20.

Fares or rates not set out in tariff

67.1 If, on complaint in writing to the Agency by any person, the Agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to

(a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;

(b) compensate any person adversely affected for any expenses they incurred as a result of the licensee's fail-

Publication des tarifs

67 (1) Le licencié doit :

a) poser à ses bureaux, dans un endroit bien en vue, une affiche indiquant que les tarifs et notamment les conditions de transport pour le service intérieur qu'il offre sont à la disposition du public pour consultation à ses bureaux et permettre au public de les consulter;

a.1) publier les conditions de transport sur tout site Internet qu'il utilise pour vendre le service intérieur;

b) indiquer clairement dans ses tarifs le prix de base du service intérieur qu'il offre entre tous les points qu'il dessert;

c) conserver ses tarifs en archive pour une période minimale de trois ans après leur cessation d'effet.

Renseignements tarifaires

(2) Les tarifs comportent les renseignements exigés par règlement.

Interdiction

(3) Le titulaire d'une licence intérieure ne peut appliquer à l'égard d'un service intérieur que le prix, le taux, les frais ou les conditions de transport applicables figurant dans le tarif en vigueur publié ou affiché conformément au paragraphe (1).

Exemplaire du tarif

(4) Il fournit un exemplaire de tout ou partie de ses tarifs sur demande et paiement de frais non supérieurs au coût de reproduction de l'exemplaire.

1996, ch. 10, art. 67; 2000, ch. 15, art. 5; 2007, ch. 19, art. 20.

Prix, taux, frais ou conditions non inclus au tarif

67.1 S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a, contrairement au paragraphe 67(3), appliqué à l'un de ses services intérieurs un prix, un taux, des frais ou d'autres conditions de transport ne figurant pas au tarif, l'Office peut, par ordonnance, lui enjoindre :

a) d'appliquer un prix, un taux, des frais ou d'autres conditions de transport figurant au tarif;

b) d'indemniser toute personne lésée des dépenses qu'elle a supportées consécutivement à la non-applica-

ure to apply a fare, rate, charge or term or condition of carriage that was set out in its tariffs; and

(c) take any other appropriate corrective measures.

2000, c. 15, s. 6; 2007, c. 19, s. 21.

tion du prix, du taux, des frais ou des autres conditions qui figuraient au tarif;

c) de prendre toute autre mesure corrective indiquée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 21.

When unreasonable or unduly discriminatory terms or conditions

67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

Conditions déraisonnables

67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

Prohibition on advertising

(2) The holder of a domestic licence shall not advertise or apply any term or condition of carriage that is suspended or has been disallowed.

2000, c. 15, s. 6; 2007, c. 19, s. 22(F).

Interdiction d'annoncer

(2) Il est interdit au titulaire d'une licence intérieure d'annoncer ou d'appliquer une condition de transport suspendue ou annulée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 22(F).

Non-application of fares, etc.

68 (1) Sections 66 to 67.2 do not apply in respect of fares, rates or charges applicable to a domestic service provided for under a contract between a holder of a domestic licence and another person whereby the parties to the contract agree to keep its provisions confidential.

Non-application de certaines dispositions

68 (1) Les articles 66 à 67.2 ne s'appliquent pas aux prix, taux ou frais applicables au service intérieur qui fait l'objet d'un contrat entre le titulaire d'une licence intérieure et une autre personne et par lequel les parties conviennent d'en garder les stipulations confidentielles.

Non-application of terms and conditions

(1.1) Sections 66 to 67.2 do not apply in respect of terms and conditions of carriage applicable to a domestic service provided for under a contract referred to in subsection (1) to which an employer is a party and that relates to travel by its employees.

Non-application aux conditions de transport

(1.1) Les articles 66 à 67.2 ne s'appliquent pas aux conditions de transport applicables au service intérieur qui fait l'objet d'un contrat visé au paragraphe (1) portant sur les voyages d'employés faits pour le compte d'un employeur qui est partie au contrat.

Provisions regarding exclusive use of services

(2) The parties to the contract shall not include in it provisions with respect to the exclusive use by the other person of a domestic service operated by the holder of the domestic licence between two points in accordance with a published timetable or on a regular basis, unless the contract is for all or a significant portion of the capacity of a flight or a series of flights.

Stipulations interdites

(2) Le contrat ne peut comporter aucune clause relative à l'usage exclusif par l'autre partie des services intérieurs offerts entre deux points par le titulaire de la licence intérieure, soit régulièrement, soit conformément à un horaire publié, sauf s'il porte sur la totalité ou une partie importante des places disponibles sur un vol ou une série de vols.

Retention of contract required

(3) The holder of a domestic licence who is a party to the contract shall retain a copy of it for a period of not less than three years after it has ceased to have effect and, on request made within that period, shall provide a copy of it to the Agency.

1996, c. 10, s. 68; 2000, c. 15, s. 7; 2007, c. 19, s. 23.

Double à conserver

(3) Le titulaire d'une licence intérieure est tenu de conserver, au moins trois ans après son expiration, un double du contrat et d'en fournir un exemplaire à l'Office pendant cette période s'il lui en fait la demande.

1996, ch. 10, art. 68; 2000, ch. 15, art. 7; 2007, ch. 19, art. 23.

Licence for Scheduled International Service

Issue of licence

69 (1) On application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a scheduled international service to the applicant if

(a) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is, pursuant to subsection (2) or (3), eligible to hold the licence,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) where the applicant is a Canadian, meets the prescribed financial requirements; and

(b) the Agency is satisfied that the applicant has not contravened section 59 in respect of the service to be provided under the licence within the preceding twelve months.

Eligibility of Canadians

(2) The Minister may, in writing, designate any Canadian as eligible to hold a scheduled international licence. That Canadian remains eligible while the designation remains in force.

Eligibility of non-Canadians

(3) A non-Canadian is eligible to hold a scheduled international licence if the non-Canadian

(a) has been designated by a foreign government or an agent of a foreign government to operate an air service under the terms of an agreement or arrangement between that government and the Government of Canada; and

(b) holds, in respect of the air service, a document issued by a foreign government or agent that, in respect of the service to be provided under the document, is equivalent to a scheduled international licence.

1996, c. 10, s. 69; 2013, c. 31, s. 6.

Service international régulier

Délivrance de la licence

69 (1) L'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service international régulier au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il y est habilité, sous le régime des paragraphes (2) ou (3),

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit, s'agissant d'un Canadien, les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement au service.

Habilitation des Canadiens

(2) Le ministre peut, par écrit, désigner des Canadiens qu'il habilite à détenir une licence pour l'exploitation d'un service international régulier; l'habilitation reste valide tant que la désignation est en vigueur.

Habilitation des non-Canadiens

(3) Peut détenir une telle licence le non-Canadien qui :

a) a fait l'objet, de la part d'un gouvernement étranger ou du mandataire de celui-ci, d'une désignation l'habilitant à exploiter un service aérien aux termes d'un accord ou d'une entente entre ce gouvernement et celui du Canada;

b) détient en outre, à l'égard du service, un document délivré par un gouvernement étranger, ou par son mandataire, équivalant à une licence internationale service régulier.

1996, ch. 10, art. 69; 2013, ch. 31, art. 6.

Determination of scheduled international service

70 The Minister may, in writing to the Agency,

(a) determine that an international service is a scheduled international service; or

(b) withdraw a determination made under paragraph (a).

Qualification : service international régulier

70 Le ministre peut, par note expédiée à l'Office, qualifier de régulier un service international ou révoquer une telle qualification.

Terms and conditions of scheduled international licence

71 (1) Subject to any directions issued to the Agency under section 76, the Agency may, on the issuance of a scheduled international licence or from time to time thereafter, make the licence subject, in addition to any terms and conditions prescribed in respect of the licence, to such terms and conditions as the Agency deems to be consistent with the agreement, convention or arrangement pursuant to which the licence is being issued, including terms and conditions respecting routes to be followed, points or areas to be served, size and type of aircraft to be operated, schedules, places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and, subject to the *Canada Post Corporation Act*, carriage of goods.

Conditions liées à la licence

71 (1) Sous réserve des directives visées à l'article 76, l'Office peut, lors de la délivrance de la licence ou par la suite en tant que de besoin, assujettir celle-ci aux conditions — outre les conditions réglementaires — réputées conformes à l'accord, la convention ou l'entente au titre duquel elle est délivrée, notamment en ce qui concerne les routes aériennes à suivre, les points ou régions à desservir, la dimension et la catégorie des aéronefs à exploiter, les horaires, les escales, les tarifs, l'assurance, le transport des passagers et, sous réserve de la *Loi sur la Société canadienne des postes*, celui des marchandises.

Compliance with terms and conditions

(2) The holder of a scheduled international licence shall comply with every term and condition to which the licence is subject.

Obligations du licencié

(2) Le licencié est tenu de respecter toutes les conditions auxquelles sa licence est assujettie.

Mandatory suspension or cancellation

72 (1) The Agency shall suspend or cancel a scheduled international licence where the Agency determines that, in respect of the service for which the licence was issued, the licensee ceases to meet any of the requirements of subparagraphs 69(1)(a)(i) to (iii).

Suspension ou annulation obligatoire

72 (1) L'Office suspend ou annule la licence s'il est convaincu que le licencié ne répond plus à telle des conditions mentionnées aux sous-alinéas 69(1)a)(i) à (iii).

Discretionary suspension or cancellation

(2) The Agency may suspend or cancel a scheduled international licence

(a) where the Agency determines that, in respect of the service for which the licence was issued, the licensee has contravened, or does not meet the requirements of, any regulation or order made under this Part or any provision of this Part other than subparagraphs 69(1)(a)(i) to (iii); or

(b) in accordance with a request from the licensee for the suspension or cancellation.

Suspension ou annulation facultative

(2) L'Office peut suspendre ou annuler la licence :

a) s'il est convaincu que le licencié a, relativement au service, enfreint des conditions autres que celles mentionnées au paragraphe (1) ou telle des dispositions de la présente partie ou de ses textes d'application;

b) sur demande du licencié.

Reinstatement condition

(3) The Agency shall not reinstate the scheduled international licence of a Canadian that has been suspended for sixty days or longer unless the Canadian establishes to the satisfaction of the Agency that the Canadian meets the prescribed financial requirements.

Licence for Non-scheduled International Service

Issue of licence

73 (1) Subject to any directions issued to the Agency under section 76, on application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a non-scheduled international service to the applicant if

(a) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is a Canadian,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) meets prescribed financial requirements; and

(b) the Agency is satisfied that the applicant has not contravened section 59 in respect of the service to be provided under the licence within the preceding twelve months.

Non-Canadian applicant

(2) Subject to any directions issued to the Agency under section 76, on application to the Agency and on payment of the specified fee, the Agency may issue a non-scheduled international licence to a non-Canadian applicant if the applicant establishes in the application to the satisfaction of the Agency that the applicant

(a) holds a document issued by the government of the applicant's state or an agent of that government that, in respect of the service to be provided under the document, is equivalent to the non-scheduled international licence for which the application is being made; and

(b) meets the requirements of subparagraphs (1)(a)(ii) and (iii) and paragraph (1)(b).

Rétablissement de la licence

(3) L'Office ne peut rétablir la licence d'un Canadien suspendue depuis au moins soixante jours que si celui-ci justifie du fait qu'il remplit les exigences financières réglementaires.

Service international à la demande

Délivrance aux Canadiens

73 (1) Sous réserve des directives visées à l'article 76, l'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service international à la demande au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il est Canadien,

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement au service à offrir.

Délivrance aux non-Canadiens

(2) Sous réserve des directives visées à l'article 76, l'Office, sur demande et paiement des droits indiqués, peut délivrer une licence pour l'exploitation d'un service international à la demande au non-Canadien qui, dans la demande, justifie du fait, qu'à l'égard du service :

a) il détient un document, délivré par le gouvernement de son État ou par son mandataire, équivalant à une licence internationale service à la demande;

b) il remplit les conditions mentionnées aux sous-alinéas (1)a)(ii) et (iii) et à l'alinéa (1)b).

Terms and conditions of non-scheduled international licence

74 (1) Subject to any directions issued to the Agency under section 76, the Agency may, on the issuance of a non-scheduled international licence or from time to time thereafter, make the licence subject, in addition to any terms and conditions prescribed in respect of the licence, to such terms and conditions as the Agency deems appropriate, including terms and conditions respecting points or areas to be served, size and type of aircraft to be operated, schedules, places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and, subject to the *Canada Post Corporation Act*, carriage of goods.

Compliance with terms and conditions

(2) The holder of a non-scheduled international licence shall comply with every term and condition to which the licence is subject.

Mandatory suspension or cancellation

75 (1) The Agency shall suspend or cancel a non-scheduled international licence where the Agency determines that, in respect of the service for which the licence was issued, the licensee ceases to meet any of the requirements of

(a) in respect of a Canadian licensee, subparagraphs 73(1)(a)(i) to (iii); and

(b) in respect of a non-Canadian licensee, subparagraphs 73(1)(a)(ii) and (iii) and paragraph 73(2)(a).

Discretionary suspension or cancellation

(2) The Agency may suspend or cancel a non-scheduled international licence

(a) where the Agency determines that, in respect of the service for which the licence was issued, the licensee has contravened, or does not meet the requirements of, any regulation or order made under this Part or any provision of this Part other than the provisions referred to in paragraphs (1)(a) and (b); or

(b) in accordance with a request from the licensee for the suspension or cancellation.

Reinstatement condition

(3) The Agency shall not reinstate the non-scheduled international licence of a Canadian that has been suspended for sixty days or longer unless the Canadian establishes to the satisfaction of the Agency that the Canadian meets the prescribed financial requirements.

Conditions liées à la licence

74 (1) Sous réserve des directives visées à l'article 76, l'Office peut, lors de la délivrance de la licence ou par la suite en tant que de besoin, assujettir celle-ci aux conditions — outre les conditions réglementaires — qu'il estime indiqué d'imposer, notamment en ce qui concerne les points ou régions à desservir, la dimension et la catégorie des aéronefs à exploiter, les horaires, les escales, les tarifs, l'assurance, le transport des passagers et, sous réserve de la *Loi sur la Société canadienne des postes*, celui des marchandises.

Obligations du licencié

(2) Le licencié est tenu de respecter toutes les conditions auxquelles sa licence est assujettie.

Suspension ou annulation obligatoire

75 (1) L'Office suspend ou annule la licence s'il est convaincu que le licencié ne répond plus à telle des conditions mentionnées, pour un Canadien, aux sous-alinéas 73(1)a)(i) à (iii) et, pour un non-Canadien, aux sous-alinéas 73(1)a)(ii) et (iii) ou à l'alinéa 73(2)a).

Suspension ou annulation facultative

(2) L'Office peut suspendre ou annuler la licence :

a) s'il est convaincu que le licencié a, relativement au service, enfreint des conditions autres que celles mentionnées au paragraphe (1) ou telle des dispositions de la présente partie ou de ses textes d'application;

b) sur demande du licencié.

Rétablissement de la licence

(3) L'Office ne peut rétablir la licence d'un Canadien suspendue depuis au moins soixante jours que si celui-ci justifie du fait qu'il remplit les exigences financières réglementaires.

Issuance of International Charter Permits

Issuance, amendment and cancellation of permits

75.1 The issuance of a permit for the operation of an international charter to a licensee and the amendment or cancellation of the permit shall be made in accordance with regulations made under paragraph 86(1)(e).

2007, c. 19, s. 24.

Ministerial Directions for International Service

Minister may issue directions

76 (1) Where the Minister determines that it is necessary or advisable to provide direction to the Agency in respect of the exercise of any of its powers or the performance of any of its duties or functions under this Part relating to international service,

(a) in the interest of the safety or security of international civil aviation,

(b) in connection with the implementation or administration of an international agreement, convention or arrangement respecting civil aviation to which Canada is a party,

(c) in the interest of international comity or reciprocity,

(d) for the purpose of enforcing Canada's rights under an international agreement, convention or arrangement respecting civil aviation or responding to acts, policies or practices by a contracting party to any such agreement, convention or arrangement, or by an agency or citizen of such a party, that adversely affect or lead either directly or indirectly to adverse effects on Canadian international civil aviation services, or

(e) in connection with any other matter concerning international civil aviation as it affects the public interest,

the Minister may, subject to subsection (3), issue to the Agency directions that, notwithstanding any other provision of this Part, are binding on, and shall be complied with by, the Agency in the exercise of its powers or the performance of its duties or functions under this Part relating to international service.

Nature of directions

(2) Directions issued under subsection (1) may relate to

Délivrance de permis d'affrètement international

Délivrance, modification et annulation de permis

75.1 La délivrance d'un permis d'affrètement international à un licencié, de même que la modification ou l'annulation d'un tel permis, est faite en conformité avec les règlements pris en vertu de l'alinéa 86(1)e).

2007, ch. 19, art. 24.

Directives ministérielles en matière de service international

Directives ministérielles

76 (1) Le ministre peut donner des directives à l'Office, s'il l'estime nécessaire ou souhaitable aux fins suivantes dans le cadre de l'exercice de ses attributions relativement aux services internationaux :

a) la sécurité ou la sûreté de l'aviation civile internationale;

b) la mise en œuvre ou la gestion d'ententes, conventions ou accords internationaux, relatifs à l'aviation civile, dont le Canada est signataire;

c) la courtoisie ou la réciprocité internationale;

d) le respect des droits du Canada sous le régime d'ententes, accords ou conventions internationaux sur l'aviation civile ou l'objectif de réagir contre des mesures, prises soit par des parties à ces ententes, conventions ou accords, soit par des ressortissants ou organismes publics de celles-ci, qui portent atteinte ou sont, directement ou indirectement, susceptibles de porter atteinte aux services internationaux de l'aviation civile canadienne;

e) toute autre question d'intérêt public relative à l'aviation civile internationale.

Ces directives sont, par dérogation aux autres dispositions de la présente partie, obligatoires pour l'Office, lequel est tenu de s'y conformer.

Objet des directives

(2) Les directives peuvent porter sur :

(a) persons or classes of persons to whom licences to operate an international service shall or shall not be issued;

(b) the terms and conditions of such licences, or their variation;

(c) the suspension or cancellation of such licences; and

(d) any other matter concerning international service that is not governed by or under the *Aeronautics Act*.

Concurrence required for certain directions

(3) A direction by the Minister relating to a matter referred to in paragraph (1)(c), (d) or (e) may be issued only with the concurrence of the Minister of Foreign Affairs.

Duties and Powers of Agency

Duties and functions of Agency under international agreements, etc.

77 Where the Agency is identified as the aeronautical authority for Canada under an international agreement, convention or arrangement respecting civil aviation to which Canada is a party, or is directed by the Minister to perform any duty or function of the Minister pursuant to any such agreement, convention or arrangement, the Agency shall act as the aeronautical authority for Canada or perform the duty or function in accordance with the agreement, convention, arrangement or direction, as the case may be.

Agency powers qualified by certain agreements, etc.

78 (1) Subject to any directions issued to the Agency under section 76, the powers conferred on the Agency by this Part shall be exercised in accordance with any international agreement, convention or arrangement relating to civil aviation to which Canada is a party.

Variations from agreements, etc.

(2) Notwithstanding subsection (1) and subject to any directions issued to the Agency under section 76, the Agency may issue a licence or suspend a licence, or vary the terms and conditions of a licence, on a temporary basis for international air services that are not permitted in an agreement, convention or arrangement relating to civil aviation to which Canada is a party.

Agency may refuse licence — individuals

79 (1) Where the Agency has suspended or cancelled the licence of an individual under this Part or where an individual has contravened section 59, the Agency may, for a period not exceeding twelve months after the date

a) les personnes ou catégories de personnes à qui une licence d'exploitation d'un service international doit ou non être délivrée;

b) les conditions auxquelles ces licences peuvent être assujetties et la modification de ces conditions;

c) la suspension ou l'annulation des licences;

d) toute question de service international non visée par la *Loi sur l'aéronautique*.

Approbation pour certaines directives

(3) Les directives portant sur les questions visées aux alinéas (1)c), d) ou e) sont données avec le concours du ministre des Affaires étrangères.

Attributions de l'Office

Attributions de l'Office

77 L'Office agit comme l'autorité canadienne en matière d'aéronautique dès lors qu'une entente, une convention ou un accord internationaux, relatifs à l'aviation civile, dont le Canada est signataire, le prévoit ou dans les cas où le ministre le charge d'exercer tout ou partie des attributions que lui confèrent ces textes.

Conventions internationales

78 (1) Sous réserve des directives visées à l'article 76, l'exercice des attributions conférées à l'Office par la présente partie est assujetti aux ententes, conventions ou accords internationaux, relatifs à l'aviation civile, dont le Canada est signataire.

Dérogations

(2) Sous réserve des directives visées à l'article 76, l'Office peut toutefois, mais seulement à titre provisoire, délivrer une licence ou la suspendre, ou en modifier les conditions, pour le service international non permis par les textes visés au paragraphe (1).

Refus par l'Office

79 (1) L'Office, s'il a suspendu ou annulé la licence d'une personne physique, ou que celle-ci a contrevenu à l'article 59, peut refuser de lui délivrer toute licence relative à un service aérien pendant une période maximale de

of the suspension, cancellation or contravention, refuse to issue a licence in respect of an air service to the individual or to any corporation of which the individual is a principal.

douze mois suivant la prise de la mesure ou la contravention. Ce refus peut aussi viser toute personne morale dont l'intéressé est un dirigeant.

Agency may refuse licence — corporations

(2) Where the Agency has suspended or cancelled the licence of a corporation under this Part or where a corporation has contravened section 59, the Agency may, for a period not exceeding twelve months after the date of the suspension, cancellation or contravention, refuse to issue a licence in respect of an air service to

(a) the corporation;

(b) any person who, as a principal of the corporation, directed, authorized, assented to, acquiesced in or participated in a contravention that gave rise to the suspension or cancellation; and

(c) any body corporate of which the corporation or the person referred to in paragraph (b) is a principal.

Refus par l'Office

(2) L'Office, s'il a suspendu ou annulé la licence d'une personne morale, ou que celle-ci a contrevenu à l'article 59, peut refuser de lui délivrer toute licence relative à un service aérien pendant une période maximale de douze mois suivant la prise de la mesure ou la date de la contravention. Ce refus peut viser une personne qui, à titre de dirigeant de la personne morale, a ordonné ou autorisé la contravention qui a entraîné la mesure ou y a acquiescé ou participé et toute autre personne morale dont la personne physique ou morale précédemment mentionnée est un dirigeant.

Exemption

80 (1) The Agency may, by order, on such terms and conditions as it deems appropriate, exempt a person from the application of any of the provisions of this Part or of a regulation or order made under this Part where the Agency is of the opinion that

(a) the person has substantially complied with the provision;

(b) an action taken by the person is as effective as actual compliance with the provision; or

(c) compliance with the provision by the person is unnecessary, undesirable or impractical.

Exemptions

80 (1) L'Office peut, par arrêté assorti des conditions qu'il juge indiquées, soustraire quiconque à l'application de toute disposition de la présente partie ou de ses textes d'application s'il estime que l'intéressé, selon le cas :

a) s'y est déjà, dans une large mesure, conformé;

b) a pris des mesures équivalant à l'application effective de la disposition;

c) se trouve dans une situation ne rendant ni nécessaire, ni même souhaitable ou commode, cette application.

Exemption not to provide certain relief

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

Exception

(2) L'exemption ne peut avoir pour effet de soustraire quiconque aux dispositions relatives à la qualité de Canadien et à la détention d'un document d'aviation canadien et d'une police d'assurance responsabilité réglementaire en matière de service aérien.

Exemption not to provide certain relief — section 69

(3) No exemption shall be granted under subsection (1) that has the effect of relieving a person from the provisions of section 69 that require, in order to be eligible to hold a scheduled international licence,

(a) a Canadian to be designated by the Minister to hold such a licence; or

Exception — article 69

(3) L'exemption ne peut avoir pour effet de soustraire quiconque aux dispositions de l'article 69 qui exigent, en vue de permettre la détention d'une licence pour l'exploitation d'un service international régulier, selon le cas :

a) la désignation d'un Canadien, par le ministre, l'habilitant à détenir une telle licence;

(b) a non-Canadian to be designated by a foreign government or an agent of a foreign government to operate an air service under the terms of an agreement or arrangement between that government and the Government of Canada.

1996, c. 10, s. 80; 2013, c. 31, s. 7.

b) la désignation d'un non-Canadien, par un gouvernement étranger ou un mandataire de celui-ci, l'habilitant à exploiter un service aérien aux termes d'un accord ou d'une entente entre ce gouvernement et celui du Canada.

1996, ch. 10, art. 80; 2013, ch. 31, art. 7.

Inquiry into licensing matters

81 For the purposes of ensuring compliance with this Part, the Agency may inquire into any matter for which a licence, permit or other document is required under this Part.

Enquêtes sur les licences

81 Dans le but de faire appliquer la présente partie, l'Office peut faire enquête sur toute question relative à une licence, un permis ou un autre document requis par la présente partie.

Licensee to provide notification

82 Every licensee shall notify the Agency without delay, in writing, if

(a) the liability insurance coverage in respect of the air service for which the licence is issued is cancelled or is altered in a manner that results in the failure by the licensee to have the prescribed liability insurance coverage for that service;

(b) the licensee's operations change in a manner that results in the failure by the licensee to have the prescribed liability insurance coverage for that service; or

(c) any change occurs that affects, or is likely to affect, the licensee's status as a Canadian.

Avis

82 Le licencié est tenu d'aviser l'Office par écrit et sans délai de l'annulation de la police d'assurance responsabilité ou de toute modification — soit de celle-ci, soit de son exploitation — la rendant non conforme au règlement et de toute modification touchant ou susceptible de toucher sa qualité de Canadien.

Disclosure of information required

83 A licensee shall, at the request of the Agency, provide the Agency with information or documents available to the licensee that relate to any complaint under review or any investigation being conducted by the Agency under this Part.

Obligation

83 Le licencié est tenu, à la demande de l'Office, de lui fournir les renseignements et documents dont il dispose concernant toute plainte faisant l'objet d'un examen ou d'une enquête de l'Office sous le régime de la présente partie.

Notification of agent required

84 (1) A licensee who has an agent in Canada shall, in writing, provide the Agency with the agent's name and address.

Mandataire

84 (1) Le licencié qui a un mandataire au Canada est tenu de communiquer par écrit à l'Office les nom et adresse de celui-ci.

Appointment and notice of agent

(2) A licensee who does not have a place of business or an agent in Canada shall appoint an agent who has a place of business in Canada and, in writing, provide the Agency with the agent's name and address.

Constitution obligatoire

(2) Le licencié qui n'a pas d'établissement ni de mandataire au Canada est tenu d'en nommer un qui y ait un établissement et de communiquer par écrit à l'Office les nom et adresse du mandataire.

Notice of change of address

85 Where the address of a licensee's principal place of business in Canada or the name or address of the licensee's agent in Canada is changed, the licensee shall notify the Agency in writing of the change without delay.

Avis de changement

85 En cas de changement de l'adresse de son principal établissement ou de celle de son mandataire au Canada, ou s'il change de mandataire, le licencié est tenu d'en aviser sans délai par écrit l'Office.

Air Travel Complaints

Review and mediation

85.1 (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint.

Report

(2) The Agency or a person authorized to act on the Agency's behalf shall report to the parties outlining their positions regarding the complaint and any resolution of the complaint.

Complaint not resolved

(3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.

Further proceedings

(4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

2000, c. 15, s. 7.1; 2007, c. 19, s. 25.

Regulations

Regulations

86 (1) The Agency may make regulations

(a) classifying air services;

(b) classifying aircraft;

Plaintes relatives au transport aérien

Examen et médiation

85.1 (1) L'Office ou son délégué examine toute plainte déposée en vertu de la présente partie et peut tenter de régler l'affaire; il peut, dans les cas indiqués, jouer le rôle de médiateur entre les parties ou pourvoir à la médiation entre celles-ci.

Communication aux parties

(2) L'Office ou son délégué fait rapport aux parties des grandes lignes de la position de chacune d'entre elles et de tout éventuel règlement.

Affaire non réglée

(3) Si l'affaire n'est pas réglée à la satisfaction du plaignant dans le cadre du présent article, celui-ci peut demander à l'Office d'examiner la plainte conformément aux dispositions de la présente partie en vertu desquelles elle a été déposée.

Inhabilité

(4) Le membre de l'Office ou le délégué qui a tenté de régler l'affaire ou joué le rôle de médiateur en vertu du présent article ne peut agir dans le cadre de procédures ultérieures, le cas échéant, devant l'Office à l'égard de la plainte en question.

Prolongation

(5) La période de cent vingt jours prévue au paragraphe 29(1) est prolongée de la durée de la période durant laquelle l'Office ou son délégué agit en vertu du présent article.

Inclusion dans le rapport annuel

(6) L'Office inclut dans son rapport annuel le nombre et la nature des plaintes déposées au titre de la présente partie, le nom des transporteurs visés par celles-ci, la manière dont elles ont été traitées et les tendances systémiques qui se sont manifestées.

2000, ch. 15, art. 7.1; 2007, ch. 19, art. 25.

Règlements

Pouvoirs de l'Office

86 (1) L'Office peut, par règlement :

a) classifier les services aériens;

b) classifier les aéronefs;

(c) prescribing liability insurance coverage requirements for air services or aircraft;

(d) prescribing financial requirements for each class of air service or aircraft;

(e) respecting the issuance, amendment and cancellation of permits for the operation of international charters;

(f) respecting the duration and renewal of licences;

(g) respecting the amendment of licences;

(h) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and

(i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,

(ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,

(iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and

(iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

(i) requiring licensees to file with the Agency any documents and information relating to activities under their licences that are necessary for the purposes of enabling the Agency to exercise its powers and perform its duties and functions under this Part and respecting the manner in which and the times at which the documents and information are to be filed;

(j) requiring licensees to include in contracts or arrangements with travel wholesalers, tour operators, charterers or other persons associated with the provision of air services to the public, or to make those contracts and arrangements subject to, terms and conditions specified or referred to in the regulations;

(k) defining words and expressions for the purposes of this Part;

c) prévoir les exigences relatives à la couverture d'assurance responsabilité pour les services aériens et les aéronefs;

d) prévoir les exigences financières pour chaque catégorie de service aérien ou d'aéronefs;

e) régir la délivrance, la modification et l'annulation des permis d'affrètements internationaux;

f) fixer la durée de validité et les modalités de renouvellement des licences;

g) régir la modification des licences;

h) prendre toute mesure concernant le trafic et les tarifs, prix, taux, frais et conditions de transport liés au service international, notamment prévoir qu'il peut :

(i) annuler ou suspendre des tarifs, prix, taux ou frais,

(ii) établir de nouveaux tarifs, prix, taux ou frais en remplacement de ceux annulés,

(iii) enjoindre à tout licencié ou transporteur de prendre les mesures correctives qu'il estime indiquées et de verser des indemnités aux personnes lésées par la non-application par le licencié ou transporteur des prix, taux, frais ou conditions de transport applicables au service et qui figuraient au tarif,

(iv) obliger tout licencié ou transporteur à publier les conditions de transport du service international sur tout site Internet qu'il utilise pour vendre ce service;

i) demander aux licenciés de déposer auprès de lui les documents ainsi que les renseignements relatifs aux activités liées à leurs licences et nécessaires à l'exercice de ses attributions dans le cadre de la présente partie, et fixer les modalités de temps ou autres du dépôt;

j) demander aux licenciés d'inclure dans les contrats ou ententes conclus avec les grossistes en voyages, voyagistes, affréteurs ou autres personnes associées à la prestation de services aériens au public les conditions prévues dans les règlements ou d'assujettir ces contrats ou ententes à ces conditions;

k) définir les termes non définis de la présente partie;

l) exempter toute personne des obligations imposées par la présente partie;

(l) excluding a person from any of the requirements of this Part;

(m) prescribing any matter or thing that by this Part is to be prescribed; and

(n) generally for carrying out the purposes and provisions of this Part.

m) prendre toute mesure d'ordre réglementaire prévue par la présente partie;

n) prendre toute autre mesure d'application de la présente partie.

Exclusion not to provide certain relief

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

(3) [Repealed, 2007, c. 19, s. 26]

1996, c. 10, s. 86; 2000, c. 15, s. 8; 2007, c. 19, s. 26.

Exception

(2) Les obligations imposées par la présente partie relativement à la qualité de Canadien, au document d'aviation canadien et à la police d'assurance responsabilité réglementaire en matière de service aérien ne peuvent faire l'objet de l'exemption prévue à l'alinéa (1)l).

(3) [Abrogé, 2007, ch. 19, art. 26]

1996, ch. 10, art. 86; 2000, ch. 15, art. 8; 2007, ch. 19, art. 26.

Advertising regulations

86.1 (1) The Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.

Règlement concernant la publicité des prix

86.1 (1) L'Office régit, par règlement, la publicité dans les médias, y compris dans Internet, relative aux prix des services aériens au Canada ou dont le point de départ est au Canada.

Contents of regulations

(2) Without limiting the generality of subsection (1), regulations shall be made under that subsection requiring a carrier who advertises a price for an air service to include in the price all costs to the carrier of providing the service and to indicate in the advertisement all fees, charges and taxes collected by the carrier on behalf of another person in respect of the service, so as to enable a purchaser of the service to readily determine the total amount to be paid for the service.

Contenu des règlements

(2) Les règlements exigent notamment que le prix des services aériens mentionné dans toute publicité faite par le transporteur inclue les coûts supportés par celui-ci pour la fourniture des services et que la publicité indique les frais, droits et taxes perçus par lui pour le compte d'autres personnes, de façon à permettre à l'acheteur de déterminer aisément la somme à payer pour ces services.

Regulations may prescribe

(3) Without limiting the generality of subsection (1), the regulations may prescribe what are costs, fees, charges and taxes for the purposes of subsection (2).

2007, c. 19, s. 27.

Précisions

(3) Les règlements peuvent également préciser, pour l'application du paragraphe (2), les types de coûts, frais, droits et taxes visés à ce paragraphe.

2007, ch. 19, art. 27.

Regulations and orders

86.2 A regulation or order made under this Part may be conditional or unconditional or qualified or unqualified and may be general or restricted to a specific area, person or thing or group or class of persons or things.

2007, c. 19, s. 27.

Textes d'application

86.2 Les textes d'application de la présente partie peuvent être conditionnels ou absolus, assortis ou non de réserves, et de portée générale ou limitée quant aux zones, personnes, objets ou catégories de personnes ou d'objets visés.

2007, ch. 19, art. 27.

any person acting on behalf of the Agency or the Minister in connection with any matter under this Act.

Obstruction and false statements

(2) No person shall knowingly obstruct or hinder, or make any false or misleading statement, either orally or in writing, to a person designated as an enforcement officer pursuant to paragraph 178(1)(a) who is engaged in carrying out functions under this Act.

Offence

174 Every person who contravenes a provision of this Act or a regulation or order made under this Act, other than an order made under section 47, is guilty of an offence punishable on summary conviction and liable

(a) in the case of an individual, to a fine not exceeding $5,000; and

(b) in the case of a corporation, to a fine not exceeding $25,000.

Officers, etc., of corporation re offences

175 Where a corporation commits an offence under this Act, every person who at the time of the commission of the offence was a director or officer of the corporation is guilty of the like offence unless the act or omission constituting the offence took place without the person's knowledge or consent or the person exercised all due diligence to prevent the commission of the offence.

Time limit for commencement of proceedings

176 Proceedings by way of summary conviction in respect of an offence under this Act may be instituted within but not later than twelve months after the time when the subject-matter of the proceedings arose.

Administrative Monetary Penalties

Definition of *Tribunal*

176.1 For the purposes of sections 180.1 to 180.7, *Tribunal* means the Transportation Appeal Tribunal of Canada established by subsection 2(1) of the *Transportation Appeal Tribunal of Canada Act*.

2007, c. 19, s. 48.

Regulation-making powers

177 (1) The Agency may, by regulation,

(a) designate

(i) any provision of this Act or of any regulation, order or direction made pursuant to this Act,

agissant au nom de l'Office ou du ministre relativement à une question visée par la présente loi.

Entrave

(2) Il est interdit, sciemment, d'entraver l'action de l'agent verbalisateur désigné au titre du paragraphe 178(1) dans l'exercice de ses fonctions ou de lui faire, oralement ou par écrit, une déclaration fausse ou trompeuse.

Infraction et peines

174 Quiconque contrevient à la présente loi ou à un texte d'application de celle-ci, autre qu'un décret prévu à l'article 47, commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'une personne physique, d'une amende maximale de 5 000 $;

b) dans le cas d'une personne morale, d'une amende maximale de 25 000 $.

Dirigeants des personnes morales

175 En cas de perpétration par une personne morale d'une infraction à la présente loi, celui qui, au moment de l'infraction, en était administrateur ou dirigeant la commet également, sauf si l'action ou l'omission à l'origine de l'infraction a eu lieu à son insu ou sans son consentement ou qu'il a pris toutes les mesures nécessaires pour empêcher l'infraction.

Prescription

176 Les poursuites intentées sur déclaration de culpabilité par procédure sommaire sous le régime de la présente loi se prescrivent par douze mois à compter du fait générateur de l'action.

Sanctions administratives pécuniaires

Définition de *Tribunal*

176.1 Pour l'application des articles 180.1 à 180.7, *Tribunal* s'entend du Tribunal d'appel des transports du Canada, constitué par le paragraphe 2(1) de la *Loi sur le Tribunal d'appel des transports du Canada*.

2007, ch. 19, art. 48.

Pouvoirs réglementaires de l'Office

177 (1) L'Office peut, par règlement :

a) désigner comme un texte dont la contravention est assujettie aux articles 179 et 180 :

(i) toute disposition de la présente loi ou de ses textes d'application,

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C. (1985), ch. F-7

Current to February 15, 2016

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(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

Federal Court has no jurisdiction

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

R.S., 1985, c. F-7, s. 17; 1990, c. 8, s. 3; 2002, c. 8, s. 25.

Incompétence de la Cour fédérale

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

L.R. (1985), ch. F-7, art. 17; 1990, ch. 8, art. 3; 2002, ch. 8, art. 25.

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

L.R. (1985), ch. F-7, art. 18; 1990, ch. 8, art. 4; 2002, ch. 8, art. 26.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire

Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

dating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Interim orders

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Reference by federal tribunal

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

Reference by Attorney General of Canada

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

Exception

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Exception to sections 18 and 18.1

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Renvoi d'un office fédéral

18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

Renvoi du procureur général

(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

Exception

(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Dérogation aux art. 18 et 18.1

18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

c) elle a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) elle a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont elle dispose;

e) elle a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) elle a agi de toute autre façon contraire à la loi.

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(a) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(b) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Avis d'appel

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Signification

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour d'appel fédérale.

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

Jugement définitif

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

L.R. (1985), ch. F-7, art. 27; L.R. (1985), ch. 51 (4e suppl.), art. 11; 1990, ch. 8, art. 7 et 78(A); 1993, ch. 27, art. 214; 2002, ch. 8, art. 34.

Judicial review

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made

Contrôle judiciaire

28 (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

in respect of any of the following federal boards, commissions or other tribunals:

(a) the Board of Arbitration established by the *Canada Agricultural Products Act*;

(b) the Review Tribunal established by the *Canada Agricultural Products Act*;

(b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(d) [Repealed, 2012, c. 19, s. 272]

(e) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(f) the National Energy Board established by the *National Energy Board Act*;

(g) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the *National Energy Board Act*;

(g) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(h) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(i) the Public Service Labour Relations and Employment Board that is established by subsection 4(1) of the *Public Service Labour Relations and Employment Board Act*;

(i.1) adjudicators as defined in subsection 2(1) of the *Public Service Labour Relations Act*;

(j) the Copyright Board established by the *Copyright Act*;

a) le conseil d'arbitrage constitué par la *Loi sur les produits agricoles au Canada*;

b) la commission de révision constituée par cette loi;

b.1) le commissaire aux conflits d'intérêts et à l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail et de l'emploi dans la fonction publique, créée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l'emploi dans la fonction publique*;

i.1) les arbitres de grief, au sens du paragraphe 2(1) de la *Loi sur les relations de travail dans la fonction publique*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

(k) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(l) [Repealed, 2002, c. 8, s. 35]

(m) [Repealed, 2012, c. 19, s. 272]

(n) the Competition Tribunal established by the *Competition Tribunal Act*;

(o) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(p) [Repealed, 2012, c. 19, s. 572]

(q) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(r) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572; 2013, c. 40, ss. 236, 439.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572; 2013, ch. 40, art. 236 et 439.

29. to 35 [Repealed, 1990, c. 8, s. 8]

29. à 35 [Abrogés, 1990, ch. 8, art. 8]

Substantive Provisions

Prejudgment interest — cause of action within province

36 (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Dispositions de fond

Intérêt avant jugement — Fait survenu dans une province

36 (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

CANADA

CONSOLIDATION

CODIFICATION

Carriage by Air Act

Loi sur le transport aérien

R.S.C., 1985, c. C-26

L.R.C. (1985), ch. C-26

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SCHEDULE VI

(Subsections 2(2.1), (3) and (5) and 3(2) and section 4)

Convention for the Unification of Certain Rules for International Carriage by Air

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

CHAPTER I

General Provisions

Article 1 — Scope of Application

1 This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2 For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the

ANNEXE VI

(paragraphes 2(2.1), (3) et (5) et 3(2) et article 4)

Convention pour l'unification de certaines règles relatives au transport aérien international

RECONNAISSANT l'importante contribution de la Convention pour l'unification de certaines règles relatives au transport aérien international, signée à Varsovie le 12 octobre 1929, ci-après appelée la « Convention de Varsovie » et celle d'autres instruments connexes à l'harmonisation du droit aérien international privé,

RECONNAISSANT la nécessité de moderniser et de refondre la Convention de Varsovie et les instruments connexes,

RECONNAISSANT l'importance d'assurer la protection des intérêts des consommateurs dans le transport aérien international et la nécessité d'une indemnisation équitable fondée sur le principe de réparation,

RÉAFFIRMANT l'intérêt d'assurer le développement d'une exploitation ordonnée du transport aérien international et un acheminement sans heurt des passagers, des bagages et des marchandises, conformément aux principes et aux objectifs de la Convention relative à l'aviation civile internationale faite à Chicago le 7 décembre 1944,

CONVAINCUS que l'adoption de mesures collectives par les États en vue d'harmoniser davantage et de codifier certaines règles régissant le transport aérien international est le meilleur moyen de réaliser un équilibre équitable des intérêts,

LES ÉTATS PARTIES À LA PRÉSENTE CONVENTION SONT CONVENUS DE CE QUI SUIT :

CHAPITRE I

Généralités

Article 1 — Champ d'application

1 La présente convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transport aérien.

2 Au sens de la présente convention, l'expression *transport international* s'entend de tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux États parties, soit sur le territoire d'un seul État partie si une escale est prévue sur le territoire d'un autre État, même si cet État n'est pas un État partie. Le transport sans une telle escale entre deux points du territoire d'un seul État partie n'est

territory of another State is not international carriage for the purposes of this Convention.

3 Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4 This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2 — Carriage Performed by State and Carriage of Postal Items

1 This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2 In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3 Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

pas considéré comme international au sens de la présente convention.

3 Le transport à exécuter par plusieurs transporteurs successifs est censé constituer pour l'application de la présente convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats, et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans le territoire d'un même État.

4 La présente convention s'applique aussi aux transports visés au Chapitre V, sous réserve des dispositions dudit chapitre.

Article 2 — Transport effectué par l'État et transport d'envois postaux

1 La présente convention s'applique aux transports effectués par l'État ou les autres personnes juridiques de droit public, dans les conditions prévues à l'article 1.

2 Dans le transport des envois postaux, le transporteur n'est responsable qu'envers l'administration postale compétente conformément aux règles applicables dans les rapports entre les transporteurs et les administrations postales.

3 Les dispositions de la présente convention autres que celles du paragraphe 2 ci-dessus ne s'appliquent pas au transport des envois postaux.

CHAPTER II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3 — Passengers and Baggage

1 In respect of carriage of passengers, an individual or collective document of carriage shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2 Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

3 The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

CHAPITRE II

Documents et obligations des Parties relatifs au transport des passagers, des bagages et des marchandises

Article 3 — Passagers et bagages

1 Dans le transport des passagers, un titre de transport individuel ou collectif doit être délivré, contenant :

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'un même État partie et si une ou plusieurs escales sont prévues sur le territoire d'un autre État, l'indication d'une de ces escales.

2 L'emploi de tout autre moyen constatant les indications qui figurent au paragraphe 1 peut se substituer à la délivrance du titre de transport mentionné dans ce paragraphe. Si un tel autre moyen est utilisé, le transporteur offrira de délivrer au passager un document écrit constatant les indications qui y sont consignées.

3 Le transporteur délivrera au passager une fiche d'identification pour chaque article de bagage enregistré.

4 The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

5 Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4 — Cargo

1 In respect of the carriage of cargo, an air waybill shall be delivered.

2 Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5 — Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

(c) an indication of the weight of the consignment.

Article 6 — Document Relating to the Nature of the Cargo

The consignor may be required, if necessary to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.

Article 7 — Description of Air Waybill

1 The air waybill shall be made out by the consignor in three original parts.

2 The first part shall be marked “for the carrier”; it shall be signed by the consignor. The second part shall be marked “for the consignee”; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

4 Il sera donné au passager un avis écrit indiquant que, lorsque la présente convention s'applique, elle régit la responsabilité des transporteurs en cas de mort ou de lésion ainsi qu'en cas de destruction, de perte ou d'avarie des bagages, ou de retard.

5 L'inobservation des dispositions des paragraphes précédents n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente convention, y compris celles qui portent sur la limitation de la responsabilité.

Article 4 — Marchandises

1 Pour le transport de marchandises, une lettre de transport aérien est émise.

2 L'emploi de tout autre moyen constatant les indications relatives au transport à exécuter peut se substituer à l'émission de la lettre de transport aérien. Si de tels autres moyens sont utilisés, le transporteur délivre à l'expéditeur, à la demande de ce dernier, un récépissé de marchandises permettant l'identification de l'expédition et l'accès aux indications enregistrées par ces autres moyens.

Article 5 — Contenu de la lettre de transport aérien ou du récépissé de marchandises

La lettre de transport aérien ou le récépissé de marchandises contiennent :

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'un même État partie et qu'une ou plusieurs escales sont prévues sur le territoire d'un autre État, l'indication d'une de ces escales;

c) la mention du poids de l'expédition.

Article 6 — Document relatif à la nature de la marchandise

L'expéditeur peut être tenu pour accomplir les formalités nécessaires de douane, de police et d'autres autorités publiques d'émettre un document indiquant la nature de la marchandise. Cette disposition ne crée pour le transporteur aucun devoir, obligation ni responsabilité.

Article 7 — Description de la lettre de transport aérien

1 La lettre de transport aérien est établie par l'expéditeur en trois exemplaires originaux.

2 Le premier exemplaire porte la mention « pour le transporteur »; il est signé par l'expéditeur. Le deuxième exemplaire porte la mention « pour le destinataire »; il est signé par l'expéditeur et le transporteur. Le troisième exemplaire est signé par le transporteur et remis par lui à l'expéditeur après acceptation de la marchandise.

3 The signature of the carrier and that of the consignor may be printed or stamped.

4 If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 8 — Documentation for Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 9 — Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 10 — Responsibility for Particulars of Documentation

1 The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2 The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3 Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

3 La signature du transporteur et celle de l'expéditeur peuvent être imprimées ou remplacées par un timbre.

4 Si, à la demande de l'expéditeur, le transporteur établit la lettre de transport aérien, ce dernier est considéré, jusqu'à preuve du contraire, comme agissant au nom de l'expéditeur.

Article 8 — Documents relatifs à plusieurs colis

Lorsqu'il y a plusieurs colis :

a) le transporteur de marchandises a le droit de demander à l'expéditeur l'établissement de lettres de transport aérien distinctes;

b) l'expéditeur a le droit de demander au transporteur la remise de récépissés de marchandises distincts, lorsque les autres moyens visés au paragraphe 2 de l'article 4 sont utilisés.

Article 9 — Inobservation des dispositions relatives aux documents obligatoires

L'inobservation des dispositions des articles 4 à 8 n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente convention, y compris celles qui portent sur la limitation de responsabilité.

Article 10 — Responsabilité pour les indications portées dans les documents

1 L'expéditeur est responsable de l'exactitude des indications et déclarations concernant la marchandise inscrites par lui ou en son nom dans la lettre de transport aérien, ainsi que de celles fournies et faites par lui ou en son nom au transporteur en vue d'être insérées dans le récépissé de marchandises ou pour insertion dans les données enregistrées par les autres moyens prévus au paragraphe 2 de l'article 4. Ces dispositions s'appliquent aussi au cas où la personne agissant au nom de l'expéditeur est également l'agent du transporteur.

2 L'expéditeur assume la responsabilité de tout dommage subi par le transporteur ou par toute autre personne à l'égard de laquelle la responsabilité du transporteur est engagée, en raison d'indications et de déclarations irrégulières, inexactes ou incomplètes fournies et faites par lui ou en son nom.

3 Sous réserve des dispositions des paragraphes 1 et 2 du présent article, le transporteur assume la responsabilité de tout dommage subi par l'expéditeur ou par toute autre personne à l'égard de laquelle la responsabilité de l'expéditeur est engagée, en raison d'indications et de déclarations irrégulières, inexactes ou incomplètes insérées par lui ou en son nom dans le récépissé de marchandises ou dans les données enregistrées par les autres moyens prévus au paragraphe 2 de l'article 4.

Article 11 — Evidentiary Value of Documentation

1 The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2 Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 12 — Right of Disposition of Cargo

1 Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2 If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.

3 If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4 The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 13 — Delivery of the Cargo

1 Except when the consignor has exercised its right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2 Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

Article 11 — Valeur probante des documents

1 La lettre de transport aérien et le récépissé de marchandises font foi, jusqu'à preuve du contraire, de la conclusion du contrat, de la réception de la marchandise et des conditions du transport qui y figurent.

2 Les énonciations de la lettre de transport aérien et du récépissé de marchandises, relatives au poids, aux dimensions et à l'emballage de la marchandise ainsi qu'au nombre des colis, font foi jusqu'à preuve du contraire; celles relatives à la quantité, au volume et à l'état de la marchandise ne font preuve contre le transporteur que si la vérification en a été faite par lui en présence de l'expéditeur, et constatée sur la lettre de transport aérien, ou s'il s'agit d'énonciations relatives à l'état apparent de la marchandise.

Article 12 — Droit de disposer de la marchandise

1 L'expéditeur a le droit, à la condition d'exécuter toutes les obligations résultant du contrat de transport, de disposer de la marchandise, soit en la retirant à l'aéroport de départ ou de destination, soit en l'arrêtant en cours de route lors d'un atterrissage, soit en la faisant livrer au lieu de destination ou en cours de route à une personne autre que le destinataire initialement désigné, soit en demandant son retour à l'aéroport de départ, pour autant que l'exercice de ce droit ne porte préjudice ni au transporteur, ni aux autres expéditeurs et avec l'obligation de rembourser les frais qui en résultent.

2 Dans le cas où l'exécution des instructions de l'expéditeur est impossible, le transporteur doit l'en aviser immédiatement.

3 Si le transporteur exécute les instructions de disposition de l'expéditeur, sans exiger la production de l'exemplaire de la lettre de transport aérien ou du récépissé de la marchandise délivré à celui-ci, il sera responsable, sauf son recours contre l'expéditeur, du préjudice qui pourra être causé par ce fait à celui qui est régulièrement en possession de la lettre de transport aérien ou du récépissé de la marchandise.

4 Le droit de l'expéditeur cesse au moment où celui du destinataire commence, conformément à l'article 13. Toutefois, si le destinataire refuse la marchandise, ou s'il ne peut être joint, l'expéditeur reprend son droit de disposition.

Article 13 — Livraison de la marchandise

1 Sauf lorsque l'expéditeur a exercé le droit qu'il tient de l'article 12, le destinataire a le droit, dès l'arrivée de la marchandise au point de destination, de demander au transporteur de lui livrer la marchandise contre le paiement du montant des créances et contre l'exécution des conditions de transport.

2 Sauf stipulation contraire, le transporteur doit aviser le destinataire dès l'arrivée de la marchandise.

3 If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 14 — Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 15 — Relations of Consignor and Consignee or Mutual Relations of Third Parties

1 Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2 The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

Article 16 — Formalities of Customs, Police or Other Public Authorities

1 The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2 The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

3 Si la perte de la marchandise est reconnue par le transporteur ou si, à l'expiration d'un délai de sept jours après qu'elle aurait dû arriver, la marchandise n'est pas arrivée, le destinataire est autorisé à faire valoir vis-à-vis du transporteur les droits résultant du contrat de transport.

Article 14 — Possibilité de faire valoir les droits de l'expéditeur et du destinataire

L'expéditeur et le destinataire peuvent faire valoir tous les droits qui leur sont respectivement conférés par les articles 12 et 13, chacun en son nom propre, qu'il agisse dans son propre intérêt ou dans l'intérêt d'autrui, à condition d'exécuter les obligations que le contrat de transport impose.

Article 15 — Rapports entre l'expéditeur et le destinataire ou rapports entre les tierces parties

1 Les articles 12, 13 et 14 ne portent préjudice ni aux rapports entre l'expéditeur et le destinataire, ni aux rapports mutuels des tierces parties dont les droits proviennent de l'expéditeur ou du destinataire.

2 Toute clause dérogeant aux dispositions des articles 12, 13 et 14 doit être inscrite dans la lettre de transport aérien ou dans le récépissé de marchandises.

Article 16 — Formalités de douane, de police ou d'autres autorités publiques

1 L'expéditeur est tenu de fournir les renseignements et les documents qui, avant la remise de la marchandise au destinataire, sont nécessaires à l'accomplissement des formalités de douane, de police ou d'autres autorités publiques. L'expéditeur est responsable envers le transporteur de tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces renseignements et pièces, sauf le cas de faute de la part du transporteur ou de ses préposés ou mandataires.

2 Le transporteur n'est pas tenu d'examiner si ces renseignements et documents sont exacts ou suffisants.

CHAPTER III

Liability of the Carrier and Extent of Compensation for Damage

Article 17 — Death and Injury of Passengers — Damage to Baggage

1 The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2 The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3 If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4 Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 18 — Damage to Cargo

1 The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2 However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

CHAPITRE III

Responsabilité du transporteur et étendue de l'indemnisation du préjudice

Article 17 — Mort ou lésion subie par le passager — Dommage causé aux bagages

1 Le transporteur est responsable du préjudice survenu en cas de mort ou de lésion corporelle subie par un passager, par cela seul que l'accident qui a causé la mort ou la lésion s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement ou de débarquement.

2 Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés, par cela seul que le fait qui a causé la destruction, la perte ou l'avarie s'est produit à bord de l'aéronef ou au cours de toute période durant laquelle le transporteur avait la garde des bagages enregistrés. Toutefois, le transporteur n'est pas responsable si et dans la mesure où le dommage résulte de la nature ou du vice propre des bagages. Dans le cas des bagages non enregistrés, notamment des effets personnels, le transporteur est responsable si le dommage résulte de sa faute ou de celle de ses préposés ou mandataires.

3 Si le transporteur admet la perte des bagages enregistrés ou si les bagages enregistrés ne sont pas arrivés à destination dans les vingt et un jours qui suivent la date à laquelle ils auraient dû arriver, le passager est autorisé à faire valoir contre le transporteur les droits qui découlent du contrat de transport.

4 Sous réserve de dispositions contraires, dans la présente convention le terme « bagages » désigne les bagages enregistrés aussi bien que les bagages non enregistrés.

Article 18 — Dommage causé à la marchandise

1 Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de la marchandise par cela seul que le fait qui a causé le dommage s'est produit pendant le transport aérien.

2 Toutefois, le transporteur n'est pas responsable s'il établit, et dans la mesure où il établit, que la destruction, la perte ou l'avarie de la marchandise résulte de l'un ou de plusieurs des faits suivants :

a) la nature ou le vice propre de la marchandise;

b) l'emballage défectueux de la marchandise par une personne autre que le transporteur ou ses préposés ou mandataires;

c) un fait de guerre ou un conflit armé;

d) un acte de l'autorité publique accompli en relation avec l'entrée, la sortie ou le transit de la marchandise.

3 The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4 The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 19 — Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 20 — Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 21 — Compensation in Case of Death or Injury of Passengers

1 For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2 The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

3 Le transport aérien, au sens du paragraphe 1 du présent article, comprend la période pendant laquelle la marchandise se trouve sous la garde du transporteur.

4 La période du transport aérien ne couvre aucun transport terrestre, maritime ou par voie d'eau intérieure effectué en dehors d'un aéroport. Toutefois, lorsqu'un tel transport est effectué dans l'exécution du contrat de transport aérien en vue du chargement, de la livraison ou du transbordement, tout dommage est présumé, sauf preuve du contraire, résulter d'un fait survenu pendant le transport aérien. Si, sans le consentement de l'expéditeur, le transporteur remplace en totalité ou en partie le transport convenu dans l'entente conclue entre les parties comme étant le transport par voie aérienne, par un autre mode de transport, ce transport par un autre mode sera considéré comme faisant partie de la période du transport aérien.

Article 19 — Retard

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.

Article 20 — Exonération

Dans le cas où il fait la preuve que la négligence ou un autre acte ou omission préjudiciable de la personne qui demande réparation ou de la personne dont elle tient ses droits a causé le dommage ou y a contribué, le transporteur est exonéré en tout ou en partie de sa responsabilité à l'égard de cette personne, dans la mesure où cette négligence ou cet autre acte ou omission préjudiciable a causé le dommage ou y a contribué. Lorsqu'une demande en réparation est introduite par une personne autre que le passager, en raison de la mort ou d'une lésion subie par ce dernier, le transporteur est également exonéré en tout ou en partie de sa responsabilité dans la mesure où il prouve que la négligence ou un autre acte ou omission préjudiciable de ce passager a causé le dommage ou y a contribué. Le présent article s'applique à toutes les dispositions de la convention en matière de responsabilité, y compris le paragraphe 1 de l'article 21.

Article 21 — Indemnisation en cas de mort ou de lésion subie par le passager

1 Pour les dommages visés au paragraphe 1 de l'article 17 et ne dépassant pas 100 000 droits de tirage spéciaux par passager, le transporteur ne peut exclure ou limiter sa responsabilité.

2 Le transporteur n'est pas responsable des dommages visés au paragraphe 1 de l'article 17 dans la mesure où ils dépassent 100 000 droits de tirage spéciaux par passager, s'il prouve :

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 22 — Limits of Liability in Relation to Delay, Baggage and Cargo

1 In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.

2 In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3 In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4 In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5 The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6 The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and

a) que le dommage n'est pas dû à la négligence ou à un autre acte ou omission préjudiciable du transporteur, de ses préposés ou de ses mandataires, ou

b) que ces dommages résultent uniquement de la négligence ou d'un autre acte ou omission préjudiciable d'un tiers.

Article 22 — Limites de responsabilité relatives aux retards, aux bagages et aux marchandises

1 En cas de dommage subi par des passagers résultant d'un retard, aux termes de l'article 19, la responsabilité du transporteur est limitée à la somme de 4 150 droits de tirage spéciaux par passager.

2 Dans le transport de bagages, la responsabilité du transporteur en cas de destruction, perte, avarie ou retard est limitée à la somme de 1 000 droits de tirage spéciaux par passager, sauf déclaration spéciale d'intérêt à la livraison faite par le passager au moment de la remise des bagages enregistrés au transporteur et moyennant le paiement éventuel d'une somme supplémentaire. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il prouve qu'elle est supérieure à l'intérêt réel du passager à la livraison.

3 Dans le transport de marchandises, la responsabilité du transporteur, en cas de destruction, de perte, d'avarie ou de retard, est limitée à la somme de 17 droits de tirage spéciaux par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une somme supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

4 En cas de destruction, de perte, d'avarie ou de retard d'une partie des marchandises, ou de tout objet qui y est contenu, seul le poids total du ou des colis dont il s'agit est pris en considération pour déterminer la limite de responsabilité du transporteur. Toutefois, lorsque la destruction, la perte, l'avarie ou le retard d'une partie des marchandises, ou d'un objet qui y est contenu, affecte la valeur d'autres colis couverts par la même lettre de transport aérien ou par le même récépissé ou, en l'absence de ces documents, par les mêmes indications consignées par les autres moyens visés à l'article 4, paragraphe 2, le poids total de ces colis doit être pris en considération pour déterminer la limite de responsabilité.

5 Les dispositions des paragraphes 1 et 2 du présent article ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du transporteur, de ses préposés ou de ses mandataires, fait soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement, pour autant que, dans le cas d'un acte ou d'une omission de préposés ou de mandataires, la preuve soit également apportée que ceux-ci ont agi dans l'exercice de leurs fonctions.

6 Les limites fixées par l'article 21 et par le présent article n'ont pas pour effet d'enlever au tribunal la faculté d'allouer en outre, conformément à sa loi, une somme correspondant à

of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 23 — Conversion of Monetary Units

1 The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2 Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1 500 000 monetary units per passenger in judicial proceedings in their territories; 62 500 monetary units per passenger with respect to paragraph 1 of Article 22; 15 000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogramme with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3 The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

tout ou partie des dépens et autres frais de procès exposés par le demandeur, intérêts compris. La disposition précédente ne s'applique pas lorsque le montant de l'indemnité allouée, non compris les dépens et autres frais de procès, ne dépasse pas la somme que le transporteur a offerte par écrit au demandeur dans un délai de six mois à dater du fait qui a causé le dommage ou avant l'introduction de l'instance si celle-ci est postérieure à ce délai.

Article 23 — Conversion des unités monétaires

1 Les sommes indiquées en droits de tirage spéciaux dans la présente convention sont considérées comme se rapportant au droit de tirage spécial tel que défini par le Fonds monétaire international. La conversion de ces sommes en monnaies nationales s'effectuera, en cas d'instance judiciaire, suivant la valeur de ces monnaies en droit de tirage spécial à la date du jugement. La valeur, en droit de tirage spécial, d'une monnaie nationale d'un État partie qui est membre du Fonds monétaire international, est calculée selon la méthode d'évaluation appliquée par le Fonds monétaire international à la date du jugement pour ses propres opérations et transactions. La valeur, en droit de tirage spécial, d'une monnaie nationale d'un État partie qui n'est pas membre du Fonds monétaire international, est calculée de la façon déterminée par cet État.

2 Toutefois, les États qui ne sont pas membres du Fonds monétaire international et dont la législation ne permet pas d'appliquer les dispositions du paragraphe 1 du présent article, peuvent, au moment de la ratification ou de l'adhésion, ou à tout moment par la suite, déclarer que la limite de responsabilité du transporteur prescrite à l'article 21 est fixée, dans les procédures judiciaires sur leur territoire, à la somme de 1 500 000 unités monétaires par passager; 62 500 unités monétaires par passager pour ce qui concerne le paragraphe 1 de l'article 22; 15 000 unités monétaires par passager pour ce qui concerne le paragraphe 2 de l'article 22; et 250 unités monétaires par kilogramme pour ce qui concerne le paragraphe 3 de l'article 22. Cette unité monétaire correspond à soixante-cinq milligrammes et demi d'or au titre de neuf cents millièmes de fin. Les sommes peuvent être converties dans la monnaie nationale concernée en chiffres ronds. La conversion de ces sommes en monnaie nationale s'effectuera conformément à la législation de l'État en cause.

3 Le calcul mentionné dans la dernière phrase du paragraphe 1 du présent article et la conversion mentionnée au paragraphe 2 du présent article sont effectués de façon à exprimer en monnaie nationale de l'État partie la même valeur réelle, dans la mesure du possible, pour les montants prévus aux articles 21 et 22, que celle qui découlerait de l'application des trois premières phrases du paragraphe 1 du présent article. Les États parties communiquent au dépositaire leur méthode de calcul conformément au paragraphe 1 du présent article ou les résultats de la conversion conformément au paragraphe 2 du présent article, selon le cas, lors du dépôt de leur instrument de ratification, d'acceptation ou d'approbation de la présente convention ou d'adhésion à celle-ci et chaque fois qu'un changement se produit dans cette méthode de calcul ou dans ces résultats.

Article 24 — Review of Limits

1 Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2 If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3 Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25 — Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26 — Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 24 — Révision des limites

1 Sans préjudice des dispositions de l'article 25 de la présente convention et sous réserve du paragraphe 2 ci-dessous, les limites de responsabilité prescrites aux articles 21, 22 et 23 sont révisées par le dépositaire tous les cinq ans, la première révision intervenant à la fin de la cinquième année suivant la date d'entrée en vigueur de la présente convention, ou si la convention n'entre pas en vigueur dans les cinq ans qui suivent la date à laquelle elle est pour la première fois ouverte à la signature, dans l'année de son entrée en vigueur, moyennant l'application d'un coefficient pour inflation correspondant au taux cumulatif de l'inflation depuis la révision précédente ou, dans le cas d'une première révision, depuis la date d'entrée en vigueur de la convention. La mesure du taux d'inflation à utiliser pour déterminer le coefficient pour inflation est la moyenne pondérée des taux annuels de la hausse ou de la baisse des indices de prix à la consommation des États dont les monnaies composent le droit de tirage spécial cité au paragraphe 1 de l'article 23.

2 Si la révision mentionnée au paragraphe précédent conclut que le coefficient pour inflation a dépassé 10 %, le dépositaire notifie aux États parties une révision des limites de responsabilité. Toute révision ainsi adoptée prend effet six mois après sa notification aux États parties. Si, dans les trois mois qui suivent cette notification aux États parties, une majorité des États parties notifie sa désapprobation, la révision ne prend pas effet et le dépositaire renvoie la question à une réunion des États parties. Le dépositaire notifie immédiatement à tous les États parties l'entrée en vigueur de toute révision.

3 Nonobstant le paragraphe 1 du présent article, la procédure évoquée au paragraphe 2 du présent article est applicable à tout moment, à condition qu'un tiers des États parties exprime un souhait dans ce sens et à condition que le coefficient pour inflation visé au paragraphe 1 soit supérieur à 30 % de ce qu'il était à la date de la révision précédente ou à la date d'entrée en vigueur de la présente convention s'il n'y a pas eu de révision antérieure. Les révisions ultérieures selon la procédure décrite au paragraphe 1 du présent article interviennent tous les cinq ans à partir de la fin de la cinquième année suivant la date de la révision intervenue en vertu du présent paragraphe.

Article 25 — Stipulation de limites

Un transporteur peut stipuler que le contrat de transport peut fixer des limites de responsabilité plus élevées que celles qui sont prévues dans la présente convention, ou ne comporter aucune limite de responsabilité.

Article 26 — Nullité des dispositions contractuelles

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente convention.

Article 27 — Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

Article 28 — Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Article 29 — Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30 — Servants, Agents — Aggregation of Claims

1 If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2 The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3 Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 31 — Timely Notice of Complaints

1 Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accor-

Article 27 — Liberté de contracter

Rien dans la présente convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport, de renoncer aux moyens de défense qui lui sont donnés en vertu de la présente convention ou d'établir des conditions qui ne sont pas en contradiction avec les dispositions de la présente convention.

Article 28 — Paiements anticipés

En cas d'accident d'aviation entraînant la mort ou la lésion de passagers, le transporteur, s'il y est tenu par la législation de son pays, versera sans retard des avances aux personnes physiques qui ont droit à un dédommagement pour leur permettre de subvenir à leurs besoins économiques immédiats. Ces avances ne constituent pas une reconnaissance de responsabilité et elles peuvent être déduites des montants versés ultérieurement par le transporteur à titre de dédommagement.

Article 29 — Principe des recours

Dans le transport de passagers, de bagages et de marchandises, toute action en dommages-intérêts, à quelque titre que ce soit, en vertu de la présente convention, en raison d'un contrat ou d'un acte illicite ou pour toute autre cause, ne peut être exercée que dans les conditions et limites de responsabilité prévues par la présente convention, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs. Dans toute action de ce genre, on ne pourra pas obtenir de dommages-intérêts punitifs ou exemplaires ni de dommages à un titre autre que la réparation.

Article 30 — Préposés, mandataires — Montant total de la réparation

1 Si une action est intentée contre un préposé ou un mandataire du transporteur à la suite d'un dommage visé par la présente convention, ce préposé ou mandataire, s'il prouve qu'il a agi dans l'exercice de ses fonctions, pourra se prévaloir des conditions et des limites de responsabilité que peut invoquer le transporteur en vertu de la présente convention.

2 Le montant total de la réparation qui, dans ce cas, peut être obtenu du transporteur, de ses préposés et de ses mandataires, ne doit pas dépasser lesdites limites.

3 Sauf pour le transport de marchandises, les dispositions des paragraphes 1 et 2 du présent article ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du préposé ou du mandataire, fait soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement.

Article 31 — Délais de protestation

1 La réception des bagages enregistrés et des marchandises sans protestation par le destinataire constituera présomption, sauf preuve du contraire, que les bagages et marchandises ont

dance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2 In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3 Every complaint must be made in writing and given or dispatched within the times aforesaid.

4 If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 32 — Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 33 — Jurisdiction

1 An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2 In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3 For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4 Questions of procedure shall be governed by the law of the court seised of the case.

été livrés en bon état et conformément au titre de transport ou aux indications consignées par les autres moyens visés à l'article 3, paragraphe 2, et à l'article 4, paragraphe 2.

2 En cas d'avarie, le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de sept jours pour les bagages enregistrés et de quatorze jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra être faite au plus tard dans les vingt et un jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition.

3 Toute protestation doit être faite par réserve écrite et remise ou expédiée dans le délai prévu pour cette protestation.

4 À défaut de protestation dans les délais prévus, toutes actions contre le transporteur sont irrecevables, sauf le cas de fraude de celui-ci.

Article 32 — Décès de la personne responsable

En cas de décès de la personne responsable, une action en responsabilité est recevable, conformément aux dispositions de la présente convention, à l'encontre de ceux qui représentent juridiquement sa succession.

Article 33 — Juridiction compétente

1 L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'un des États Parties, soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.

2 En ce qui concerne le dommage résultant de la mort ou d'une lésion corporelle subie par un passager, l'action en responsabilité peut être intentée devant l'un des tribunaux mentionnés au paragraphe 1 du présent article ou, eu égard aux spécificités du transport aérien, sur le territoire d'un État partie où le passager a sa résidence principale et permanente au moment de l'accident et vers lequel ou à partir duquel le transporteur exploite des services de transport aérien, soit avec ses propres aéronefs, soit avec les aéronefs d'un autre transporteur en vertu d'un accord commercial, et dans lequel ce transporteur mène ses activités de transport aérien à partir de locaux que lui-même ou un autre transporteur avec lequel il a conclu un accord commercial loue ou possède.

3 Aux fins du paragraphe 2 :

a) « accord commercial » signifie un accord autre qu'un accord d'agence conclu entre des transporteurs et portant sur la prestation de services communs de transport aérien de passagers;

b) « résidence principale et permanente » désigne le lieu unique de séjour fixe et permanent du passager au moment de l'accident. La nationalité du passager ne sera pas le facteur déterminant à cet égard.

4 La procédure sera régie selon le droit du tribunal saisi de l'affaire.

Article 34 — Arbitration

1 Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2 The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3 The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4 The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 35 — Limitation of Actions

1 The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2 The method of calculating that period shall be determined by the law of the court seised of the case.

Article 36 — Successive Carriage

1 In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2 In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3 As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 37 — Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Article 34 — Arbitrage

1 Sous réserve des dispositions du présent article, les parties au contrat de transport de fret peuvent stipuler que tout différend relatif à la responsabilité du transporteur en vertu de la présente convention sera réglé par arbitrage. Cette entente sera consignée par écrit.

2 La procédure d'arbitrage se déroulera, au choix du demandeur, dans l'un des lieux de compétence des tribunaux prévus à l'article 33.

3 L'arbitre ou le tribunal arbitral appliquera les dispositions de la présente convention.

4 Les dispositions des paragraphes 2 et 3 du présent article seront réputées faire partie de toute clause ou de tout accord arbitral, et toute disposition contraire à telle clause ou à tel accord arbitral sera nulle et de nul effet.

Article 35 — Délai de recours

1 L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans à compter de l'arrivée à destination, ou du jour où l'aéronef aurait dû arriver, ou de l'arrêt du transport.

2 Le mode du calcul du délai est déterminé par la loi du tribunal saisi.

Article 36 — Transporteurs successifs

1 Dans les cas de transport régis par la définition du paragraphe 3 de l'article 1, à exécuter par divers transporteurs successifs, chaque transporteur acceptant des voyageurs, des bagages ou des marchandises est soumis aux règles établies par la présente convention, et est censé être une des parties du contrat de transport, pour autant que ce contrat ait trait à la partie du transport effectuée sous son contrôle.

2 Au cas d'un tel transport, le passager ou ses ayants droit ne pourront recourir que contre le transporteur ayant effectué le transport au cours duquel l'accident ou le retard s'est produit, sauf dans le cas où, par stipulation expresse, le premier transporteur aura assuré la responsabilité pour tout le voyage.

3 S'il s'agit de bagages ou de marchandises, le passager ou l'expéditeur aura recours contre le premier transporteur, et le destinataire ou le passager qui a le droit à la délivrance contre le dernier, et l'un et l'autre pourront, en outre, agir contre le transporteur ayant effectué le transport au cours duquel la destruction, la perte, l'avarie ou le retard se sont produits. Ces transporteurs seront solidairement responsables envers le passager, ou l'expéditeur ou le destinataire.

Article 37 — Droit de recours contre des tiers

La présente convention ne préjuge en aucune manière la question de savoir si la personne tenue pour responsable en vertu de ses dispositions a ou non un recours contre toute autre personne.

CHAPTER IV

Combined Carriage

Article 38 — Combined Carriage

1 In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2 Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

CHAPITRE IV

Transport intermodal

Article 38 — Transport intermodal

1 Dans le cas de transport intermodal effectué en partie par air et en partie par tout autre moyen de transport, les dispositions de la présente convention ne s'appliquent, sous réserve du paragraphe 4 de l'article 18, qu'au transport aérien et si celui-ci répond aux conditions de l'article 1.

2 Rien dans la présente convention n'empêche les parties, dans le cas de transport intermodal, d'insérer dans le titre de transport aérien des conditions relatives à d'autres modes de transport, à condition que les stipulations de la présente convention soient respectées en ce qui concerne le transport par air.

CHAPTER V

Carriage by Air Performed by a Person Other Than the Contracting Carrier

Article 39 — Contracting Carrier — Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 40 — Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

Article 41 — Mutual Liability

1 The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment

CHAPITRE V

Transport aérien effectué par une personne autre que le transporteur contractuel

Article 39 — Transporteur contractuel — Transporteur de fait

Les dispositions du présent chapitre s'appliquent lorsqu'une personne (ci-après dénommée « transporteur contractuel ») conclut un contrat de transport régi par la présente convention avec un passager ou un expéditeur ou avec une personne agissant pour le compte du passager ou de l'expéditeur, et qu'une autre personne (ci-après dénommée « transporteur de fait ») effectue, en vertu d'une autorisation donnée par le transporteur contractuel, tout ou partie du transport, mais n'est pas, en ce qui concerne cette partie, un transporteur successif au sens de la présente convention. Cette autorisation est présumée, sauf preuve contraire.

Article 40 — Responsabilité respective du transporteur contractuel et du transporteur de fait

Sauf disposition contraire du présent chapitre, si un transporteur de fait effectue tout ou partie du transport qui, conformément au contrat visé à l'article 39, est régi par la présente convention, le transporteur contractuel et le transporteur de fait sont soumis aux règles de la présente convention, le premier pour la totalité du transport envisagé dans le contrat, le second seulement pour le transport qu'il effectue.

Article 41 — Attribution mutuelle

1 Les actes et omissions du transporteur de fait ou de ses préposés et mandataires agissant dans l'exercice de leurs

shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2 The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

Article 42 — Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only be effective if addressed to the contracting carrier.

Article 43 — Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 44 — Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 45 — Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against

fonctions, relatifs au transport effectué par le transporteur de fait, sont réputés être également ceux du transporteur contractuel.

2 Les actes et omissions du transporteur contractuel ou de ses préposés et mandataires agissant dans l'exercice de leurs fonctions, relatifs au transport effectué par le transporteur de fait, sont réputés être également ceux du transporteur de fait. Toutefois, aucun de ces actes ou omissions ne pourra soumettre le transporteur de fait à une responsabilité dépassant les montants prévus aux articles 21, 22, 23 et 24. Aucun accord spécial aux termes duquel le transporteur contractuel assume des obligations que n'impose pas la présente convention, aucune renonciation à des droits ou moyens de défense prévus par la présente convention ou aucune déclaration spéciale d'intérêt à la livraison, visée à l'article 22 de la présente convention, n'auront d'effet à l'égard du transporteur de fait, sauf consentement de ce dernier.

Article 42 — Notification des ordres et protestations

Les instructions ou protestations à notifier au transporteur, en application de la présente convention, ont le même effet qu'elles soient adressées au transporteur contractuel ou au transporteur de fait. Toutefois, les instructions visées à l'article 12 n'ont d'effet que si elles sont adressées au transporteur contractuel.

Article 43 — Préposés et mandataires

En ce qui concerne le transport effectué par le transporteur de fait, tout préposé ou mandataire de ce transporteur ou du transporteur contractuel, s'il prouve qu'il a agi dans l'exercice de ses fonctions, peut se prévaloir des conditions et des limites de responsabilité applicables, en vertu de la présente convention, au transporteur dont il est le préposé ou le mandataire, sauf s'il est prouvé qu'il a agi de telle façon que les limites de responsabilité ne puissent être invoquées conformément à la présente convention.

Article 44 — Cumul de la réparation

En ce qui concerne le transport effectué par le transporteur de fait, le montant total de la réparation qui peut être obtenu de ce transporteur, du transporteur contractuel et de leurs préposés et mandataires quand ils ont agi dans l'exercice de leurs fonctions, ne peut pas dépasser l'indemnité la plus élevée qui peut être mise à charge soit du transporteur contractuel, soit du transporteur de fait, en vertu de la présente convention, sous réserve qu'aucune des personnes mentionnées dans le présent article ne puisse être tenue pour responsable au-delà de la limite applicable à cette personne.

Article 45 — Notification des actions en responsabilité

Toute action en responsabilité, relative au transport effectué par le transporteur de fait, peut être intentée, au choix du demandeur, contre ce transporteur ou le transporteur contractuel ou contre l'un et l'autre, conjointement ou séparément. Si

only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article 46 — Additional Jurisdiction

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

Article 47 — Invalidity of Contractual Provisions

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

Article 48 — Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

CHAPTER VI

Other Provisions

Article 49 — Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 50 — Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

l'action est intentée contre l'un seulement de ces transporteurs, ledit transporteur aura le droit d'appeler l'autre transporteur en intervention devant le tribunal saisi, les effets de cette intervention ainsi que la procédure qui lui est applicable étant réglés par la loi de ce tribunal.

Article 46 — Juridiction annexe

Toute action en responsabilité, prévue à l'article 45, doit être portée, au choix du demandeur, sur le territoire d'un des États parties, soit devant l'un des tribunaux où une action peut être intentée contre le transporteur contractuel, conformément à l'article 33, soit devant le tribunal du domicile du transporteur de fait ou du siège principal de son exploitation.

Article 47 — Nullité des dispositions contractuelles

Toute clause tendant à exonérer le transporteur contractuel ou le transporteur de fait de leur responsabilité en vertu du présent chapitre ou à établir une limite inférieure à celle qui est fixée dans le présent chapitre est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions du présent chapitre.

Article 48 — Rapports entre transporteur contractuel et transporteur de fait

Sous réserve de l'article 45, aucune disposition du présent chapitre ne peut être interprétée comme affectant les droits et obligations existant entre les transporteurs, y compris tous droits à un recours ou dédommagement.

CHAPITRE VI

Autres dispositions

Article 49 — Obligation d'application

Sont nulles et de nul effet toutes clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence.

Article 50 — Assurance

Les États parties exigent que leurs transporteurs contractent une assurance suffisante pour couvrir la responsabilité qui leur incombe aux termes de la présente convention. Un transporteur peut être tenu, par l'État partie à destination duquel il exploite des services, de fournir la preuve qu'il maintient une assurance suffisante couvrant sa responsabilité au titre de la présente convention.

Article 51 — Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 5, 7 and 8 relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 52 — Definition of Days

The expression "days" when used in this Convention means calendar days, not working days.

CHAPTER VII

Final Clauses

Article 53 — Signature, Ratification and Entry into Force

1 This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28 May 1999, the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.

2 This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in paragraph 2 of Article 1, paragraph 1(b) of Article 3, paragraph (b) of Article 5, Articles 23, 33, 46 and paragraph (b) of Article 57, applies equally to a Regional Economic Integration Organisation. For the purpose of Article 24, the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organisation.

3 This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.

4 Any State or Regional Economic Integration Organisation which does not sign this Convention may accept, approve or accede to it at any time.

5 Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.

6 This Convention shall enter into force on the sixtieth day following the date of deposit of the thirtieth instrument of

Article 51 — Transport effectué dans des circonstances extraordinaires

Les dispositions des articles 3 à 5, 7 et 8 relatives aux titres de transport ne sont pas applicables au transport effectué dans des circonstances extraordinaires en dehors de toute opération normale de l'exploitation d'un transporteur.

Article 52 — Définition du terme « jour »

Lorsque dans la présente convention il est question de jours, il s'agit de jours courants et non de jours ouvrables.

CHAPITRE VII

Dispositions protocolaires

Article 53 — Signature, ratification et entrée en vigueur

1 La présente convention est ouverte à Montréal le 28 mai 1999 à la signature des États participant à la Conférence internationale de droit aérien, tenue à Montréal du 10 au 28 mai 1999. Après le 28 mai 1999, la Convention sera ouverte à la signature de tous les États au siège de l'Organisation de l'aviation civile internationale à Montréal jusqu'à ce qu'elle entre en vigueur conformément au paragraphe 6 du présent article.

2 De même, la présente convention sera ouverte à la signature des organisations régionales d'intégration économique. Pour l'application de la présente convention, une « organisation régionale d'intégration économique » est une organisation constituée d'États souverains d'une région donnée qui a compétence sur certaines matières régies par la Convention et qui a été dûment autorisée à signer et à ratifier, accepter, approuver ou adhérer à la présente convention. Sauf au paragraphe 2 de l'article 1, au paragraphe 1, alinéa b), de l'article 3, à l'alinéa b) de l'article 5, aux articles 23, 33, 46 et à l'alinéa b) de l'article 57, toute mention faite d'un « État partie » ou « d'États parties » s'applique également aux organisations régionales d'intégration économique. Pour l'application de l'article 24, les mentions faites d'« une majorité des États parties » et d'« un tiers des États parties » ne s'appliquent pas aux organisations régionales d'intégration économique.

3 La présente convention est soumise à la ratification des États et des organisations d'intégration économique qui l'ont signée.

4 Tout État ou organisation régionale d'intégration économique qui ne signe pas la présente convention peut l'accepter, l'approuver ou y adhérer à tout moment.

5 Les instruments de ratification d'acceptation, d'approbation ou d'adhésion seront déposés auprès de l'Organisation de l'aviation civile internationale, qui est désignée par les présentes comme dépositaire.

6 La présente convention entrera en vigueur le soixantième jour après la date du dépôt auprès du dépositaire du tren-

ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.

7 For other States and for other Regional Economic Integration Organisations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.

8 The Depositary shall promptly notify all signatories and States Parties of:

(a) each signature of this Convention and date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;

(c) the date of entry into force of this Convention;

(d) the date of the coming into force of any revision of the limits of liability established under this Convention;

(e) any denunciation under Article 54.

Article 54 — Denunciation

1 Any State Party may denounce this Convention by written notification to the Depositary.

2 Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

Article 55 — Relationship with Other Warsaw Convention Instruments

This Convention shall prevail over any rules which apply to international carriage by air:

1 between States Parties to this Convention by virtue of those States commonly being Party to

(a) the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

(b) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);

(c) the *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier*, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

(d) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage*

tième instrument de ratification, d'acceptation, d'approbation ou d'adhésion et entre les États qui ont déposé un tel instrument. Les instruments déposés par les organisations régionales d'intégration économique ne seront pas comptés aux fins du présent paragraphe.

7 Pour les autres États et pour les autres organisations régionales d'intégration économique, la présente convention prendra effet soixante jours après la date du dépôt d'un instrument de ratification, d'acceptation, d'approbation ou d'adhésion.

8 Le dépositaire notifiera rapidement à tous les signataires et à tous les États parties :

a) chaque signature de la présente convention ainsi que sa date;

b) chaque dépôt d'un instrument de ratification, d'acceptation, d'approbation ou d'adhésion ainsi que sa date;

c) la date d'entrée en vigueur de la présente convention;

d) la date d'entrée en vigueur de toute révision des limites de responsabilité établies en vertu de la présente convention;

e) toute dénonciation au titre de l'article 54.

Article 54 — Dénonciation

1 Tout État partie peut dénoncer la présente convention par notification écrite adressée au dépositaire.

2 La dénonciation prendra effet cent quatre-vingt jours après la date à laquelle le dépositaire aura reçu la notification.

Article 55 — Relation avec les autres instruments de la Convention de Varsovie

La présente convention l'emporte sur toutes règles s'appliquant au transport international par voie aérienne :

1) entre États parties à la présente convention du fait que ces États sont communément parties aux instruments suivants :

a) *Convention pour l'unification de certaines règles relatives au transport aérien international*, signée à Varsovie le 12 octobre 1929 (appelée ci-après la Convention de Varsovie);

b) *Protocole portant modification de la Convention pour l'unification de certaines règles relatives au transport aérien international signée à Varsovie le 12 octobre 1929*, fait à La Haye le 28 septembre 1955 (appelé ci-après le Protocole de La Haye);

c) *Convention complémentaire à la Convention de Varsovie, pour l'unification de certaines règles relatives au transport aérien international effectué par une personne autre que le transporteur contractuel*, signée à Guadalajara le 18 septembre 1961 (appelée ci-après la Convention de Guadalajara);

d) *Protocole portant modification de la Convention pour l'unification de certaines règles relatives au transport aé-*

by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);

(e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2 within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

Article 56 — States with More Than One System of Law

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.

3 In relation to a State Party which has made such a declaration:

(a) references in Article 23 to "national currency" shall be construed as referring to the currency of the relevant territorial unit of that State; and

(b) the reference in Article 28 to "national law" shall be construed as referring to the law of the relevant territorial unit of that State.

Article 57 — Reservations

No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:

(a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or

(b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

rien international signée à Varsovie le 12 octobre 1929 amendée par le Protocole fait à La Haye le 28 septembre 1955, signé à Guatemala le 8 mars 1971 (appelé ci-après le Protocole de Guatemala);

e) Protocoles additionnels n^{os} 1 à 3 et Protocole de Montréal n ^{o} 4 portant modification de la Convention de Varsovie amendée par le Protocole de La Haye ou par la Convention de Varsovie amendée par le Protocole de La Haye et par le Protocole de Guatemala, signés à Montréal le 25 septembre 1975 (appelés ci-après les Protocoles de Montréal); ou

2) dans le territoire de tout État partie à la présente convention du fait que cet État est partie à un ou plusieurs des instruments mentionnés aux alinéas a) à e) ci-dessus.

Article 56 — États possédant plus d'un régime juridique

1 Si un État comprend deux unités territoriales ou davantage dans lesquelles des régimes juridiques différents s'appliquent aux questions régies par la présente convention, il peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que ladite convention s'applique à toutes ses unités territoriales ou seulement à l'une ou plusieurs d'entre elles et il peut à tout moment modifier cette déclaration en en soumettant une nouvelle.

2 Toute déclaration de ce genre est communiquée au dépositaire et indique expressément les unités territoriales auxquelles la Convention s'applique.

3 Dans le cas d'un État partie qui a fait une telle déclaration :

a) les références, à l'article 23, à la « monnaie nationale » sont interprétées comme signifiant la monnaie de l'unité territoriale pertinente dudit État;

b) à l'article 28, la référence à la « loi nationale » est interprétée comme se rapportant à la loi de l'unité territoriale pertinente dudit État.

Article 57 — Réserves

Aucune réserve ne peut être admise à la présente convention, si ce n'est qu'un État partie peut à tout moment déclarer, par notification adressée au dépositaire, que la présente convention ne s'applique pas :

a) aux transports aériens internationaux effectués et exploités directement par cet État à des fins non commerciales relativement à ses fonctions et devoirs d'État souverain;

b) au transport de personnes, de bagages et de marchandises effectué pour ses autorités militaires à bord d'aéronefs immatriculés dans ou loués par ledit État partie et dont la capacité entière a été réservée par ces autorités ou pour le compte de celles-ci.

EN FOI DE QUOI les plénipotentiaires soussignés, dûment autorisés, ont signé la présente convention.

DONE at Montreal on the 28th day of May of the year one thousand nine hundred and ninety-nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to this Convention, as well as to all States Parties to the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols.

2001, c. 31, s. 5.

FAIT à Montréal le 28 e jour du mois de mai de l'an mil neuf cent quatre-vingt-dix-neuf dans les langues française, anglaise, arabe, chinoise, espagnole et russe, tous les textes faisant également foi. La présente convention restera déposée aux archives de l'Organisation de l'aviation civile internationale, et le dépositaire en transmettra des copies certifiées conformes à tous les États parties à la Convention de Varsovie, au Protocole de La Haye, à la Convention de Guadalajara, au Protocole de Guatemala et aux Protocoles de Montréal.

2001, ch. 31, art. 5.

CANADA

CONSOLIDATION

CODIFICATION

Statutory Instruments Act

Loi sur les textes réglementaires

R.S.C., 1985, c. S-22

L.R.C. (1985), ch. S-22

Current to February 15, 2016

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R.S.C., 1985, c. S-22

L.R.C., 1985, ch. S-22

An Act to provide for the examination, publication and scrutiny of regulations and other statutory instruments

Loi prévoyant l'examen, la publication et le contrôle des règlements et autres textes réglementaires

Short Title

Short title

1 This Act may be cited as the *Statutory Instruments Act*.

1970-71-72, c. 38, s. 1.

Titre abrégé

Titre abrégé

1 *Loi sur les textes réglementaires*.

1970-71-72, ch. 38, art. 1.

Interpretation

Definitions

2 (1) In this Act,

prescribed means prescribed by regulations made pursuant to this Act; (*Version anglaise seulement*)

regulation means a statutory instrument

(a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament; (*règlement*)

regulation-making authority means any authority authorized to make regulations and, with reference to any particular regulation or proposed regulation, means the authority that made or proposes to make the regulation; (*autorité réglementaire*)

statutory instrument

(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent,

Définitions

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

autorité réglementaire Toute autorité investie du pouvoir de prendre des règlements et, en particulier, l'autorité à l'origine d'un règlement ou projet de règlement donné. (*regulation-making authority*)

règlement Texte réglementaire :

a) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;

b) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.

Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale. (*regulation*)

texte réglementaire

a) Règlement, décret, ordonnance, proclamation, arrêté, règle, règlement administratif, résolution, instruction ou directive, formulaire, tarif de droits, de

commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,

but

(b) does not include

(i) any instrument referred to in paragraph (a) and issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or

(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

(ii) any instrument referred to in paragraph (a) and issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,

(iii) any instrument referred to in paragraph (a) and in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or

(iv) a law made by the Legislature of Yukon, of the Northwest Territories or for Nunavut, a rule made by the Legislative Assembly of Yukon under section 16 of the *Yukon Act*, of the Northwest Territories under section 16 of the *Northwest Territories Act* or of Nunavut under section 21 of the *Nunavut Act* or any instrument issued, made or established under any such law or rule. (*texte réglementaire*)

frais ou d'honoraires, lettres patentes, commission, mandat ou autre texte pris :

(i) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale, avec autorisation expresse de prise du texte et non par simple attribution à quiconque — personne ou organisme — de pouvoirs ou fonctions liés à une question qui fait l'objet du texte,

(ii) soit par le gouverneur en conseil ou sous son autorité, mais non dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) la présente définition exclut :

(i) les textes visés à l'alinéa a) et émanant d'une personne morale constituée sous le régime d'une loi fédérale, sauf s'il s'agit :

(A) de règlements pris par une personne morale responsable en fin de compte, par l'intermédiaire d'un ministre, devant le Parlement,

(B) de textes dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement prévue sous le régime d'une loi fédérale,

(ii) les textes visés à l'alinéa a) et émanant d'un organisme judiciaire ou quasi judiciaire, sauf s'il s'agit de règlements, ordonnances ou règles qui régissent la pratique ou la procédure dans les instances engagées devant un tel organisme constitué sous le régime d'une loi fédérale,

(iii) les textes visés à l'alinéa a) et qui, notamment pour ce qui est de leur production ou de leur communication, sont de droit protégés ou dont le contenu se limite à des avis ou renseignements uniquement destinés à servir ou à contribuer à la prise de décisions, à la fixation d'orientations générales ou à la vérification d'éléments qui y sont nécessairement liés,

(iv) les lois de la Législature du Yukon, de la Législature des Territoires du Nord-Ouest ou de la Législature du Nunavut, les règles établies par l'Assemblée législative du Yukon en vertu de l'article 16 de la *Loi sur le Yukon*, celles établies par l'Assemblée législative des Territoires du Nord-Ouest en vertu de l'article 16 de la *Loi sur les Territoires du Nord-Ouest*, celles établies par l'Assemblée législative du Nunavut en vertu de l'article 21 de la *Loi sur le Nunavut*, ainsi que les textes pris sous le régime de ces lois et règles. (*statutory instrument*)

Determination of whether certain instruments are regulations

(2) In applying the definition *regulation* in subsection (1) for the purpose of determining whether an instrument described in subparagraph (b)(i) of the definition *statutory instrument* in that subsection is a regulation, that instrument shall be deemed to be a statutory instrument, and any instrument accordingly determined to be a regulation shall be deemed to be a regulation for all purposes of this Act.

R.S., 1985, c. S-22, s. 2; 1993, c. 28, s. 78; 1998, c. 15, s. 38; 2002, c. 7, s. 236; 2014, c. 2, s. 27; 2015, c. 33, s. 3(F).

Présomption

(2) Pour déterminer si les textes visés au sous-alinéa b)(i) de la définition de *texte réglementaire* au paragraphe (1) sont des règlements, il faut présumer qu'ils sont des textes réglementaires; s'ils correspondent alors à la définition de *règlement*, ils sont réputés être des règlements pour l'application de la présente loi.

L.R. (1985), ch. S-22, art. 2; 1993, ch. 28, art. 78; 1998, ch. 15, art. 38; 2002, ch. 7, art. 236; 2014, ch. 2, art. 27; 2015, ch. 33, art. 3(F).

Examination of Proposed Regulations

Proposed regulations sent to Clerk of Privy Council

3 (1) Subject to any regulations made pursuant to paragraph 20(a), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

Examination

(2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

(a) it is authorized by the statute pursuant to which it is to be made;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

Advise regulation-making authority

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (2)(a), (b), (c) or (d) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.

Examen des projets de règlement

Envoi au Conseil privé

3 (1) Sous réserve des règlements d'application de l'alinéa 20a), l'autorité réglementaire envoie chacun de ses projets de règlement en trois exemplaires, dans les deux langues officielles, au greffier du Conseil privé.

Examen

(2) À la réception du projet de règlement, le greffier du Conseil privé procède, en consultation avec le sous-ministre de la Justice, à l'examen des points suivants :

a) le règlement est pris dans le cadre du pouvoir conféré par sa loi habilitante;

b) il ne constitue pas un usage inhabituel ou inattendu du pouvoir ainsi conféré;

c) il n'empiète pas indûment sur les droits et libertés existants et, en tout état de cause, n'est pas incompatible avec les fins et les dispositions de la *Charte canadienne des droits et libertés* et de la *Déclaration canadienne des droits*;

d) sa présentation et sa rédaction sont conformes aux normes établies.

Avis à l'autorité réglementaire

(3) L'examen achevé, le greffier du Conseil privé en avise l'autorité réglementaire en lui signalant, parmi les points mentionnés au paragraphe (2), ceux sur lesquels, selon le sous-ministre de la Justice, elle devrait porter son attention.

Application

(4) Paragraph (2)(d) does not apply to any proposed rule, order or regulation governing the practice or procedure in proceedings before the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada or the Court Martial Appeal Court.

R.S., 1985, c. S-22, s. 3; R.S., 1985, c. 31 (1st Supp.), s. 94, c. 51 (4th Supp.), s. 22; 2002, c. 8, s. 174; 2015, c. 33, s. 3(F).

Doubt as to nature of proposed statutory instrument

4 Where any regulation-making authority or other authority responsible for the issue, making or establishment of a statutory instrument, or any person acting on behalf of such an authority, is uncertain as to whether a proposed statutory instrument would be a regulation if it were issued, made or established by that authority, it or he shall cause a copy of the proposed statutory instrument to be forwarded to the Deputy Minister of Justice who shall determine whether or not the instrument would be a regulation if it were so issued, made or established.

R.S., 1985, c. S-22, s. 4; 2015, c. 33, s. 3(F).

Transmission and Registration

Transmission of regulations to Clerk of Privy Council

5 (1) Subject to any regulations made pursuant to paragraph 20(b), every regulation-making authority shall, within seven days after making a regulation, transmit copies of the regulation in both official languages to the Clerk of the Privy Council for registration pursuant to section 6.

Copies to be certified

(2) One copy of each of the official language versions of each regulation that is transmitted to the Clerk of the Privy Council pursuant to subsection (1), other than a regulation made or approved by the Governor in Council, shall be certified by the regulation-making authority to be a true copy thereof.

R.S., 1985, c. S-22, s. 5; R.S., 1985, c. 31 (4th Supp.), s. 102; 2015, c. 33, s. 3(F).

Registration of statutory instruments

6 Subject to subsection 7(1), the Clerk of the Privy Council shall register

(a) every regulation transmitted to him pursuant to subsection 5(1);

(b) every statutory instrument, other than a regulation, that is required by or under any Act of Parliament to be published in the *Canada Gazette* and is so published; and

Application

(4) L'alinéa (2) d) ne s'applique pas aux projets de règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant la Cour suprême du Canada, la Cour d'appel fédérale, la Cour fédérale, la Cour canadienne de l'impôt ou la Cour d'appel de la cour martiale du Canada.

L.R. (1985), ch. S-22, art. 3; L.R. (1985), ch. 31 (1er suppl.), art. 94, ch. 51 (4e suppl.), art. 22; 2002, ch. 8, art. 174; 2015, ch. 33, art. 3(F).

Détermination du caractère de règlement

4 L'autorité réglementaire ou toute autre autorité chargée de prendre des textes réglementaires, ou la personne agissant en son nom, pour qui se pose la question de savoir si un projet de texte réglementaire, une fois pris par elle, constituerait un règlement en envoie un exemplaire au sous-ministre de la Justice, auquel il appartient de trancher la question.

L.R. (1985), ch. S-22, art. 4; 2015, ch. 33, art. 3(F).

Transmission et enregistrement

Transmission au greffier du Conseil privé

5 (1) Sous réserve des règlements d'application de l'alinéa 20b), l'autorité réglementaire, dans les sept jours suivant la prise d'un règlement, en transmet des exemplaires, dans les deux langues officielles, au greffier du Conseil privé pour l'enregistrement prévu à l'article 6.

Certification

(2) L'autorité réglementaire certifie la conformité à l'original de la version française et de la version anglaise de l'un des exemplaires ainsi transmis, sauf s'il s'agit d'un règlement pris ou approuvé par le gouverneur en conseil.

L.R. (1985), ch. S-22, art. 5; L.R. (1985), ch. 31 (4e suppl.), art. 102; 2015, ch. 33, art. 3(F).

Enregistrement des textes réglementaires

6 Sous réserve du paragraphe 7(1), le greffier du Conseil privé enregistre :

a) les règlements qui lui sont transmis en application du paragraphe 5(1);

b) les textes réglementaires — à l'exclusion des règlements — qui doivent être publiés dans la *Gazette du Canada* sous le régime d'une loi fédérale et le sont effectivement;

(c) every statutory instrument or other document that, pursuant to any regulation made under paragraph 20(g), is directed or authorized by the Clerk of the Privy Council to be published in the *Canada Gazette*.

R.S., 1985, c. S-22, s. 6; 1993, c. 34, s. 113(F).

c) les textes réglementaires ou autres documents dont, conformément aux règlements d'application de l'alinéa 20g), il ordonne ou autorise la publication dans la *Gazette du Canada*.

L.R. (1985), ch. S-22, art. 6; 1993, ch. 34, art. 113(F).

Refusal to register

7 (1) Where any statutory instrument is transmitted or forwarded to the Clerk of the Privy Council for registration under this Act, the Clerk of the Privy Council may refuse to register the instrument if

(a) he is not advised that the instrument was, before it was issued, made or established, determined by the Deputy Minister of Justice pursuant to section 4 to be one that would, if it were issued, made or established, not be a regulation; and

(b) in his opinion, the instrument was, before it was issued, made or established, a proposed regulation to which subsection 3(1) applied and was not examined in accordance with subsection 3(2).

Refus d'enregistrement

7 (1) Le greffier du Conseil privé peut refuser d'enregistrer un texte réglementaire dans les cas où :

a) d'une part, il n'a pas été informé du fait que le sous-ministre de la Justice, consulté sur le texte à l'état de projet dans le cadre de l'article 4, avait jugé qu'une fois pris, il ne constituerait pas un règlement;

b) d'autre part, à son avis, le texte à l'état de projet était assujetti au paragraphe 3(1) et n'a pas fait l'objet de l'examen prévu au paragraphe 3(2).

Determination by Deputy Minister of Justice

(2) Where the Clerk of the Privy Council refuses to register any statutory instrument for the reasons referred to in subsection (1), he shall forward a copy of the instrument to the Deputy Minister of Justice who shall determine whether or not it is a regulation.

1970-71-72, c. 38, s. 7.

Décision du sous-ministre de la Justice

(2) Le greffier du Conseil privé envoie un exemplaire de tout texte réglementaire qu'il refuse d'enregistrer pour les raisons mentionnées au paragraphe (1) au sous-ministre de la Justice, auquel il appartient de décider s'il constitue un règlement.

1970-71-72, ch. 38, art. 7.

Power to Revoke Regulations

Revocation of regulations by Governor in Council

8 No regulation is invalid by reason only that it was not examined in accordance with subsection 3(2), but where any statutory instrument that was issued, made or established without having been so examined

(a) was, before it was issued, made or established, determined by the Deputy Minister of Justice pursuant to section 4 to be one that would, if it were issued, made or established, be a regulation, or

(b) has, since its issue, making or establishment, been determined by the Deputy Minister of Justice pursuant to subsection 7(2) to be a regulation,

the Governor in Council, on the recommendation of the Minister of Justice, may, notwithstanding the provisions of the Act by or under the authority of which the instrument was or purports to have been issued, made or es-

Pouvoir d'abroger les règlements

Abrogation des règlements par le gouverneur en conseil

8 Un règlement n'est pas invalide au seul motif qu'il n'a pas fait l'objet de l'examen prévu au paragraphe 3(2). Le gouverneur en conseil peut toutefois, sur la recommandation du ministre de la Justice, abroger en tout ou en partie un texte réglementaire pris sans avoir été ainsi examiné, lorsque le sous-ministre de la Justice :

a) consulté sur le texte à l'état de projet dans le cadre de l'article 4, a jugé qu'une fois pris, il constituerait un règlement;

b) consulté, dans le cadre du paragraphe 7(2), sur le texte une fois pris, a décidé qu'il constituait un règlement.

Le gouverneur en conseil peut exercer ce pouvoir malgré les dispositions de la loi sous le régime de laquelle le texte a ou est censé avoir été pris. Le cas échéant, il fait

tablished, revoke the instrument in whole or in part and thereupon cause the regulation-making authority or other authority by which it was issued, made or established to be notified in writing of that action.

R.S., 1985, c. S-22, s. 8; 2015, c. 33, s. 3(F).

adresser un avis écrit de l'abrogation à l'autorité réglementaire ou autre qui a pris le texte.

L.R. (1985), ch. S-22, art. 8; 2015, ch. 33, art. 3(F).

Coming into Force of Regulations

Coming into force

9 (1) No regulation shall come into force on a day earlier than the day on which it is registered unless

(a) it expressly states that it comes into force on a day earlier than that day and is registered within seven days after it is made, or

(b) it is a regulation of a class that, pursuant to paragraph 20(b), is exempted from the application of subsection 5(1),

in which case it shall come into force, except as otherwise authorized or provided by or under the Act pursuant to which it is made, on the day on which it is made or on such later day as may be stated in the regulation.

Where regulation comes into force before registration

(2) Where a regulation is expressed to come into force on a day earlier than the day on which it is registered, the regulation-making authority shall advise the Clerk of the Privy Council in writing of the reasons why it is not practical for the regulation to come into force on the day on which it is registered.

R.S., 1985, c. S-22, s. 9; 2015, c. 33, s. 3(F).

Entrée en vigueur des règlements

Entrée en vigueur : règle générale

9 (1) L'entrée en vigueur d'un règlement ne peut précéder la date de son enregistrement sauf s'il s'agit :

a) d'un règlement comportant une disposition à cet effet et enregistré dans les sept jours suivant sa prise;

b) d'un règlement appartenant à la catégorie soustraite à l'application du paragraphe 5(1) aux termes de l'alinéa 20b).

Sauf autorisation ou disposition contraire figurant dans sa loi habilitante ou édictée sous le régime de celle-ci, il entre alors en vigueur à la date de sa prise ou à la date ultérieure qui y est indiquée.

Entrée en vigueur antérieure à l'enregistrement

(2) Dans le cas d'un règlement comportant la disposition visée à l'alinéa (1)a), l'autorité réglementaire informe par écrit le greffier du Conseil privé des raisons pour lesquelles il serait contre-indiqué de faire entrer en vigueur le règlement à la date de son enregistrement.

L.R. (1985), ch. S-22, art. 9; 2015, ch. 33, art. 3(F).

Publication in Canada Gazette

Official gazette of Canada

10 (1) The Queen's Printer shall continue to publish the *Canada Gazette* as the official gazette of Canada.

Publication

(2) The Governor in Council may determine the form and manner in which the *Canada Gazette*, or any part of it, is published, including publication by electronic means.

R.S., 1985, c. S-22, s. 10; 2000, c. 5, s. 58.

Publication dans la gazette du Canada

Journal officiel du Canada

10 (1) L'imprimeur de la Reine assure la continuité de publication de la *Gazette du Canada* à titre de journal officiel du Canada.

Modalités de publication

(2) Le gouverneur en conseil peut fixer les modalités de publication — notamment la publication sur support électronique — de tout ou partie de la *Gazette du Canada*.

L.R. (1985), ch. S-22, art. 10; 2000, ch. 5, art. 58.

Regulations to be published in *Canada Gazette*

11 (1) Subject to any regulations made pursuant to paragraph 20(c), every regulation shall be published in the *Canada Gazette* within twenty-three days after copies thereof are registered pursuant to section 6.

No conviction under unpublished regulation

(2) No regulation is invalid by reason only that it was not published in the *Canada Gazette*, but no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the *Canada Gazette* unless

(a) the regulation was exempted from the application of subsection (1) pursuant to paragraph 20(c), or the regulation expressly provides that it shall apply according to its terms before it is published in the *Canada Gazette*; and

(b) it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it.

R.S., 1985, c. S-22, s. 11; R.S., 1985, c. 31 (4th Supp.), s. 103.

Power to direct or authorize publication in *Canada Gazette*

12 Notwithstanding anything in this Act, the Governor in Council may by regulation direct that any statutory instrument or other document, or any class thereof, be published in the *Canada Gazette* and the Clerk of the Privy Council, where authorized by regulations made by the Governor in Council, may direct or authorize the publication in the *Canada Gazette* of any statutory instrument or other document, the publication of which, in his opinion, is in the public interest.

1970-71-72, c. 38, s. 12.

13 [Repealed, 2012, c. 19, s. 476]

Indexes

Quarterly consolidated index of regulations

14 (1) The Clerk of the Privy Council shall prepare and the Queen's Printer shall publish quarterly a consolidated index of all regulations and amendments to regulations in force at any time after the end of the preceding calendar year, other than any regulation that is exempted from the application of subsection 11(1) as a regulation described in subparagraph 20(c)(iii).

Obligation de publier

11 (1) Sous réserve des règlements d'application de l'alinéa 20c), chaque règlement est publié dans la *Gazette du Canada* dans les vingt-trois jours suivant son enregistrement conformément à l'article 6.

Violation d'un règlement non publié

(2) Un règlement n'est pas invalide au seul motif qu'il n'a pas été publié dans la *Gazette du Canada*. Toutefois personne ne peut être condamné pour violation d'un règlement qui, au moment du fait reproché, n'était pas publié sauf dans le cas suivant :

a) d'une part, le règlement était soustrait à l'application du paragraphe (1), conformément à l'alinéa 20c), ou il comporte une disposition prévoyant l'antériorité de sa prise d'effet par rapport à sa publication dans la *Gazette du Canada*;

b) d'autre part, il est prouvé qu'à la date du fait reproché, des mesures raisonnables avaient été prises pour que les intéressés soient informés de la teneur du règlement.

L.R. (1985), ch. S-22, art. 11; L.R. (1985), ch. 31 (4e suppl.), art. 103.

Ordre ou autorisation de publication

12 Malgré les autres dispositions de la présente loi, le gouverneur en conseil peut, par règlement, ordonner la publication dans la *Gazette du Canada* de tous textes réglementaires ou autres documents ou de telles de leurs catégories. Le greffier du Conseil privé, dans les cas où il y est habilité par règlement du gouverneur en conseil et si lui-même l'estime d'intérêt public, peut ordonner ou autoriser la publication dans la *Gazette du Canada* de tels textes ou documents.

1970-71-72, ch. 38, art. 12.

13 [Abrogé, 2012, ch. 19, art. 476]

Répertoires

Répertoire trimestriel des règlements

14 (1) Le greffier du Conseil privé établit et l'imprimeur de la Reine publie trimestriellement un répertoire général des règlements et de leurs modifications en vigueur à un moment donné au cours de l'année civile à laquelle se rapporte le répertoire, à l'exclusion des règlements soustraits à l'application du paragraphe 11(1) conformément au sous-alinéa 20c)(iii).

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Court File No.: A-39-16

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

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

APPLICANT'S RECORD
VOLUME 2
(Appendix "B" – Book of Authorities)

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Applicant

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Solicitor for the Respondent,
Canadian Transportation Agency

TABLE OF CONTENTS OF VOLUME 2

Decision No. 222-A-2010

May 27, 2010

APPLICATION by Duke Jets Ltd. requesting the Canadian Transportation Agency to determine whether a licence is required pursuant to Part II of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended.

File No. M4210-4/D/10021

Duke Jets Ltd. (Duke Jets) applied to the Canadian Transportation Agency (Agency) for a determination as to whether its proposed plan to arrange charter flights on behalf of its clients, constitutes the provision of a publicly available air service for which a licence is required.

Agency licences are issued pursuant to Part II of the *Canada Transportation Act* (CTA) to those who propose to operate a publicly available air service in Canada.

Section 57 of the CTA provides in part that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

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

Duke Jets proposes to act as an agent for its clients to arrange the most suitable charter flights for business travel. Duke Jets' stated contractual responsibility toward its clients is limited to retaining the air services on their behalf. It will contact a variety of charter companies requesting quotes on appropriate aircraft for a particular flight/itinerary. Should the client decide to proceed with booking the aircraft, Duke Jets would then enter into a charter agreement with the air carrier on behalf of the client.

The Agency has carefully considered the request and the information and material provided in support.

172

Duke Jets would be acting as an agent arranging charter flights on behalf of its clients. It would not be assuming the risks nor be entitled to the benefits associated with the operation of an air service nor would it be performing the key functions or have any decision-making authority in respect of the air service. The Agency therefore concludes that Duke Jets would not be operating a publicly available service for which it would require a licence issued by the Agency pursuant to Part II of the CTA.

Accordingly, the Agency has determined that, provided Duke Jets operates its business in the manner described in the application, Duke Jets would not require a licence issued under Part II of the CTA.

Duke Jets is reminded that only air carriers holding a valid Agency licence may enter into an agreement to provide an air service to, from or within Canada. In addition, the air carrier must satisfy the requirements of the *Air Transportation Regulations*, SOR/88-58, as amended, with respect to non-scheduled international entity type charter flights. As such, the charter agreement with the air carrier must clearly indicate that Duke Jets has entered into the agreement on behalf of the named client failing which other regulatory requirements may apply and need to be met.

Members

- Jean-Denis Pelletier, P. Eng.
- J. Mark MacKeigan

Rulings

Go back to Rulings (/decisions)

Date modified:
2012-04-26

Decision No. 42-A-2013

February 8, 2013

APPLICATION by WestJet, on behalf of itself and WestJet Encore Ltd.

File No.: M4161/W221

WestJet, on behalf of itself and WestJet Encore Ltd. (Encore), has applied to the Canadian Transportation Agency (Agency) for a determination as to whether Encore will require Agency licences in respect of a proposed domestic service and a proposed scheduled international service between Canada and the United States of America.

Encore, a wholly-owned subsidiary of WestJet, currently does not hold any licences issued by the Agency. Encore and WestJet have entered into a draft Capacity Purchase Agreement (Agreement) where, in the view of both parties, WestJet would be the entity operating the air services for which it already holds the required licence authorities.

Agency licences are issued pursuant to Part II of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) to persons who propose to operate air services in Canada.

Paragraph 57(*a*) of the CTA states that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

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

The Agency has developed the following four overall factors that it considers relevant in determining whether a person is in fact or will be operating an air service:

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

The Agency has considered the application and the material filed in support.

The Agency has determined that Encore would not be assuming the majority of the risks nor be entitled to the majority of the benefits associated with the operation of the air services. The majority of the risks and benefits associated with the proposed air services would rest with WestJet. In addition, while Encore would be operating aircraft with flight crew with respect to the air services, it would do so on behalf of WestJet and would not be performing the other key strategic functions or have the decision-making authority normally associated with the operation of an air service.

The Agency notes that while there are no exclusivity and non-competition provisions in the Agreement, none are likely required, as Encore is a wholly-owned subsidiary of WestJet and therefore subject to its direction. Finally, WestJet's brand name and logo would be prominently displayed in the delivery of services. The Agency also notes that the flights to be operated would be identified using WestJet's designator code.

The Agency therefore finds that WestJet, and not Encore, would be operating the proposed air services. Accordingly, if the Agreement is executed based on the terms stated to date, Encore will not be required to hold licences for the proposed air services, as described in the application, as its role would be limited to providing aircraft and flight crew to WestJet, for the purpose of providing the subject air services pursuant to WestJet's licences.

In providing the proposed air services, Encore and WestJet must comply with the requirements of section 60 of the CTA and section 8.2 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)) which address the provision of aircraft, with flight crew, to a licensee for the purpose of providing a domestic service and a scheduled international service between Canada and the United States of America, pursuant to the licensee's licences.

As Encore is not a licensee, Agency approval will be required before it can provide aircraft

with flight crew to WestJet for the purpose of providing an air service, pursuant to subsection 8.2(1) of the ATR (Air Transportation Regulations).

The Agency requests that WestJet file a copy of the final executed Agreement within 30 days of its execution. Furthermore, WestJet and Encore must inform the Agency of any material changes to the documents previously filed in support of this application.

Finally, Encore is reminded that should it decide to operate an air service, it will be required to obtain the appropriate licence authority from the Agency. WestJet is also reminded of the public disclosure requirements of section 8.5 and the requirement of paragraph 18(*c*) of the ATR (Air Transportation Regulations).

Member(s)

Geoffrey C. Hare

J. Mark MacKeigan

Rulings

Go back to Rulings (/decisions)

Date modified:
2013-02-11

Decision No. 390-A-2013

October 7, 2013

IN THE MATTER OF determinations of what constitutes an "air service" and the criteria to be applied by the Canadian Transportation Agency.

File No.: M4161-9 PRO

INTRODUCTION

[1] The purpose of this Determination is to inform the air industry of the criteria the Canadian Transportation Agency (Agency) will apply to determine what constitutes an "air service" within the meaning of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA).

[2] The Agency is mandated by Parliament to administer, interpret and enforce the CTA and associated regulations. The Agency is not bound by its past determinations and the interpretation of the CTA by the Agency can evolve in light of its own experience and the evolution of the air transportation industry.

[3] Part II of the CTA applies in respect of air transportation matters and details, among other matters, the applicable licensing requirements that are administered by the Agency. The licensing requirements of the CTA apply to any person who operates or proposes to operate an "air service" in Canada. An "air service" is defined in subsection 55(1) of the CTA as "a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both."

[4] The key element to any Agency determination as to whether a person is operating an air service is determining if the service is publicly available. While the CTA refers to the phrase "publicly available" within its definition of an air service, the term "publicly available" is not

178

defined in the CTA. The Agency has interpreted this expression through its decisions which are rendered on a case-by-case basis, based on the specific facts in each application. The determination as to whether a service involves the transportation by means of an aircraft does not pose the same interpretation issues.

[5] It is clearly within the Agency's jurisdiction to determine, according to the CTA, the basis upon which an air carrier will require a licence for the provision of air services. This necessarily includes the interpretation of the expression "publicly available" which is not defined in the legislation. The Agency has developed an expertise in such interpretations. Pursuant to subsection 41(1) of the CTA, an appeal lies from the Agency to the Federal Court of Appeal on leave on questions of law or questions of jurisdiction. This statutory scheme clearly indicates Parliament's intention that the Agency is responsible for interpreting the provisions of the CTA, subject only to appeal to the Federal Court of Appeal. Furthermore, superior courts have consistently provided deference to the Agency in its interpretation of the CTA. The Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650, 2007 SCC 15 at paras. 98, 100 stated:

> [...] The *Canada Transportation Act* is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes. When interpreting the Act, including its human rights components, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate: *Pushpanathan*, at para. 26.
>
> [...] The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.

[6] Under its current 3-year Strategic Plan, the Agency has committed to modernize its regulatory framework, including by improving the transparency and clarity of the legislation and regulations that it administers pertaining to the air transportation sector. The Agency has also indicated that it will engage stakeholders in this process and take their views into account. This Determination is consistent with this commitment.

[7] While the Agency has rendered numerous decisions on the subject of whether a person is operating an "air service" and specifically, if a "publicly available" service is being operated, the requirement to respect confidentiality has normally precluded the Agency from disclosing

pertinent information and providing detailed reasons in its "public" decisions. This has resulted in little information being provided in the public domain on the Agency's interpretation of what constitutes a publicly available air transportation service.

[8] In addition, the continually evolving nature of the air transportation sector, including the introduction into the market of non-traditional service delivery models, has led the Agency to review the concept of "publicly available" and how it should be interpreted in the context of the objectives of the CTA, in particular of the air licensing regime administered by the Agency.

[9] The Agency, as a result, undertook a review with the intention of articulating a comprehensive set of criteria to assist in the interpretation of what constitutes an air service and, in particular, the concept of "publicly available", that could be shared with interested stakeholders.

[10] The Agency, after completing its initial review, developed a draft Interpretation Note on the "Requirement to Hold an Air Service Licence", which was circulated to a targeted group of stakeholders for their comments.

[11] Three industry stakeholders provided comments to the Agency. In summary, two of the stakeholders stressed that the requirement to hold a licence is subject to a number of consumer and industry economic protection provisions, which are focused on commercial air services. They conclude that a contractual requirement with an "offer, acceptance, and consideration" are all required components of a publicly available service. They contend that case law on the term "publicly available" indicates that the availability need not be utilized, nor be attractive to the entire public body, but only that it is available to the entire public body. Any reservation by the operator of the aircraft regarding access to the operation negates entirely any public factor. They also submit that the operation of corporate aircraft for the transportation of "clients, customers, and guests" is not a publicly available service, as the service is not available to the general public and is entirely at the discretion of the corporate aircraft owner.

[12] One of the stakeholders submits that "the reasonable expectations of the individual and their ability to influence or control their transportation circumstances are central to the consideration of publically available." Where an individual has very little control over the type of transportation, it would be similar to a commercial operation for which a licence should be required. This would apply to corporate aircraft utilized to transport general employees of a company, including sports teams, as well as government aircraft that are used to transport

180

members of the public, such as within a police helicopter or forest firefighters. They also submit that, if there is some form of direct or indirect compensation for the flight, the use of personal aircraft to transport family, friends, and other personal acquaintances should be considered a publicly available service as should the transportation by one Government of another Government's employees.

[13] The Agency, after considering all of the stakeholders' comments, has decided to inform the air industry through this Determination of the criteria that the Agency will apply in interpreting what constitutes an "air service" and, more specifically, when an air service is considered to be "publicly available".

LEGISLATION

[14] Paragraph 57(*a*) of the CTA provides that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

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

[16] Paragraph 86(1)(*k*) of the CTA provides the Agency with the authority to make regulations for the purposes of defining words and expressions for the purposes of Part II of the CTA.

[17] Section 2 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)) defines:

- "passenger" as a person, other than a member of the air crew, who uses an air carrier's domestic service or international service by boarding the air carrier's aircraft pursuant to a valid contract or arrangement; and
- "goods" as anything that can be transported by air, including animals.

AGENCY DETERMINATION

[18] In summary, under the CTA, a person is required to hold an Agency licence to operate an air service that is:

i. provided by means of an aircraft;

ii. for the transportation of passengers and/or goods; and

iii. publicly available.

[19] What constitutes an air service for the purpose of Part II of the CTA and, in particular, when that service is considered to be publicly available are addressed in this Determination.

Purpose of the air licensing requirement

[20] The Agency finds that any interpretation of the expression "publicly available" should be consistent with the purpose behind the CTA requirement for a person to hold an Agency licence.

[21] In this regard, the Agency notes that the requirement to hold a licence subjects the licensee to a number of consumer and industry economic protection provisions of the CTA. The purpose of the air licensing requirement is identified through these consumer and industry economic protection provisions.

[22] For example, the CTA's ownership provisions ensure that only Canadians or Canadian owned and controlled enterprises can operate domestic services, thereby restricting foreign access to the domestic marketplace. Similarly, only Canadians designated by the Minister of Transport as eligible may operate scheduled international services using rights granted to Canada in an air transport agreement or arrangement with another government.

[23] Canadian licence applicants that propose to operate certain air services using aircraft having a certified maximum capacity of 40 or more passengers must also meet the prescribed financial requirements set out in section 8.1 of the ATR (Air Transportation Regulations), before a licence can be issued, which is intended to reduce the risk that underfunded applicants enter the marketplace.

[24] Licensees must also:

- have, display and apply a clear tariff that addresses certain prescribed matters and is reasonable and not unduly discriminatory;
- notify the public when discontinuing certain domestic services; and
- provide for the protection of monies paid in advance by Canadian-originating passengers for certain international charter flights.

182

[25] The consumer and industry economic protection provisions referred to above are set out in Part II of the CTA. These requirements are "economic" and/or "consumer protectionist" in nature, as they serve to:

- limit access to the domestic market to Canadians;
- ensure compliance with international air agreements;
- limit the risk of underfunded applicants from entering the marketplace;
- require that a clear tariff be in place and be disclosed to clarify the terms and conditions of carriage;
- provide any person with access to complaint-based remedies against unreasonable terms and conditions of carriage and certain specified matters relating to fares;
- provide for public notification where the discontinuance of certain scheduled services eliminates or significantly reduces the availability of air services within that market; and,
- provide for the protection of monies paid in advance for certain international charter flights.

[26] In addition to the consumer and industry economic protection provisions referred to above, licensees must also meet the CTA's prescribed liability insurance requirements to hold an air service licence. The requirement to hold insurance, however, is not exclusive to the CTA as the *Aeronautics Act*, R.S.C., 1985, c. A-2 (AA) also requires all persons operating aircraft to meet the prescribed insurance requirements under the AA, if such persons are not already subject to the CTA's air licensing requirements. The CTA's insurance requirements therefore apply only to persons who operate or propose to operate a publicly available air transportation service. Should a person not operate or propose to operate a publicly available air transportation service, this person would nevertheless be subject to the insurance requirements that are otherwise applicable to "all" other aircraft operators. The prescribed insurance requirements of the two acts for commercial operations are essentially identical, with the only noteworthy difference being that the supporting regulations to the CTA, the ATR (Air Transportation Regulations), address the insurance requirements for situations where a licensee utilizes the aircraft and crew of another person in the operation of its own air service.

[27] Additionally, the Agency cannot issue a licence unless the applicant holds a Canadian aviation document (CAD) issued pursuant to the AA and the *Canadian Aviation Regulations,*SOR/96-433 (CAR), which ensure that the operation of an aircraft in Canada is subject to the safety and security requirements that are administered by Transport Canada.

The AA and the CAR establish the requirement to hold a CAD for all persons that operate aircraft in Canada irrespective of whether such persons are required to hold an Agency licence.

[28] Finally, it is noted that Part V of the CTA provides the Agency with the authority to create regulations and adjudicate complaints for the purpose of eliminating from the transportation network undue obstacles to the mobility of persons with disabilities. This authority, however, extends to the transportation network under the legislative authority of Parliament and is not limited or tied to the licensing regime.

[29] As such, the Agency's interpretation of the expression "publicly available" must be aligned with the objectives of the air licensing regime that it administers, which are "economic" and/or "consumer protection" in nature.

[30] In considering the prescribed consumer and industry economic protection provisions, the Agency interprets the CTA's air licensing requirements as intending to apply to the operation of a "commercial" air transportation service that is offered to the public. If a person is not operating a "commercial" air transportation service that is offered to the public, there would be little, if any, need for the CTA's consumer and industry economic protection provisions, such as the requirement to protect the domestic market from foreign competition; to hold additional insurance to that required under the AA; to hold and apply a tariff; to notify the public when discontinuing a service; or to protect advanced payments by passengers. In these cases, the safety and security requirements associated with aircraft operations would continue to be regulated by the AA, as would the requirement for the aircraft operator to hold the prescribed insurance.

[31] The Agency's interpretation of an air service that is publicly available therefore takes into consideration whether the person who provides the service is engaged in the business of transporting persons and/or goods, as part of acommercial undertaking, on aconsideration for service basis.

What is an air service?

[32] The Agency finds that in determining what constitutes an air service, all of its components, as defined in the CTA and the ATR (Air Transportation Regulations), need to be considered together to achieve the intended purpose of the air licensing regime. Specifically, is the service:

184

i. offered and made available to the public?

ii. provided by means of an aircraft?

iii. provided pursuant to a contract or arrangement for the transportation of passengers or goods?

iv. offered for consideration?

[33] Each of these four criteria are discussed below:

(i) Is the service offered and made available to the public?

[34] A publicly available service is one that is offered to the public.

[35] This is the means through which members of the public can become aware of the air service's existence and availability and thereby decide if they would like to utilize the service.

[36] A person who offers an air service to the public may accomplish this through some form of promotion, advertisement or solicitation. The public can be informed by any means, including by voice, print, electronic media, or word of mouth. Promotional material, known routes, schedules, fares, terms and conditions of carriage, or a ticket distribution system are each indicative of a service that is offered to the public.

[37] It is not necessary for a person to extensively or aggressively promote an air service nor is it necessary for all members of the public to be made aware of an air service's existence to meet this requirement. The Agency is of the opinion that the existence of a restriction regarding who may access the air service does not necessarily make it private. All that is required is for a person to offer an air service to a segment or a portion of the general public.

[38] In addition, the person to whom the service is being offered should be able to avail themselves of the service.

[39] The person should be able to contact the air service provider and arrange for air transportation. The method used to obtain the air service could be by telephone, Internet, travel agent, broker, sales agent, sales office or any other means available to the public.

[40] To ensure that an air service reaches an intended user group, the person who operates the service may impose eligibility conditions on the user. While these conditions may be

restrictive, the service could still be considered to be offered and made available to the public if a person, who meets the terms and conditions of carriage, including payment of the appropriate consideration, can access the air service.

(ii) Is the service provided by means of an aircraft?

[41] The determination as to whether a service involves the transportation by means of an aircraft is a straight forward matter that does not pose interpretation issues and, therefore, does not need to be further elaborated on.

(iii) Is the service provided pursuant to a contract or arrangement for the transportation of passengers or goods?

[42] A key component of a publicly available service is that there be a contractual or other arrangement that authorizes the use of the air service. The contract or arrangement creates an obligation on the person who operates the service to provide the air service in return for payment of an agreed consideration.

[43] The requirement that there be a contractual obligation or other arrangement between parties is consistent with the ATR (Air Transportation Regulations)'s definition of a passenger, which is defined as a person that boards the aircraft pursuant to a valid contract or arrangement.

[44] When members of the public do not have a contractual or other right to be transported or have their goods transported by aircraft, then the service would not be a publicly available service and an Agency licence would not be required.

(iv) Is the service offered for consideration?

[45] The commercial nature of the arrangement, on a consideration for service basis, is also a key component of a publicly available service and is consistent with the requirement for the economic and consumer protection provisions of the CTA.

[46] A person's right to use an air service is generally established when such person agrees to provide consideration (including airfare, charge, or other consideration) established by the person that is providing the air service. When the service is provided to a person and there is no contractual obligation to provide the service for consideration, it would not be considered to be an air service and an Agency licence would not be required.

[47] The purchase of a bundled service that includes air transportation would meet the

186

requirement that there be consideration for the air service, irrespective of whether the air service component is advertised as being free (e.g. lodge operator that includes an air service as part of a bundled package).

Private carriage

[48] Having considered the criteria that are required for the operation of an air service, the Agency will now consider private carriage, including the personal use of aircraft and the operation of corporate aircraft.

[49] It is important to distinguish between transporting members of the public and/or goods, and offering and making an air service available to the public. The transportation of a member of the public and/or their goods does not, on its own, necessarily result in the service being publicly available, as everyone is notionally part of the public. A person that is not engaged in the business of transporting passengers and/or goods by aircraft would not be operating a publicly available service only by agreeing to transport a person and/or their goods in a specific instance, whether or not as a one-time only event. For an air service to be publicly available, a person must offer the service to the public, including to a segment or a portion of the general public; in addition, members of the public must be able to enter into a contractual or other arrangement to acquire a right to such air service.

Personal use of aircraft

[50] The operation of an aircraft for personal use, including the transportation of family, friends and other personal acquaintances, is considered to be private carriage and not a publicly available service and, therefore, an Agency licence would not be required to operate this service.

Corporate aircraft

[51] The operation of corporate aircraft by an organization for the use and transportation of its officials, directors, employees, contractors, suppliers, and goods (or those of any parent, affiliated or subsidiary companies) in the conduct of the organization's business is generally also considered to be private carriage and not a publicly available service and, therefore, an Agency licence would not be required to operate this service. The same would apply to the transportation of the organization's clients and customers where the travel is not pursuant to a contract or arrangement for consideration.

DETERMINATION

[52] The Agency finds that an air service includes all of the following four criteria where the service is:

i. offered and made available to the public;

ii. provided by means of an aircraft;

iii. provided pursuant to a contract or arrangement for the transportation of passengers or goods; and

iv. offered for consideration.

[53] Every case is unique and accordingly the Agency will make its determinations based on the merits of each case. The Agency will apply these approved criteria when determining whether a person operates an air service that requires that person to hold an Agency licence.

[54] If a person believes that the criteria set out in this Determination may impact a previous determination of their requirement to hold an Agency licence, they may request the Agency to reconsider the matter.

Member(s)

Geoffrey C. Hare

J. Mark MacKeigan

Rulings

Go back to Rulings (/decisions)

Date modified:
2013-10-08

Decision No. 462-A-2013

December 13, 2013

DETERMINATION by the Canadian Transportation Agency as to whether Angel Flight of British Columbia Society is operating an air service within the meaning of subsection 55(1) of the *Canada Transportation Act*, S.C., 1996, as amended.

File No.: M4161-A1066

INTRODUCTION

[1] In Decision No. 390-A-2013 (/eng/ruling/390-a-2013) (Decision), the Canadian Transportation Agency (Agency) determined that an "air service" is one that is:

1. offered and made available to the public;
2. provided by means of an aircraft;
3. provided pursuant to a contract or arrangement for the transportation of passengers or goods; and
4. offered for consideration.

[2] The Decision also informed the air industry of the criteria that the Agency will apply, going forward, to determine what constitutes an "air service" within the meaning of subsection 55(1) of the *Canada Transportation* Act (CTA). The Agency also stated in the Decision that "If a person believes that the criteria set out in this Determination may impact a previous determination of their requirement to hold an Agency licence, they may request the Agency to reconsider the matter."

190

[3] On October 8, 2013, Agency staff advised Angel Flight of British Columbia Society (Angel Flight) that a case would be opened to review whether Angel Flight is presently operating an air service, based on the four criteria identified in the Decision. Angel Flight responded to specific questions posed by Agency staff that address each of the four criteria.

ISSUE

[4] Is Angel Flight operating an air service?

BACKGROUND

[5] Angel Flight is a charitable, non-profit organization that provides air transportation for persons with cancer or children with certain medical conditions needing medical services at hospitals and centralized medical care facilities in Vancouver and Victoria, British Columbia. Angel Flight's service is provided free of charge.

[6] Angel Flight, using a network of volunteer private pilots and aircraft owners, as well as ground crew support, works with families, doctors, hospital personnel and social workers to arrange for the benevolent flights.

[7] On December 21, 2006, the Agency, in its Order No. 2006-A-671, found that Angel Flight was operating an air service within the meaning of subsection 55(1) of the CTA, in contravention of paragraph 57(*a*) of the CTA. Accordingly, the Agency ordered Angel Flight to cease and desist from operating a publicly available air service without holding a licence for that service.

[8] On January 11, 2007, Angel Flight applied to the Agency for an exemption from the requirement, under paragraph 57(*a*) of the CTA, to hold an Agency licence.

[9] On February 27, 2007, the Agency, by Order No. 2007-A-73 (/eng/ruling/2007-a-73), exempted Angel Flight from the requirement to hold a licence. The exemption was subject to certain conditions. The Agency also concluded that, in light of the exemption granted, Order No. 2006-A-671 (/eng/ruling/2006-a-671) was no longer in effect.

[10] In Decision No. 56-A-2012 (/eng/ruling/56-a-2012), the Agency varied Order No. 2007-A-73 (/eng/ruling/2007-a-73) to permit Angel Flight to operate under its own insurance policy rather than by being named as an additional insured under the policy of the volunteer pilots and aircraft owners.

ANALYSIS AND FINDINGS

[11] Paragraph 57(*a*) of the CTA provides that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

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

[13] The Agency will now consider, based on the four criteria set out in the Decision whether Angel Flight is operating an air service.

[14] The Agency has determined that a publicly available service is one that is offered to the public, typically through some form of promotion, advertisement, or solicitation. This is the means through which members of the public can become aware of the service's existence and availability and thereby decide if they would like to contact the air service provider and arrange for air transportation.

[15] Angel Flight advertises its air transportation service to the public on a number of different mediums, including through radio advertisements and its website. Angel Flight's President and CEO also undertakes speaking engagements, on Angel Flight's behalf, with service clubs on both fund raising and awareness activities.

[16] Members of the public that are interested in Angel Flight's service can apply for a flight by submitting a completed copy of the "Patient Information Sheet" and the "Air Transport Waiver of Liability" form that can be obtained directly from Angel Flight's Web Site or by contacting Angel Flight and requesting a copy.

[17] To be eligible for Angel Flight's service, the person must:

1. be a person with cancer or a child with a medical condition that requires treatment at a health centre in Victoria or Vancouver;
2. be able to walk and climb aboard and out of a small aircraft without any assistance; and
3. receive medical clearance from a medical professional stating that the flight applicant has no condition that precludes the flight applicant from travelling in an unpressurized aircraft at heights of up to 10,000 feet.

[18] If the above conditions are met, Angel Flight will plan and arrange each flight based on

the individual requirements of the flight applicant. Angel Flight indicated to the Agency that it endeavors to grant all requested flights, where its eligibility conditions are met.

[19] The Agency determined in the Decision that to ensure that an air service reaches an intended user group, the person who operates the service may impose eligibility conditions on the user. While these conditions may be restrictive, the service could still be considered to be offered and made available to the public if a person, who meets the terms and conditions of carriage, can access the air service.

[20] The Agency therefore finds that Angel Flight's service, which is provided by means of an aircraft, is offered and made available to the public.

[21] The Agency determined in the Decision that a key component of an air service is that there be a contractual or other arrangement that authorizes the use of the air service. The contract or arrangement creates an obligation on the person who operates the service to provide the air service in return for payment of an agreed consideration.

[22] Angel Flight requires all flight applicants to complete, sign and return the "Patient Information Sheet" and the "Air Transport Waiver of Liability" form for its evaluation. Once Angel Flight receives the duly completed forms, it will assess whether the flight applicant is eligible for its service.

[23] Angel Flight's "Patient Information Sheet" requests general information necessary to plan and arrange the requested flight services. Flight applicants complete and sign the "Air Transport Waiver of Liability" form, in return for being granted the air transportation, wherein the flight applicant and any escort agree to hold harmless Angel Flight, its volunteer pilots and any persons acting on its behalf from any liability.

[24] Angel Flight's service is offered and provided completely free of charge to flight applicants and their escorts.

[25] The Agency therefore finds that Angel Flight's service is not provided pursuant to a contract or arrangement for the transportation of passengers or goods for consideration.

CONCLUSION

[26] While Angel Flight's service is offered and made available to the public and is provided by means of an aircraft, it is not provided pursuant to a contract or arrangement for

consideration. As a result, the Agency finds that Angel Flight's service is not an "air service" within the meaning of subsection 55(1) of the CTA. As such, the Agency finds that the exemption from the requirement to hold a licence issued by Order No. 2007-A-73 (/eng/ruling/2007-a-73), as varied by Decision No. 56-A-2012, is no longer necessary.

[27] Consequently, the Agency, pursuant to section 32 of the CTA, rescinds Order No. 2007-A-73 (/eng/ruling/2007-a-73), as varied by Decision No. 56-A-2012 (/eng/ruling/56-a-2012).

Member(s)

Geoffrey C. Hare

J. Mark MacKeigan

Rulings

Go back to Rulings (/decisions)

Date modified:
2013-12-24

Decision No. 41-A-2014

February 10, 2014

DETERMINATION by the Canadian Transportation Agency on whether Angel Flight Alberta Society is operating an air service within the meaning of subsection 55(1) of the *Canada Transportation Act*, S.C., 1996, as amended.

File No.: M4161-A1086

INTRODUCTION

[1] In Decision No. 390-A-2013 (/eng/ruling/390-a-2013) (Decision), the Canadian Transportation Agency (Agency) determined that an "air service" is one that is:

1. offered and made available to the public;
2. provided by means of an aircraft;
3. provided pursuant to a contract or arrangement for the transportation of passengers or goods; and
4. offered for consideration.

[2] The Decision informed the air industry of the criteria the Agency will apply, going forward, to determine what constitutes an "air service" within the meaning of subsection 55(1) of the *Canada Transportation Act* (CTA). The Agency also stated in the Decision that "If a person believes that the criteria set out in this Determination may impact a previous determination of their requirement to hold an Agency licence, they may request the Agency to reconsider the matter."

196

[3] On January 11, 2014, Angel Flight Alberta Society (Angel Flight Alberta) requested that the Agency review whether Angel Flight Alberta is presently operating an air service, based on the four criteria identified in Agency Decision No. 390-A-2013 (/eng/ruling/390-a-2013). Angel Flight Alberta responded to specific questions posed by Agency staff that address each of the four criteria.

ISSUE

[4] Is Angel Flight Alberta operating an air service?

BACKGROUND

[5] Angel Flight Alberta is a charitable, non-profit organization that provides free air transportation to disadvantaged people in rural Alberta needing medical services at hospitals and centralized medical care facilities in Edmonton and Calgary.

[6] Angel Flight Alberta uses a network of volunteer pilots and aircraft owners to provide the air transportation.

[7] On October 2, 2008, the Agency by way of Order No. 2008-A-395 (/eng/ruling/2008-a-395) found that Angel Flight Alberta was operating an air service, within the meaning of subsection 55(1) of the CTA, in contravention of paragraph 57(*a*) of the CTA. Accordingly, the Agency ordered Angel Flight Alberta to cease and desist from operating a publicly available air service without holding a licence for that service.

[8] On November 3, 2008, the Agency exempted Angel Flight Alberta, by way of Decision No. 566-A-2008, from the requirement to hold a licence. The exemption was subject to certain conditions. The Agency also concluded that, in light of the exemption granted, Order No. 2008-A-395 would no longer be in effect.

ANALYSIS AND FINDINGS

[9] Paragraph 57(*a*) of the CTA provides that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

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

[11] The Agency will now consider, based on the four criteria set out in the Decision, whether

Angel Flight Alberta is operating an air service.

[12] The Agency has determined that a publicly available service is one that is offered to the public, typically through some form of promotion, advertisement, or solicitation. This is the means through which members of the public can become aware of the service's existence and availability and thereby decide if they would like to contact the air service provider and arrange for air transportation.

[13] Angel Flight Alberta's service is advertised to the public on a number of different mediums, including the Internet and through word of mouth from individuals who have benefited from Angel Flight Alberta's service. Angel Flight Alberta's founding director also makes presentations to promote the charitable organization's service.

[14] Members of the public who are interested in Angel Flight Alberta's service can contact Angel Flight Alberta and apply for a flight by submitting a completed copy of the "Patient Information Sheet" and "Air Transport Waiver of Liability" form. These forms can be obtained by contacting Angel Flight Alberta by e-mail or telephone.

[15] To be eligible for Angel Flight Alberta's service, the person must:

1. travel long distances for medical treatment; and
2. receive medical clearance from a medical professional stating that the flight applicant has no condition that precludes the applicant from travelling in an unpressurized aircraft at heights of up to 10,000 feet.

[16] If the above conditions are met, Angel Flight Alberta will plan and arrange each flight based on the individual requirements of the flight applicant. Angel Flight Alberta indicated to the Agency that it endeavors to grant all requested flights, where its eligibility conditions are met.

[17] The Agency determined in the Decision that to ensure that an air service reaches an intended user group, the person who operates the service may impose eligibility conditions on the user. While these conditions may be restrictive, the service could still be considered to be offered and made available to the public if a person, who meets the terms and conditions of carriage, can access the air service.

[18] The Agency therefore finds that Angel Flight Alberta's service, which is provided by

means of an aircraft, is offered and made available to the public.

[19] The Agency determined in the Decision that a key component of an air service is that there be a contractual or other arrangement that authorizes the use of the air service. The contract or arrangement creates an obligation on the person who operates the service to provide the air service in return for payment of an agreed consideration.

[20] Angel Flight Alberta requires all flight applicants to complete, sign and return the "Patient Information Sheet" and the "Air Transport Waiver of Liability" form. Once Angel Flight Alberta receives the duly completed forms, it will assess if the flight applicant is eligible for its service.

[21] Angel Flight Alberta's "Patient Information Sheet" requests general information necessary to plan and arrange the requested flight services. Flight applicants complete and sign the "Air Transport Waiver of Liability" form, in return for being granted the air transportation, wherein the flight applicant and any escort agree to hold harmless Angel Flight Alberta, its volunteer pilots and any persons acting on its behalf from any liability.

[22] According to the "Air Transport Waiver of Liability" form, Angel Flight Alberta's service is offered and provided completely free of charge to the flight applicant and any escort.

[23] The Agency therefore finds that Angel Flight Alberta's service is not provided pursuant to a contract or arrangement for the transportation of passengers or goods for consideration.

CONCLUSION

[24] While Angel Flight Alberta's service is offered and made available to the public and is provided by means of an aircraft, it is not provided pursuant to a contract or arrangement for consideration. As a result, the Agency finds that Angel Flight Alberta's service is not an "air service" within the meaning of subsection 55(1) of the CTA. As such, the Agency finds that the exemption from the requirement to hold a licence issued by Decision No. 566-A-2008 (/eng/ruling/566-a-2008) is no longer necessary.

[25] Consequently, the Agency, pursuant to section 32 of the CTA, rescinds Decision No. 566-A-2008.

Member(s)

Geoffrey C. Hare

Rulings

Go back to Rulings (/decisions)

Date modified:
2014-02-11

200

Decision No. 129-A-2014

April 7, 2014

DETERMINATION by the Canadian Transportation Agency on whether Hope Air is operating an air service within the meaning of subsection 55(1) of the *Canada Transportation Act*, S.C., 1996, as amended.

File No.: M4161/H226

INTRODUCTION

[1] In Decision No. 390-A-2013 (/eng/ruling/390-a-2013) (Decision), the Canadian Transportation Agency (Agency) determined that an "air service" is one that is:

1. offered and made available to the public;
2. provided by means of an aircraft;
3. provided pursuant to a contract or arrangement for the transportation of passengers or goods; and
4. offered for consideration.

[2] The Decision informed the air industry of the criteria the Agency will apply, going forward, to determine what constitutes an "air service" within the meaning of subsection 55(1) of the *Canada Transportation Act* (CTA). The Agency also stated in the Decision that, "If a person believes that the criteria set out in this Determination may impact a previous determination of their requirement to hold an Agency licence, they may request the Agency to reconsider the matter."

202

[3] On January 15, 2014, Hope Air requested that the Agency review whether Hope Air is presently operating an air service, based on the four criteria identified in the Decision. Hope Air responded on March 2, 2014, to specific questions posed by Agency staff that address each of the four criteria.

ISSUE

[4] Is Hope Air operating an air service?

BACKGROUND

[5] Hope Air is a registered, charitable organization that arranges and provides free flights to Canadians who cannot afford the cost of an airline ticket to travel to a medical appointment or specialized medical technologies that usually exist only in larger urban centres.

[6] Hope Air offers the following programs or services to flight applicants:

- The Flight Purchase Programwhere cash donations from donors are used to directly purchase flights on commercial airlines for Canadians in need;

- The Commercial Airline Donation Programwhere Canadian commercial airlines donate seats or flight passes;

- The Volunteer Pilot Programwhere private pilots from across Canada volunteer their time and general aviation aircraft to service communities not well served by commercial airlines; and

- The Business Aviation Program(previously referred to as the Corporate Aviation Program) where eligible corporate aircraft owners donate their aircraft and flight crew to transport the flight applicant on, typically, long-haul routes, where the flight applicant has an immune deficiency and commercial air travel would not be appropriate.

[7] In its Order No. 2006-A-674 (/eng/ruling/2006-a-674) dated December 22, 2006, the Agency determined that Hope Air, with regard to its Volunteer Pilot Program and its Business

Aviation Program, was operating an air service within the meaning of subsection 55(1) of the CTA, in contravention of paragraph 57(*a*) of the CTA. Accordingly, the Agency ordered Hope Air to cease and desist from operating an air service without holding a licence for that service.

[8] In Order No. 2007-A-29 (/eng/ruling/2007-a-29) dated January 26, 2007, the Agency exempted Hope Air from the requirement to hold a licence. The exemption was subject to certain conditions. The Agency also concluded that, in light of the exemption granted, Order No. 2006-A-674 would no longer be in effect.

ANALYSIS AND FINDINGS

[9] Paragraph 57(*a*) of the CTA provides that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

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

[11] The Agency will now consider, based on the four criteria set out in the Decision, whether Hope Air is operating an air service in respect of any of its services, including its Volunteer Pilot Program and Business Aviation Program.

[12] The Agency has determined that a publicly available service is one that is offered to the public, typically through some form of promotion, advertisement, or solicitation. This is the means through which members of the public can become aware of the service's existence and availability and thereby decide if they would like to contact the air service provider and arrange for air transportation.

[13] Hope Air's services are advertised to the public on the Web and other media such as radio, television, brochures, and through word of mouth from a variety of sources in the community, such as family doctors, social workers, hospitals and clinics where flight applicants receive treatment.

[14] Members of the public interested in Hope Air's services can contact Hope Air by e-mail, facsimile, or telephone and can apply for a flight by completing and submitting the online "Flight Request" form. Flight applicants can also contact Hope Air by e-mail, facsimile, or telephone for an interview with a volunteer or staff member who will go through the required "Flight Request" information.

204

[15] To be eligible for Hope Air's services, the person must:

1. travel for approved medical appointment where the cost of the medical treatment is covered by the applicant's provincial health care plan;
2. not be able to afford the cost of the flight;
3. be self-ambulatory and not require any medical services on board the aircraft; and
4. receive medical clearance from a medical professional stating that the flight applicant has no condition that precludes the applicant from travelling in an aircraft.

[16] If the above conditions are met, Hope Air will plan and arrange each flight based on the individual requirements of the flight applicant. Hope Air indicated to the Agency that it endeavors to grant all requested flights, where its eligibility conditions are met.

[17] The Agency determined in the Decision that to ensure that an air service reaches an intended user group, the person who operates the service may impose eligibility conditions on the user. While these conditions may be restrictive, the service could still be considered to be offered and made available to the public if a person, who meets the terms and conditions of carriage, can access the air service.

[18] The Agency therefore finds that Hope Air's services, which are provided by means of an aircraft, are offered and made available to the public.

[19] The Agency also determined in the Decision that a key component of an air service is that there be a contractual or other arrangement that authorizes the use of the air service. The contract or arrangement creates an obligation on the person who operates the service to provide the air service in return for payment of an agreed consideration.

[20] Hope Air requires all flight applicants to complete and submit the online "the Flight Request" forms which is used to plan and arrange the requested flight services and to assess whether the flight applicant meets the above-noted eligibility criteria.

[21] Once Hope Air determines that the flight applicant is eligible for its services, Hope Air will contact the applicant's medical professional to obtain information and confirm whether the applicant is "fit to fly". Subject to the applicant meeting the eligibility requirements and receiving approval from the applicant's medical professional, Hope Air will arrange the air transportation service with its aviation partners.

[22] According to Hope Air, its services are offered and provided completely free of charge to the flight applicant and any escort, nor is any other form of consideration involved.

[23] The Agency therefore finds that Hope Air's services, including its Volunteer Pilot Program and Business Aviation Program, are not provided pursuant to a contract or arrangement for the transportation of passengers or goods for consideration.

CONCLUSION

[24] While Hope Air's services are offered and made available to the public and are provided by means of an aircraft, they are not provided pursuant to a contract or arrangement for consideration. As a result, the Agency finds that Hope Air's services, including its Volunteer Pilot Program and Business Aviation Program, are not an "air service" within the meaning of subsection 55(1) of the CTA. As such, the Agency finds that the exemption from the requirement to hold a licence issued by Order No. 2007-A-29 (/eng/ruling/2007-a-29) is no longer necessary.

[25] Consequently, the Agency, pursuant to section 32 of the CTA, rescinds Order No. 2007-A-29 (/eng/ruling/2007-a-29).

Member(s)

Geoffrey C. Hare

Rulings

Go back to Rulings (/decisions)

Date modified:
2014-04-08

Decision No. 152-A-2014

April 28, 2014

APPLICATION by Air Georgian Limited carrying on business as Air Canada Express.

File No.: M4161/A1185

Air Georgian Limited carrying on business as Air Canada Express (Air Georgian) has applied to the Canadian Transportation Agency (Agency) for a determination on whether it requires Agency licences to operate medium aircraft with flight crew on behalf of Air Canada under a commercial capacity agreement.

Air Georgian is currently licensed to operate domestic, scheduled international and non-scheduled international services, small and all-cargo aircraft. Air Georgian and Air Canada have amended their existing Amended and Restated Commercial Agreement also known as a capacity purchase agreement (CPA).

Under the amended CPA, effective May 1, 2014, Air Georgian will operate five medium aircraft with flight crew in support of Air Canada's domestic service and scheduled international service between Canada and the United States of America. Air Georgian filed an amended draft copy of the amended CPA in support of this application.

Agency licences are issued pursuant to Part II of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) to persons who propose to operate air services in Canada.

Paragraph 57(*a*) of the CTA states that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

Subsection 55(1) of the CTA defines "air service" as "a service, provided by means of an

aircraft, that is publicly available for the transportation of passengers or goods, or both."

The Agency has developed the following four overall factors that it considers relevant in determining whether a person is in fact or will be operating an air service:

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

The Agency has considered the application and the material filed in support.

The Agency has determined that Air Georgian would not be assuming the majority of the risks, nor be entitled to the majority of the benefits associated with the operation of the air services. The majority of the risks and benefits associated with the air services would rest with Air Canada. In addition, while Air Georgian would be operating aircraft with flight crew with respect to the air services, it would do so on behalf of Air Canada and would not be performing the other key strategic functions or have the decision-making authority normally associated with the operation of an air service.

The Agency notes that under the amended CPA, there are exclusivity and non-competition provisions solely to the benefit of Air Canada. In addition, Air Canada's brand name and logo will be prominently displayed in the delivery of the air services. The Agency also notes that the flights to be operated by Air Georgian will be identified using Air Canada's designator code.

The Agency therefore finds that Air Canada, and not Air Georgian, would be operating the air services. Accordingly, if the amended CPA is executed based on the terms stated to date, Air Georgian will not be required to hold licences in respect of the services covered under the amended CPA, as its role would be limited to providing aircraft and flight crew to Air Canada, for the purpose of providing the subject services pursuant to Air Canada's licences.

In providing the air services, Air Georgian and Air Canada must comply with the requirements of section 60 of the CTA and section 8.2 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)) which address the provision of aircraft, with

flight crew, to a licensee for the purpose of providing a domestic service and a scheduled international service, between Canada and the United States of America, using medium aircraft, pursuant to the licensee's licences.

As Air Georgian does not hold licences to operate the services using medium aircraft, Agency approval pursuant to subsection 8.2(1) of the ATR (Air Transportation Regulations) will be required before Air Georgian can provide aircraft with flight crew to Air Canada.

Air Georgian must file a copy of the final executed agreement prior to receiving Agency approval pursuant to subsection 8.2(1) of the ATR (Air Transportation Regulations). Furthermore, Air Georgian and Air Canada must inform the Agency of any material changes to the amended CPA.

Air Georgian is reminded that should it decide to operate air services on its own behalf using medium aircraft, it will be required to obtain the appropriate licence authority from the Agency prior to operating such services. Air Georgian and Air Canada are also reminded of the public disclosure requirements of section 8.5 and the requirement of paragraph 18(*c*) of the ATR (Air Transportation Regulations).

Member(s)

J. Mark MacKeigan

Rulings

Go back to Rulings (/decisions)

Date modified:
2014-04-30

Indexed as:

Dunsmuir v. New Brunswick

David Dunsmuir, Appellant;
v.
Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management, Respondent.

[2008] 1 S.C.R. 190

[2008] S.C.J. No. 9

2008 SCC 9

File No.: 31459.

Supreme Court of Canada

Heard: May 15, 2007;
Judgment: March 7, 2008.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

(173 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Catchwords:

Administrative law -- Judicial review -- Standard of review -- Proper approach to judicial review of administrative decision makers -- Whether judicial review should include only two standards: correctness and reasonableness.

Administrative law -- Judicial review -- Standard of review -- Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of

notice -- Adjudicator interpreting enabling statute as conferring jurisdiction to determine whether discharge was in fact for cause -- Adjudicator holding employer breached duty of procedural fairness and ordering reinstatement -- Whether standard of reasonableness applicable to adjudicator's decision on statutory interpretation issue -- Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, ss. 97(2.1), 100.1(5) -- Civil Service Act, S.N.B. 1984, c. C-5.1, s. 20.

Administrative law -- Natural justice -- Procedural fairness -- Dismissal of public office holders -- Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice -- Employee not informed of reasons for termination or provided with opportunity to respond -- Whether employee entitled to procedural fairness -- Proper approach to dismissal of public employees.

[page191]

Summary:

D was employed by the Department of Justice for the Province of New Brunswick. He held a position under the *Civil Service Act* and was an office holder "at pleasure". His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of his employment. On the third occasion, a formal letter of reprimand was sent to D warning him that his failure to improve his performance would result in further disciplinary action up to and including dismissal. While preparing for a meeting to discuss D's performance review the employer concluded that D was not right for the job. A formal letter of termination was delivered to D's lawyer the next day. Cause for the termination was explicitly not alleged and D was given four months' pay in lieu of notice.

D commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act* ("*PSLRA*"), alleging that the reasons for the employer's dissatisfaction were not made known, that he did not receive a reasonable opportunity to respond to the concerns, that the employer's actions in terminating him were without notice, due process or procedural fairness, and that the length of the notice period was inadequate. The grievance was denied and then referred to adjudication. A preliminary issue of statutory interpretation arose as to whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator held that the referential incorporation of s. 97(2.1) of the *PSLRA* into s. 100.1(5) of that Act meant that he could determine whether D had been discharged or otherwise disciplined for cause. Ultimately, the adjudicator made no finding as to whether the discharge was or was not for cause. In his decision on the merits, he found that the termination letter effected termination with pay in lieu of notice and that the termination was not disciplinary. As D's employment was hybrid in character, the adjudicator held that D was entitled to and did not receive procedural fairness in the employer's decision to terminate his employment. He

declared that the termination was void *ab initio* and ordered D reinstated as of the date of dismissal, adding that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

On judicial review, the Court of Queen's Bench applied the correctness standard and quashed the adjudicator's preliminary decision, concluding that the adjudicator did not have jurisdiction to inquire into the [page192] reasons for the termination, and that his authority was limited to determining whether the notice period was reasonable. On the merits, the court found that D had received procedural fairness by virtue of the grievance hearing before the adjudicator. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the court quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice. The Court of Appeal held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was unreasonable. It found that where the employer elects to dismiss with notice or pay in lieu of notice, s. 97(2.1) of the *PSLRA* does not apply and the employee may only grieve the length of the notice period. It agreed with the reviewing judge that D's right to procedural fairness had not been breached.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ.: Despite its clear, stable constitutional foundations, the system of judicial review in Canada has proven to be difficult to implement. It is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. Notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appears to be illusory. There ought to be only two standards of review: correctness and reasonableness. [para. 32] [para. 34] [para. 41]

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations [page193] that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [paras. 47-50]

An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker with regard to a particular category of question. If the inquiry proves unfruitful, courts must analyze the factors making it possible to identify the proper standard of review. The existence of a privative clause is a strong indication of review pursuant to the reasonableness standard, since it is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. It is not, however, determinative. Where the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, deference will usually apply automatically. Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals, and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*. [paras. 52-62]

The standard of reasonableness applied on the issue of statutory interpretation. While the question of whether the combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice is a question of law, it is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator, who was in fact interpreting his enabling statute. Furthermore, s. 101(1) of the *PSLRA* includes a full privative clause, and the nature of the regime favours the standard of reasonableness. Here, the adjudicator's [page194] interpretation of the law was unreasonable and his decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law. The employment relationship between the parties in this case was governed by private law. The combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* cannot, on any reasonable interpretation, remove the employer's right, under the ordinary rules of contract, to discharge an employee with reasonable notice or pay in lieu thereof without asserting cause. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. [paras. 66-75]

On the merits, D was not entitled to procedural fairness. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness. The principles expressed in *Knight v. Indian Head School Division No. 19* in

relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that *Knight* ignored the important effect of a contract of employment, it should not be followed. In the case at bar, D was a contractual employee in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that as a civil servant he could only be dismissed in accordance with the ordinary rules of contract. To consider a public law duty of fairness issue where such a duty exists falls squarely within the adjudicator's task to resolve a grievance. Where, as here, the relationship is contractual, it was unnecessary to consider any public law duty of procedural fairness. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of D, the adjudicator erred and his decision was therefore correctly struck down. [paras. 76-78] [para. 81] [para. 84] [para. 106] [para. 114] [para. 117]

Per Binnie J.: The majority reasons for setting aside the adjudicator ruling were generally agreed with, however the call of the majority to re-evaluate the pragmatic and functional test and to re-assess "the structure and characteristics of the system of judicial review as a whole" and to develop a principled framework that is [page195] "more coherent and workable" invites a broader reappraisal. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. Litigants find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. The Court should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [paras. 119-122] [para. 133] [para. 145]

The distinction between "patent unreasonableness" and reasonableness *simpliciter* is now to be abandoned. The repeated attempts to explain the difference between the two, was in hindsight, unproductive and distracting. However, a broad reappraisal of the system of judicial review should explicitly address not only administrative tribunals but issues related to other types of administrative bodies and statutory decision makers including mid-level bureaucrats and, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. [paras. 121-123] [paras. 134-135] [para. 140]

It should be presumed that the standard of review of an administrative outcome on grounds of substance is reasonableness. In accordance with the ordinary rules of litigation, it should also be presumed that the decision under review is reasonable until the applicant shows otherwise. An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision rests on an error in the determination of a legal issue not confided (or which constitutionally could not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. Questions of law outside the administrative decision maker's

home statute and closely related rules or statutes which require his or her expertise should also be reviewable on a "correctness" standard whether or not it meets the majority's additional requirement that it be "of central importance to the legal system as a whole". The standard of correctness should also apply to the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. Nobody should have his or her rights, [page196] interests or privileges adversely dealt with by an unjust process. [paras. 127-129] [paras. 146-147]

On the other hand when the application for judicial review challenges the substantive outcome of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended. [para. 130]

Abandonment of the distinction between reasonableness *simpliciter* and patent unreasonableness has important implications. The two different standards addressed not merely "the magnitude or the immediacy of the defect" in the administrative decision but recognized that different administrative decisions command different degrees of deference, depending on who is deciding what. [para. 135]

"Contextualizing" a single standard of "reasonableness" review will shift the courtroom debate from choosing between two standards of reasonableness that each represented a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference. [para. 139]

Thus a single "reasonableness" standard will now necessarily incorporate both the degree of deference owed to the decision maker formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances. The judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. [para. 141] [para. 149]

A single "reasonableness" standard is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making. "Contextualizing" the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives [page197] of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred. In some cases the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant

or others directly affected weighed against the public purpose which is sought to be advanced. In each case careful consideration will have to be given to the reasons given for the decision. This list of "contextual" considerations is non-exhaustive. A reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the administrative outcome is an issue given to another forum to decide. [para. 144] [paras. 151-155]

Per Deschamps, Charron and Rothstein JJ.: Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. In the adjudicative context, decisions on questions of fact, whether undergoing appellate review or administrative law review, always attract deference. When there is a privative clause, deference is owed to the administrative body that interprets the legal rules it was created to interpret and apply. If the body oversteps its delegated powers, if it is asked to interpret laws in respect of which it does not have expertise or if Parliament or a legislature has provided for a statutory right of review, deference is not owed to the decision maker. Finally, when considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court. [paras. 158-164]

Here, the employer's common law right to dismiss without cause was the starting point of the analysis. Since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court can proceed to its own interpretation of the applicable rules and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is essential if s. 97(2.1) of the *PSLRA* is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5) of the *PSLRA*. The adjudicator's failure to inform himself of this crucial difference led him to look for a cause for the dismissal, which was not relevant. Even if deference had been owed to the adjudicator, his interpretation could not have stood. Employment security is so fundamental to an employment relationship [page198] that it could not have been granted by the legislature by providing only that the *PSLRA* was to apply *mutatis mutandis* to non-unionized employees. [paras. 168-171]

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By Bastarache and LeBel JJ.

Referred to: *Chalmers (Dr. Everett) Hospital v. Mills* (1989), 102 N.B.R. (2d) 1; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Mount Sinai Hospital Center v. Quebec*

(Minister of Health and Social Services), [2001] 2 S.C.R. 281, 2001 SCC 41; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *McLeod v. Egan*, [1975] 1 S.C.R. 517; *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Quebec (Commission des [page199] droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Ridge v. Baldwin*, [1963] 2 All E.R. 66; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688; *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis v. Teevan* (1998), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70; *Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278; *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184, aff'd (1991), 118 N.B.R. (2d) 306; *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

By Binnie J.

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History and Disposition:

APPEAL from a judgment of the New Brunswick Court of Appeal (Turnbull, Daigle and Robertson JJ.A.) (2006), 297 N.B.R. (2d) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 2006 CLLC para. 220-030, [2006] N.B.J. No. 118 (QL), 2006 CarswellNB 155, 2006 NBCA 27, affirming a judgment of Rideout J. (2005), 293 N.B.R. (2d) 5, 43 C.C.E.L. (3d) 205, [2005] N.B.J. No. 327 (QL), 2005 CarswellNB 444, 2005 NBQB 270, quashing a preliminary ruling and quashing in part an award made by an adjudicator. Appeal dismissed.

Counsel:

J. Gordon Petrie, Q.C., and *Clarence L. Bennett*, for the appellant.

C. Clyde Spinney, Q.C., and *Keith P. Mullin*, for the respondent.

The judgment of McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ. was delivered by

BASTARACHE and LeBEL JJ.:--

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision [page202] makers or judicial review judges. The time has arrived for a reassessment of the question.

A. *Facts*

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter [page203] first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal."

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a [page204] couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will

> terminate on December 31, 2004. Cause for termination is not alleged.
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> ...
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession ... .

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

[page205]

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board .

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate.

Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be [page206] interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Chalmers (Dr. Everett) Hospital v. Mills* (1989), 102 N.B.R. (2d) 1.

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator [page207] placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. *Judicial History*

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the [page208] relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to

determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions [page209] of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28. However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

[page210]

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A.

reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

[page211]

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's Statutory Interpretation Determination

A. *Judicial Review*

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of

the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, [page212] the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is

constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

[page214]

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. *Reconsidering the Standards of Judicial Review*

34 The current approach to judicial review involves three standards of review, which range from

correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*") [page215], Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its [page216] members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a third standard of review was introduced into Canadian administrative law. The legislative context of

that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the [page217] patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" ... . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when

> the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E.*, notwithstanding the increased [page218] clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, at paras. 101-3). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As [page219] LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision,

> regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness ... .

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at paras. 40-41, *per* LeBel J.

C. *Two Standards of Review*

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 U.T.L.J. 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently [page220] greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 Reasonableness is a deferential standard animated by the principle that underlies the

development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree [page222] of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids

inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[page223]

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a

specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision [page224] maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness [page225] standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the

jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality [page226] and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39.

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[page227]

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails.

Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. *Application*

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

[page228]

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at para. 58; *Voice*

Construction, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *Alberta Union of Provincial Employees v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding [page229] settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Chalmers (Dr. Everett) Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), by simply stating that cause is not alleged" (*ibid.* (emphasis added)). The [page230] adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide or even have such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. [page231] The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

77 Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, [page232] in his view, lack of due process and a breach of procedural fairness.

78 The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. *Duty of Fairness*

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

80 This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

81 We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment [page233] merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of

employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

83 In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

84 Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* [page234] to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

85 In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66, a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative

decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

[page235]

86 The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

87 Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735). In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual ... . [p. 653]
> (See also *Baker*, at para. 20.)

88 In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Director of Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the [page236] individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

89 The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at

pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

90 From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

91 *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness [page237] depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis v. Teevan* (1998), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (C.A.)) .

92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.

(Wade and Forsyth, at pp. 532-33)

93 Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural [page238] justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (H.L.), at p. 1294)

94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (Q.B.), aff'd (1991), 118 N.B.R. (2d) 306 (C.A.)). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

95 Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

96 *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according [page239] to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

97 The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as

> private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

98 If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

99 First, historically, offices were viewed as a form of property, and thus could be recovered by [page240] the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

100 A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

101 A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. 2004), at p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

102 In our view, the existence of a contract of employment, not the public employee's status as an

office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

[page241]

103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment. [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right [page242] to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 95 . But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

106 Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to [page243] a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

107 Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

108 It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A

breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

[page244]

109 In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

110 In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

111 It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

112 In our view, the distinction between office holder and contractual employee for the purposes [page245] of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

113 The starting point, therefore, in any analysis, should be to determine the nature of the

employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, [page246] protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. New Brunswick *Interpretation Act*, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

116 A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. *Conclusion*

117 In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was

unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights [page247] to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

118 We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

The following are the reasons delivered by

119 BINNIE J.:-- I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

120 However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of [page248] an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole.
>
> ...
>
> ... The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

121 The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although

now it is to be called the "standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene ii)

122 I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by [page249] practical considerations: for example, a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

123 Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

124 On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 14:2210.

125 Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion [page250] "has the right to be wrong". This reflects an unduly court-centred view of the

universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. *Limits on the Allocation of Decision Making*

126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

127 Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

128 Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers . This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

[page251]

129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the

requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. Hansard is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor [page252] Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52.

B. *Reasonableness of Outcome*

130 At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

131 In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087 (emphasis deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*. ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation ... ?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (para. 53), and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [page253] [2001] 2 S.C.R. 281, 2001 SCC 41 (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. *The Need to Reappraise the Approach to Judicial Review*

132 The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making. The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

133 People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also [page254] face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D.

Standards of Review

134 My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having

multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court [page255] to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. *Degrees of Deference*

135 The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

136 A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision-making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, or policy decisions [page256] arising out of decisions of major administrative tribunals, as in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

137 Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a

professional body, given the task of determining an appropriate sanction for a member's misconduct (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20).

138 In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

139 The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another [page257] without any overall saving to motorists in time or expense.

140 That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

141 Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. *Multiple Aspects of Administrative Decisions*

142 Mention should be made of a further feature that also reflects the complexity of the subject [page258] matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the

general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11). In the jargon of the judicial review bar, this is known as "segmentation".

G. *The Existence of a Privative Clause*

143 The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the [page259] clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. *A Broader Reappraisal*

144 "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

145 The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some

presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

146 The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be [page260] presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

147 An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

148 When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test of *irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

149 Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter, and* an assessment [page261] of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. *Judging "Reasonableness"*

150 I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The

standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

151 This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate": *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including [page262] the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

152 Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Law Society of New Brunswick v. Ryan*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

153 The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered [page263] together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

154 It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

155 That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. *Application to This Case*

156 Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's [page264] interpretation of his "home turf" statutory framework.

157 Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

The reasons of Deschamps, Charron and Rothstein JJ. were delivered by

158 DESCHAMPS J.:-- The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

159 By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. [page265] Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

160 The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

161 Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology -- "palpable and overriding error" versus "unreasonable decision" -- does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

162 Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, [page266] and the particular context of administrative decision making can make judicial review

different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

163 However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

164 The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

[page267]

165 In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

166 In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

167 I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is

untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more [page268] complex in the administrative law context than in the criminal and civil law contexts.

168 In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

169 It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said:

> An employee to whom section 20 of the *Civil Service Act* and section 100.1 of the *PSLR Act* apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons. [p. 5]

170 The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the [page269] employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment

and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

171 This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

172 In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

[page270]

173 On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

* * * * *

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

92(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(*a*) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(*b*) disciplinary action resulting in discharge, suspension or a financial penalty, and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

...

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a [page271] grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

...

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

...

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Solicitors:

Solicitors for the appellant: Stewart McKelvey, Fredericton.

Solicitor for the respondent: Attorney General of New Brunswick, Fredericton.

cp/e/qllls

Case Name:

Lukács v. Canada (Transportation Agency)

Between
Dr. Gábor Lukács, Appellant, and
Canadian Transportation Agency, Respondent

[2014] F.C.J. No. 301

2014 FCA 76

456 N.R. 186

Docket: A-279-13

Federal Court of Appeal
Halifax, Nova Scotia

Dawson and Webb JJ.A. and Blanchard J.A. (ex officio)

Heard: January 29, 2014.
Judgment: March 19, 2014.

(63 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Administrative law -- Bodies under review -- Nature of body -- Types -- Regulatory agencies -- Powers or functions -- Types -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was

reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Statutory interpretation -- Statutes -- Construction -- By context -- Legislative intent -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Appeal by Lukacs from the Canada Transportation Agency's decision to enact a rule (the "quorum rule") that provided that in all proceedings before the Agency, one member constituted a quorum. Prior to the enactment of the quorum rule, two members of the Agency constituted a quorum. The quorum rule was not made with the approval of the Governor in Council. The appellant took the position that the rules governing the conduct of the proceedings before the Agency were regulations within the meaning of s. 36(1) of the Canada Transportation Act and as such could only be made with the approval of the Governor in Council and that as the rules were originally approved by the Governor in Council, they could not be amended without the approval of the Governor in Council. The Agency argued that the quorum rule was a rule respecting the number of members that were required to hear any matter or perform any function of the Agency and, as such, it could be enacted by the Agency pursuant to the Agency's rule-making power in s. 17 of the Act.

HELD: Appeal dismissed. The appropriate standard of review was reasonableness as the issue was whether the Agency properly interpreted its rule-making power contained in its home statute. The Agency's decision to enact the quorum rule pursuant to its rule-making power, so that the approval of the Governor in Council was not required, was reasonable. A contextual analysis of the Canada Transportation Act suggested that rules held a subsidiary position to orders or regulations, which was consistent with the view that rules were created by the Agency on its own initiative, while order came at the end of an adjudicative process and regulations must be approved by the Governor in Council. Furthermore, the interpretation of "rules" as a subset of "regulation" violated the presumption against tautology. Moreover, whenever "rule" appeared in the Act, it was in the context of internal procedural or non-adjudicative administrative matters and wherever "regulation" appeared in the Act it referred to more than internal, procedural matters. In addition, since the Act specifically required Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure but there was no express requirement for the Agency to do so, the application of the expressio unius maxim was consistent with the interpretation that the Agency's rules were not subject to that requirement. Furthermore, under the former Act, the predecessor of the Agency had the power to make rules with the approval of the Governor in Council. Interpreting

the Act so as to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) was consistent with the purpose of the Agency as envisioned in the Act. The fact that the Governor in Council had approved the Rules in 2005 did not mean that the approval of the Governor in Council was required to amend the rules. Firstly, Governor in Council approval in 2005 was an unnecessary step. Secondly, the quorum rule was new and did not rescind or vary any provision of the rules that was previously approved by the Governor in Council.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 4(1), s. 16(1), s. 17, s. 17(a), s. 17(b), s. 17(c), s. 25, s. 25.1(4), s. 29(1), ss. 34-36, s. 34(1), s. 34(2), s. 36(1), s. 36(2), s. 41, s. 54, s. 86(1), s. 86.1, s. 92(3), s. 109, s. 117(2), s. 128(1), s. 163(1), s. 169.36(1), s. 170

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 2.1

Interpretation Act, R.S.C. 1985, c. I-21, s. 2(1), s. 3(3), s. 15(2)(b), s. 35(1)

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22, s. 22(1)

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)

Counsel:

Dr. Gábor Lukács, the Appellant (on his own behalf).

Simon-Pierre Lessard, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states 'In all proceedings before the Agency, one member constitutes a quorum". The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

2 The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made

with the approval of the Governor in Council.

3 The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

4 The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

5 Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

6 The Act contains a quorum provision that is expressly subjected to the Agency's rules:

> 16. (1) Subject to the Agency's rules, two members constitute a quorum.
>
> * * *
>
> 16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

7 The Agency's rule-making power is as follows:

> 17. The Agency may make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> (*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament. [Emphasis added.]

* * *

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale. [Le souligné est de moi.]

8 The relevant provision of the Act dealing with regulations states:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.
(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

* * *

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.
(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

The Standard of Review

9 The parties disagree about the standard of review to be applied.

10 The appellant argues that the issue of whether the Agency was authorized to enact the Quorum Rule without the approval of the Governor in Council is a true question of jurisdiction, or *vires*. As a result, he submits the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). In oral argument, the appellant also argued that a quorum requirement is a question of law that is both of central importance to the legal system as a whole and outside the Agency's specialized area of expertise so that the validity of the Quorum Rule should be reviewed on the standard of correctness.

11 The respondent counters that in more recent jurisprudence the Supreme Court of Canada has held that true questions of jurisdiction are narrow and exceptional, and that an administrative

tribunal's interpretation of its own statute should be presumed to be reviewable on the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 33 and 39).

12 I agree that what is at issue is whether the Agency properly interpreted its rule-making power contained in its home statute. Pursuant to *Alberta Teachers'*, the presumption of reasonableness review applies. In my view, the presumption of reasonableness review has not been rebutted.

13 As recently discussed by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 N.R. 340, at paragraphs 32 and 33, legislatures do not always speak with clarity. As a result, applying the principles of statutory interpretation may not always provide a single, clear interpretation of a provision. The resolution of unclear language in an administrative agency's home statute is usually best left to the agency, because the choice between competing reasonable interpretations will often involve policy considerations the legislature presumably wanted the agency to decide.

14 For two reasons I reject the assertion that a quorum rule raises a general question of law of central importance to the legal system outside the expertise of the Agency.

15 First, while conceptually quorum requirements are of importance to the fair administration of justice, it does not follow that the Agency's choice between a quorum of one or two members is a question of central importance to the legal system as a whole. In my view, it is not. The Quorum Rule does not seek to define quorum requirements for any other body than the Agency itself.

16 Second, the Supreme Court has rejected such a narrow view of the expertise of an administrative agency or tribunal. It is now recognized that courts may not be as well-qualified as a given agency to provide an interpretation of the agency's home statute that makes sense in the broad policy context in which the agency operates (*McLean*, at paragraphs 30 and 31, citing, among other authorities, *Council of Canadians with Disabilities v. Via Rail, Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 92 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paragraph 25.

17 It follows that the Agency's interpretation of its rule-making authority is a question reviewable on the standard of reasonableness.

18 Before leaving the issue of the standard of review I will deal with two authorities raised by the appellant in reply, which were, as a result, the subject of supplementary written submissions.

19 The two authorities are *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286, and *Yates v. Newfoundland and Labrador (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317.

20 In my view both decisions are distinguishable. At issue in the first case was whether

regulations enacted by the Lieutenant-Governor in Council were *ultra vires*. In the second case, the Court's attention was not drawn to the decisions of the Supreme Court in *Alberta Teachers'* and *McLean*. I am not persuaded either case supports the appellant's position.

The Applicable Principles of Statutory Interpretation

21 Whether rules made under section 17 of the Act must be approved by the Governor in Council depends upon the interpretation to be given to the word "regulation" as used in subsection 36(1) of the Act.

22 The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

24 This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

25 Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

Application of the Principles of Statutory Interpretation

26 I therefore turn to the required textual, contextual and purposive analysis required to answer this question.

(i) Textual Analysis

27 The appellant argues that the definitions of"regulation" found in the *Interpretation Act*, R.S.C. 1985, c. I-21 and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 decide the meaning of "rules" under the Act. The appellant's argument relies on paragraph 15(2)(*b*) of the *Interpretation Act*, which states:

> 15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> [...]
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> * * *
>
> 15. (2) Les dispositions définitoires ou interprétatives d'un texte :
>
> ...
>
> *b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

28 Subsection 2(1) of the *Interpretation Act* provides that:

> 2. (1) In this Act,

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité. [Le souligné est de moi.]

29 Similarly, subsection 2(1) of the *Statutory Instruments Act* provides:

2. (1) In this Act,

"regulation" means a statutory instrument

(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Texte réglementaire :

a) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;

b) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.

Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale. [Le souligné est de moi.]

30 In the alternative, even if the definitions of "regulation"do not formally apply to the Act, the appellant submits that they are declaratory of the usual and ordinary meaning of the word "regulation". It follows, the appellant argues, that the word "regulation" found in subsection 36(1) of the Act includes "rules" made under section 17, so that the Agency was required to obtain the Governor in Council's approval of the Quorum Rule.

31 There are, in my view, a number of difficulties with these submissions.

32 First, the definition of "regulation" in subsection 2(1) of the *Interpretation Act* is preceded by the phrase "In this Act". This is to be contrasted with subsection 35(1) of the *Interpretation Act* which contains definitions that are to be applied "[i]n every enactment". As the word "regulation" is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

33 Similarly, the word "regulation" is defined in the *Statutory Instruments Act* only for the

purpose of that Act.

34 Second, paragraph 15(2)(*b*) of the *Interpretation Act* is subject to the caveat "unless a contrary intention" is evidenced in the enactment under consideration. For reasons developed in the contextual analysis, I am of the view that the Act does demonstrate such a contrary intention.

35 Third, subsection 3(3) of the *Interpretation Act* states that "[n]othing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act." This further limits the application of paragraph 15(2)(*b*) of the *Interpretation Act*.

36 Notwithstanding these difficulties, I agree that there is some potential ambiguity in the plain meaning of the word "regulation"in that in some contexts it can include a "rule". Where the word "regulation"can support more than one ordinary meaning, the meaning of the word plays a lesser role in the interpretive process. I therefore turn to the contextual analysis to read the provisions of the Act as a harmonious whole.

(ii) Contextual Analysis

37 An electronic search of the Act discloses that the word "rule" is used in the order of 11 different provisions, while "regulation"is found in over 30 provisions. In no case are the words used interchangeably. For example, at subsection 4(1) of the Act, "orders and regulations" made under the Act relating to transportation matters take precedence over any "rule, order or regulation" made under any other Act of Parliament. Similarly, under section 25 of the Act, the Agency is granted all powers vested in superior courts to, among other things, enforce "orders and regulations" made under the Act. The absence of reference to "rules" in both provisions suggests rules hold a subsidiary position to orders or regulations. This interpretation is consistent with the view that rules are created by the Agency on its own initiative, while orders come at the end of an adjudicative process and regulations must be approved by the Governor in Council.

38 Other provisions relevant to the contextual analysis are sections 34 and 36 of the Act. Subsection 34(2) requires the Agency to give to the Minister notice of every rule proposed under subsection 34(1) (which deals with the fixing of license and permit fees). Subsection 36(2) similarly requires the Agency to give the Minister notice of every regulation proposed to be made under the Act. If rules are a subset of regulations, subsection 34(2) would be redundant, because the Minister must be notified of all proposed regulations. The interpretation of "rules" as a subset of "regulation" would violate the presumption against tautology, where Parliament is presumed to avoid speaking in vain *(Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] 1 S.C.R. 831, at page 838.

39 Moreover, whenever "rule" appears in the Act it is in the context of internal procedural or non-adjudicative administrative matters. See:

* subsection 16(1): dealing with the quorum requirement;
* subsection 17(*a*): dealing with sittings of the Agency and the carrying on of its work;
* subsection 17(*b*): concerning procedures and business before the Agency, including the circumstances in which hearings may be held in private;
* subsection 17(*c*) dealing with a number of members required to hear any matter or perform any of the functions of the Agency;
* subsection 25.1(4): dealing with the Agency's right to make rules specifying a scale under which costs are taxed;
* subsection 34(1): dealing with fixing fees for, among other things, applications, licenses and permits;
* section 109: dealing with the right of judges of the Federal Court to, with the approval of the Governor in Council, make general rules regarding the practice and procedure of the Court in relation to insolvent railways;
* subsection 163(1): providing that in the absence of agreement to the contrary, the Agency's rules of procedure apply to arbitrations; and
* subsection 169.36(1): dealing with the right of the Agency to make rules of procedure for an arbitration.

40 In contrast, the Act's use of the word"regulations" generally refers to more than merely internal, procedural matters. For example:

* subsection 86(1): the Agency can make regulations relating to air services;
* section 86.1: the Agency shall make regulations respecting advertising of prices for air services within or originating in Canada;
* subsection 92(3): the Agency can make regulations concerning the adequacy of liability insurance for a railway;
* subsection 117(2): the Agency may make regulations with respect to information to be contained in a railway tariff;
* subsection 128(1): the Agency can make regulations relating to the interswitching of rail traffic; and
* section 170: the Agency can make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities.

41 The dichotomy between internal/procedural matters on one hand and external/substantive on the other is reflected in section 54 of the Act, which provides that the appointment of receivers or managers does not relieve them from complying with the Act and with the "orders, regulations, and directions made or issued under this Act". The absence of "rules" from this listing is consistent with the interpretation that, in the context of the Act, rules only apply to procedural matters and not the substantive operations that a receiver or manager would be charged with. This interpretation also accords with the presumption of consistent expression, since it is generally inferred that "[w]hen an

Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning" (*Peach Hill Management Ltd. v. Canada*, [2000] F.C.J. No. 894, 257 N.R. 193, at paragraph 12 (F.C.A.).

42 Another relevant provision is section 109, which requires Federal Court judges to seek approval from the Governor in Council when establishing rules of procedure for matters relating to insolvent railways. Two possible conclusions may be taken from this provision. First, it could imply that the Agency's rules are also subject to Governor in Council approval. Second, it could imply that since Federal Court judges are explicitly required to seek such approval, the absence of that same requirement under section 17 is indicative of Parliament's intent that the Agency is not required to seek such approval.

43 The latter interpretation is, in my view, the better view. It is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*, which in essence states that consistent drafting requires that some legislative silences should be seen as deliberate. While this maxim should be approached with caution, the Supreme Court has relied on similar reasoning to find Parliament's inclusion of express limitations in some sections of an act as evidence Parliament did not intend those limitations to be included in other provisions where the exceptions are not explicitly stated (*Ulybel Enterprises* at paragraph 42).

44 In the present case, since the Act specifically requires Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure, the application of the *exclusio unius* maxim is consistent with the interpretation that the Agency's rules are not subject to this requirement.

45 There is a further, final contextual aid, found in the legislative evolution of the Act. In *Ulybel Enterprises* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act,1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business

before the Agency, including the circumstances in which in camera hearings may be held; and

(*c*) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.

(2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum. [Emphasis added.]

* * *

22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

(2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres. [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

50 The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

51 First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

52 Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

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

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

<u>What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?</u>

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005

stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347, at paragraph 23). As the Agency later reasonably concluded that Governor in Council approval was not required to enact the Quorum Rule, it follows that Governor in Council approval in 2005 was an unnecessary step that does not limit or bind the Agency now or in the future.

61 Second, the Quorum Rule is new. It does not vary or rescind any provision in the Rules that could be said to be previously approved by the Governor in Council.

Conclusion

62 For these reasons, I would dismiss the appeal. In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

63 In the event the parties are unable to reach agreement on the disbursements, they shall be assessed.

DAWSON J.A.
WEBB J.A.:-- I agree.
BLANCHARD J.A. (*ex officio*):-- I agree.

Case Name:

Lukacs v. Canada (Canadian Transportation Agency)

Between
Dr. Gabor Lukacs, Applicant, and
Canadian Transportation Agency et al., Respondents, and
The Privacy Commissioner of Canada, Intervener, and
The Attorney General of Canada, Intervener

[2015] F.C.J. No. 707

[2015] A.C.F. no 707

2015 FCA 140

253 A.C.W.S. (3d) 751

386 D.L.R. (4th) 163

2015 CarswellNat 1893

88 Admin. L.R. (5th) 24

473 N.R. 263

Docket: A-218-14

Federal Court of Appeal
Halifax, Nova Scotia

Ryer, Near and Boivin JJ.A.

Heard: March 17, 2015.
Judgment: June 5, 2015.

(82 paras.)

Government law -- Access to information and privacy -- Access to information -- Inspection of public documents -- Redaction or summation prior to disclosure -- Bars and grounds for refusal -- Protected personal information -- Application by transport passenger advocate for review of

Agency's refusal to provide unredacted copy of public record allowed -- Record related to family's complaint about delayed flight and request for compensation -- Once record of proceedings before Agency placed in public record, it became subject to production to members of public -- Open court principle applied -- Privacy Act, ss. 2, 3, 4, 7, 8, 69.

Transportation law -- Air transportation -- Regulation -- Federal -- Complaints about air carriers -- Canadian Transportation Agency -- Application by transport passenger advocate for review of Agency's refusal to provide unredacted copy of public record allowed -- Record related to family's complaint about delayed flight and request for compensation -- Once record of proceedings before Agency placed in public record, it became subject to production to members of public -- Open court principle applied -- Canadian Transportation Agency Rules, Rules 7, 31.

Application by Lukacs for judicial review of the Canadian Transportation Agency's refusal of his request for an unredacted copy of materials the Agency placed on its public record in a dispute resolution proceeding between Air Canada and a family whose flight from Vancouver to Cancun was delayed. Lukacs was an air transportation passenger advocate. He sought copies of all public documents filed with the Agency in relation to the family's claim for compensation for denied boarding and costs. The Agency asserted that it was bound by the provisions of the Privacy Act to remove personal information from its public record prior to providing a copy to Lukacs.

HELD: Application allowed. The Agency's status as a specialized tribunal did not warrant a divergence from the open court principle. The public record of the proceedings before the tribunal relating to the family's complaint was subject to production in response to a request from a member of the public.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 6, s. 17, s. 25, s. 35

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 1, s. 2(b)

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 23(1), Rule 23(3), Rule 23(4), Rule 23(9)

Canadian Transportation Agency Rules (Dispute Proceedings at Certain Rules Applicable to All Proceedings), SOR/2014-104, Rule 7, Rule 7(2), Rule 31

Federal Courts Rules, SOR/98-106, Rule 151, Rule 151(2), Rule 152

Privacy Act, R.S.C. 1985, c. P-21, s. 2, s. 3, s. 4, s. 7, s. 7(a), s. 7(b), s. 8, s. 8(1), s. 8(2), s. 8(2)(a), s. 8(2)(b), s. 8(2)(m), s. 8(2)(m)(i), s. 69(2)

Counsel:

Dr. Gabor Lukacs, on his own behalf.

Allan Matte, for the Respondent.

Jennifer Seligy, Steven J. Welchner, for the Intervener.

Melissa Chan, for the Attorney General of Canada.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 RYER J.A.:-- Dr. Gabor Lukacs is a Canadian air passenger rights advocate. He brings this application for judicial review of a decision of the Canadian Transportation Agency (the "Agency") to refuse his request for an unredacted copy of the materials that the Agency placed on its public record in a dispute resolution proceeding between Air Canada and a family whose flight from Vancouver to Cancun had been delayed (the "Cancun Matter").

2 The Agency is constituted under the *Canada Transportation Act*, S.C. 1996, c.10 (the "CTA"). The jurisdiction of the Agency is broad, encompassing economic regulatory matters in relation to air, rail and marine transportation in Canada, and adjudicative decision-making in respect of disputes that arise in areas under its jurisdiction.

3 When engaged in adjudicative dispute resolution, the Agency acts in a quasi-judicial capacity, functioning in many respects like a court of law, and members of the Agency, as defined in section 6 of the CTA, function like judges, in many respects.

4 Adjudicative proceedings before a court of law are subject to the open court principle, which generally requires that such proceedings, the materials in the record before the court and the resulting decision must be open and available for public scrutiny, except to the extent that the court otherwise orders.

5 These rights of access to court proceedings, documents and decisions are grounded in common law, as an element of the rule of law, and in the Constitution, as an element of the protection accorded to free expression by s.2(*b*) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c. 11 (the "*Charter*").

6 Court-sanctioned limitations on the rights arising from the open court principle are often

imposed under the procedural rules applicable to the court. In the context of the *Charter*, the appropriateness of requested limitations to the open court principle are determined under a judge-made test requiring the court to consider whether the salutary effects of the requested limitation on the administration of justice outweighs the deleterious effects of that limitation.

7 In responding to Dr. Lukacs' request for the materials on its public record in the Cancun Matter, the Agency acknowledged that it was subject to the open court principle. However, the Agency asserted that, unlike courts of law, the application of that principle to the Agency s public record was circumscribed by the provisions of the *Privacy Act*, R.S.C., 1985, c. P-21 (the *"Privacy Act"*). Thus, before providing the materials to Dr. Lukacs, one of the Agency's administrative employees removed portions of them that she determined to contain personal information ("Personal Information"), as defined in section 3 of the *Privacy Act*.

8 The Agency refused Dr. Lukacs' further request for a copy of the unredacted material on its public record, asserting that subsection 8(1) of the *Privacy Act* prevented it from disclosing Personal Information under its control.

9 Dr. Lukacs brought this application for judicial review challenging the Agency's refusal to provide the unredacted materials on a number of bases. Among his arguments, he asserted that because the requested materials had been placed on the Agency's public record ("Public Record") in accordance with subsection 23(1) of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (the "Old Rules"), all of those materials -- in an unredacted form -- were publicly available ("Publicly Available") within the meaning of subsection 69(2) of the *Privacy Act*, and, as such, the prohibition on disclosure in subsection 8(1) of the *Privacy Act* does not apply to his request.

10 In my view, this argument is persuasive and, accordingly, the Agency's refusal to provide an unredacted copy of the requested materials to Dr. Lukacs is impermissible.

I. BACKGROUND

11 The Agency's decision in the Cancun Matter (Decision 55-C-A-2014) dealt with a claim for compensation for denied boarding and costs from flight delays that was made by a family in relation to a flight from Vancouver to Cancun, Mexico.

12 On February 14, 2014, Dr. Lukacs made a request to the Secretary of the Agency for a copy of all of the public documents that were filed with the Agency in the Cancun Matter.

13 On February 24, 2014, Ms. Patrice Bellerose, a staff employee of the Agency, sent an email to Dr. Lukacs indicating that the Agency would provide the Public Record as soon as they could do so.

14 On March 19, 2014, Ms. Bellerose sent an email to Dr. Lukacs that contained a copy of the materials that had been filed, but portions of those materials were redacted.

15 Ms. Bellerose made the redactions on the basis that section 8 of the *Privacy Act* prevented the Agency from disclosing what she determined to be Personal Information contained in the materials that the Agency placed on its Public Record. Importantly, none of the materials filed in the Cancun Matter was subject to a confidentiality order, which the Agency was empowered to make, pursuant to subsections 23(4) to (9) of the Old Rules, upon request from any person who files a document in any given proceeding.

16 On March 24, 2014, Dr. Lukacs wrote to the Secretary of the Agency requesting "unredacted copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a member of the Agency."

17 On March 26, 2014, Mr. Geoffrey C. Hare, Chairperson and CEO of the Agency, wrote to Dr. Lukacs and, without specifically so stating, refused (the "Refusal") to accede to Dr. Lukacs' request for unredacted copies of the materials (the "Unredacted Materials") in the Cancun Matter.

18 On April 22, 2014, Dr. Lukacs brought this application for judicial review in respect of the Agency's practice of limiting public access to Personal Information in documents filed in the Agency's adjudicative proceedings, specifically challenging the refusal of the Agency to provide him with the Unredacted Materials.

19 The relief sought by Dr. Lukacs is as follows:

1. a declaration that adjudicative proceedings before the Canadian Transportation Agency are subject to the constitutionally protected open-court principle;

2. a declaration that all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings are part of the public record in their entirety, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

3. a declaration that members of the public are now entitled to view all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

4. a declaration that information provided to the Canadian Transportation Agency in the course of adjudicative proceedings fall within the exceptions

of subsections 69(2) and/or 8(2)(*b*) and/or 8(2)(*m*) of the *Privacy Act*, R.S.C. 1985, c. P-21;

5. in the alternative, a declaration that provisions of the *Privacy Act*, R.S.C. 1985, c. P-21 are inapplicable with respect to information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings to the extent that these provisions limit the rights of the public to view such information pursuant to subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms*;

6. a declaration that the power to determine questions related to confidentiality of information provided in the course of adjudicative proceedings before the Canadian Transportation Agency is reserved to Members of the Agency, and cannot be delegated to Agency Staff;

7. an order of *mandamus* directing the Canadian Transportation Agency to provide the Applicant with unredacted copies of the documents in File No. M4120-3/13-05726, or otherwise allow the Applicant and/or others on his behalf to view unredacted copies of these documents;

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

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

20 By order dated December 10, 2014, Stratas J.A. granted the Privacy Commissioner of Canada (the "Privacy Commissioner") leave to intervene in this application on the basis that the application raises issues as to whether certain provisions of the *Privacy Act* provide justification for the Refusal.

21 On November 21, 2014, Dr. Lukacs filed a Notice of Constitutional Question in which he challenged the constitutional validity of certain provisions of the *Privacy Act*. Dr. Lukacs contends that he has a constitutional right under the open court principle, protected by paragraph 2(b) of the *Charter*, to obtain the Unredacted Documents. He submitted that, if any provisions of the *Privacy Act* limit his right to obtain such documents, those provisions infringe paragraph 2(b) of the *Charter*. Further, Dr. Luk cs argues that any infringement is not saved under section 1 of the *Charter*.

22 On March 5, 2015, the Attorney General of Canada filed a Memorandum of Fact and Law and became a party to this application.

II. THE REFUSAL

23 In the Refusal, Chairperson Hare stated that the Agency is a government institution ("Government Institution"), as defined under section 3 of the *Privacy Act*, that is subject to the full application of that legislation. He then referred to sections 8, 10 and 11 of the *Privacy Act* and stated that:

> The purpose of the Act is to protect the privacy of individuals with respect to personal information about themselves held by a government institution. Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution. Also, in accordance with sections 10 and 11 of the Act, personal information under the control of a government institution such as the Agency must be accounted for in either personal information banks or classes of personal information. Because there are no provisions in the Act that grant to government institutions that are subject to the Act, the discretion not to apply those provisions of the Act, personal information under the control of the Agency is not disclosed without the consent of the individual and are accounted for either in personal information banks or classes of personal information and consequently published in InfoSource. This is all consistent with the directions of the Treasury Board Canada Secretariat.
>
> Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's licence number, or credit card or passport details, is not available for consultation.
>
> The file you requested has such sensitive personal information and it has therefore been removed by the Agency as required under the Act.

24 While these reasons do not explicitly so state, it is apparent to me that the Agency concluded that subsection 8(1) of the *Privacy Act* circumscribes the scope and ambit of the open court principle. Thus, the Agency concluded that subsection 8(1) of the *Privacy Act* requires it to redact Personal Information contained in documents placed on its Public Record in dispute resolution proceedings before such documents can be disclosed to a member of the public who requests them.

25 Chairperson Hare's reasons do not explain why any of the disclosure-permissive provisions in the *Privacy Act*, such as paragraphs 8(2)(*a*), (*b*) or (*m*), are inapplicable to Dr. Lukacs' request. Additionally, his reasons do not discuss whether the Personal Information that the Agency redacted, in intended compliance with the non-disclosure requirement in subsection 8(1) of the *Privacy Act*, was Publicly Available.

III. ISSUES

26 This appeal raises two general issues:

(a) whether subsection 8(1) of the *Privacy Act* requires or permits the Agency to refuse to provide the Unredacted Materials to Dr. Lukacs (the "Refusal Issue"); and

(b) if the answer to the first issue is in the affirmative, whether subsection 8(1) of the *Privacy Act* infringes upon Dr. Lukacs' rights under paragraph 2(*b*) of the *Charter* (the "Constitutional Issue").

IV. ANALYSIS

A. Introduction

The open court principle

27 I will begin this analysis by considering what is meant by the open court principle. In the words of Chief Justice McLachlin in her speech "Openness and the Rule of Law" (Annual International Rule of Law Lecture, delivered in London, United Kingdom, 8 January 2014), at page 3:

> The open court principle can be reduced to two fundamental propositions. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form.
>
> [Emphasis added]

28 It is the first aspect of this formulation that is presently in issue. More particularly, the issue under consideration relates to disclosure of documents that were on the Agency's Public Record and formed the basis for its decision in the Cancun Matter.

29 The open court principle has been recognized for over a century, as noted by the Supreme

Court in *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253 at paragraph 31. In that case, Bastarache J. stated at paragraph 33:

> In addition to its longstanding role as a common law rule required by the rule of law, the open court principle gains importance from its clear association with free expression protected by s. 2(*b*) of the Charter. In the context of this appeal, it is important to note that s. 2(*b*) provides that the state must not interfere with an individual's ability to "inspect and copy public records and documents, including judicial records and documents (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at 1328, citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 597). La Forest J. adds at para. 24 of [*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480]: "[e] ssential to the freedom of the press to provide information to the public is the ability of the press to have access to this information" (emphasis added). Section 2(*b*) also protects the ability of the press to have access to court proceedings (*CBC*, at para. 23; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 53).
>
> [Emphasis added]

30 Thus, where the open court principle is unrestricted in its application, a member of the public has a common law and perhaps a constitutional right to inspect and copy all documents that have been placed on the record that is or was before a court.

31 An important consideration is whether there are any limits on the extent of the application of the open court principle. Clearly, there are.

32 In *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385, Dickson J., as he then was, stated at page 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

33 In the context of access to documents, courts generally have procedural rules that permit the filing of documents on a confidential basis where an order to that effect is obtained. For example, sections 151 and 152 of the *Federal Courts Rules*, SOR/98-106 set out a scheme for claiming confidentiality with respect to materials filed in proceedings before the Federal Court and this Court. Importantly, subsection 151(2) of those Rules stipulates that before a confidentiality order can be made, the Court must be satisfied that the material should be treated as confidential,

notwithstanding the public interest in open and accessible court proceedings. Thus, both the Federal Court and this Court are empowered to circumscribe the open court principle in appropriate circumstances.

34 More broadly, limitations on the application of the open court principle have been challenged, in a number of circumstances, on the basis that they infringe upon rights protected under s 2(*b*) of the *Charter*. For example:

(a) A time-limited publication ban to protect the identity of undercover police officers was upheld, but a publication ban on police operational methods was found to be unnecessary (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442);

(b) In connection with the construction and sale of two nuclear reactors by a Crown corporation to China, the Supreme Court granted a confidentiality order with respect to an affidavit that contained sensitive technical information about the ongoing environmental assessment of the construction site by Chinese authorities (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522);

(c) A request for a blanket sealing order with respect to search warrants and supporting information was denied because the party seeking the order failed to show a serious and specific risk to the integrity of a criminal investigation, but editing of the materials was permitted to protect the identity of a confidential informant (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188);

(d) A request for a publication ban prohibiting a newspaper from reporting on settlement negotiations between the federal government and a company with respect to the recovery of public funds in connection with the federal "Sponsorship Program" was denied on the basis that the settlement negotiations were already a matter of public record and a publication ban would stifle the media's exercise of their constitutionally-mandated role to report stories of public interest (*Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592); and

(e) A teenage girl, who was seeking an order to compel disclosure by an internet service provider of information relating to cyber-bullying, was granted permission to proceed anonymously, but a publication ban on

> those parts of the internet materials that did not identify the girl was denied (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567).

35 In determining whether or not it was appropriate to limit the application of the open court principle in each of these matters, the courts adopted the approach taken by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 and *Mentuck* (the so-called *Dagenais/Mentuck* test). This test was described in *Toronto Star Newspapers*, at paragraph 4, as follows:

> Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*

Stated another way, the test is whether the salutary effects of the requested limitation of the open court principle will outweigh the deleterious effects of that limitation.

36 Another important consideration is whether the open court principle applies only to courts or whether it also applies to quasi-judicial tribunals.

> *The Agency and the Open Court Principle*

37 In this application, all parties are agreed that the open court principle applies to the Agency when it undertakes dispute resolution proceedings in its capacity as a quasi-judicial tribunal. Support for this proposition can be found in *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, 327 D.L.R. (4th) 470, at paragraph 22, where Sharpe J.A. stated:

> [22] The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the Charter: *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 184 S.C.R. As Dickson J. stated, at pp. 186-87 S.C.R.: At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance".
>
> [Emphasis added]

However, the Agency asserts that it is nonetheless obliged to first apply section 8 of the *Privacy Act* before it can give effect to the open court principle. This assertion necessitates a consideration of

both the *Privacy Act* and the particular circumstances of the Agency.

The Privacy Act

38 Section 2 of the *Privacy Act* contains Parliament's stipulation as to its purpose. That provision reads as follows:

Purpose

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

* * *

Object

2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

39 The Supreme Court of Canada has elaborated upon the objectives of the *Privacy Act*. In *Lavigne v. Canada*, 2002 SCC 53, [2002] 2 S.C.R. 773 at paragraph 24, Justice Gonthier stated,

> [24] The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by Government Institutions, and second, to provide individuals with a right of access to personal information about themselves...

Several paragraphs later, Justice Gonthier further stated:

> [27] To achieve the objectives of the *Privacy Act*, Parliament has created a detailed scheme for collecting, using and disclosing personal information. First, the Act specifies the circumstances in which personal information may be collected by a government institution, and what use the institution may make of it: only personal information that relates directly to an operating program or activity of the government institution that collects it may be collected (s.4), and it may be used for the purpose for which it was obtained or compiled by the institution or for a use consistent with that purpose, and for a purpose for which the information may be disclosed to the institution under s. 8(2) (s.7). As a rule, personal information may never be disclosed to third parties except with the

consent of the individual to whom it relates (s.8(1)) and subject to the exceptions set out in the Act (s.8(2)).

40 These passages from *Lavigne* indicate the importance of the protection of privacy in relation to Personal Information collected and held by our government and its emanations. However, they also point to a number of specific instances in which such Personal Information can be used and disclosed.

41 The *Privacy Act* applies to Government Institutions. Section 4 of the *Privacy Act* prohibits the collection of Personal Information about individuals unless it relates directly to an operating program or activity of the institution.

42 Once Personal Information has been collected and becomes subject to the control of a Government Institution, paragraph 7(*a*) of the *Privacy Act* limits its use to the purpose for which it was obtained or compiled, or to a use consistent with that purpose. Paragraph 7(*b*) of the *Privacy Act* permits such information to be used for a purpose for which it may be disclosed under subsection 8(2) of the *Privacy Act*.

43 Section 7 of the *Privacy Act* reads as follows:

> **7.** Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except:
>
> (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or
>
> (*b*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).
>
> * * *
>
> **7.** À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci:
>
> *a*) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;
>
> *b*) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

44 Subsection 8(1) of the *Privacy Act* prohibits disclosure of Personal Information under the control of a Government Institution without the consent of the individual, subject to certain exceptions contained in subsection 8(2) of the *Privacy Act*. Subsection 8(1) reads as follows:

> 8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
>
> * * *
>
> 8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

45 Of particular relevance to this appeal are the exceptions to paragraph 8(1) of the *Privacy Act* contained in paragraphs 8(2)(*a*) and (*b*) and sub-paragraph (*m*)(i) of the *Privacy Act*, which read as follows:

> 8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> (*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> ...
>
> (*m*) for any purpose where, in the opinion of the head of the institution,
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure,
>
> * * *
>
> 8. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

> *a*) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
>
> *b*) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;
>
> ...
>
> *m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
>
> (i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

46 A further exemption with respect to the use and disclosure of Personal Information is found in subsection 69(2) of the *Privacy Act*, which reads as follows:

> 69. (2) Sections 7 and 8 do not apply to personal information that is publicly available.
>
> * * *
>
> 69. (2) Les articles 7 et 8 ne s'appliquent pas aux renseignements personnels auxquels le public a accès.

The *Privacy Act* contains no definition of Publicly Available.

The Agency

47 There is no doubt that the Agency falls within the definition of Government Institution. As such, the Agency is bound by the provisions of that legislation. However, this case raises interesting questions as to how the Agency's adjudicative function -- one part of its broad legislative mandate -- is affected by the scope and application of the *Privacy Act*.

48 A helpful description of the Agency and its functions can be found in *Lukacs v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186, wherein, at paragraphs 50 to 53, Justice Dawson of this Court stated:

> [50] the Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.
>
> [51] First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.
>
> [52] Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

49 This description highlights the duality of the Agency's functions. It acts in an administrative capacity, when carrying out its economic regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate. In this latter capacity, the Agency exercises many of the powers, rights and privileges of superior courts (see sections 25 to 35 of the CTA).

The Agency's Rules

50 Section 17 of the CTA empowers the Agency to make rules governing the manner of and procedures for dealing with matters and business that come before it. At the time that Dr. Lukacs brought this application, the Old Rules were in force. They have been superseded by the *Canadian Transportation Agency Rules (Dispute Proceedings at Certain Rules Applicable to All Proceedings*), SOR/2014-104 (the "New Rules").

51 While both sets of Rules relate to proceedings before the Agency, the New Rules are more comprehensive and, in general, apply only to the Agency's dispute resolution proceedings. In an annotated version of the New Rules (the "Annotation") (See: Canadian Transportation Agency, *Annotated Dispute Adjudication Rules* (21 August 2014), online: Canadian Transportation Agency <https://www.otc-cta.gc.ca/eng/publication/annotated-dispute-adjudication-rul es>), the Agency provides the following description of its adjudicative and non-adjudicative functions:

> 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.

[Emphasis added]

52 Both the Old Rules and the New Rules contemplate the commencement of dispute resolution proceedings by the filing of complaint documentation. The New Rules specifically provide that the proceedings do not commence until the application documentation has been accepted by the Agency.

53 Both sets of Rules require that documents filed with the Agency in respect of dispute resolution proceedings must be placed by it on its Public Record. Subsection 23(1) of the Old Rules reads as follows:

Claim for confidentiality

23. (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

* * *

Demande de traitement confidentiel

23. (1) L'Office verse dans ses archives publiques les documents concernant une instance qui sont déposés auprès de lui, à moins que la personne qui les dépose ne présente une demande de traitement confidentiel conformément au présent article.

Subsection 7 of the New Rules reads as follows:

Filing

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

Agency's public record

(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.

* * *

Dépôt

7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Both sets of Rules -- subsections 23(3) to (9) of the Old Rules and section 31 of the New Rules -- empower the Agency to grant confidentiality protection in respect of documents that are filed by parties to the proceedings.

54 The Agency's perspective with respect to the privacy implications of filings made under subsection 7(2) of the New Rules is set forth in the Annotation as follows:

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.
>
> [Emphasis added]

55 There is no definition of Public Record in either the Old Rules or the New Rules.

The Factual Context in this Application

56 It is undisputed that the documents that were requested by Dr. Lukacs were placed by the Agency on its Public Record in the Cancun Matter and that the Agency made no confidentiality order in respect of any of those documents

57 It is equally clear that certain portions of the documents that were provided by the Agency to Dr. Lukacs were redacted. Moreover, those redactions were made by an employee of the Agency, not by a member of the Agency carrying out a quasi-judicial function.

B. The Refusal Issue

The Standard of Review

58 The issue is whether the Agency, acting through its Chairperson, erred in concluding that subsection 8(1) of the *Privacy Act* required it to redact Personal Information contained in the documents on its Public Record in the Cancun Matter, before disclosing those documents to Dr. Lukacs in response to his request.

59 In accordance with this Court's decision in *Nault v. Canada (Public Works and Government Services)*, 2011 FCA 263, 425 N.R. 160 at paragraph 19, citing *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at paragraphs 14 to 19, the standard of review applicable to the decision of the head of a Government Institution to refuse to disclose documents containing Personal Information is correctness. *Nault* also stipulates that the interpretation of provisions of the *Privacy Act* that are

relevant to the refusal to disclose is also to be reviewed on the standard of correctness.

The Positions of the Parties

60 The determination of the correctness of the Refusal requires the interpretation of a number of provisions of the *Privacy Act*.

61 By virtue of subsection 69(2) of the *Privacy Act*, it is clear that the prohibition on disclosure of Personal Information in subsection 8(1) of the *Privacy Act* is inapplicable in respect of Personal Information that is Publicly Available.

62 Thus, if the documents placed by the Agency on its Public Record in the Cancun Matter are Publicly Available, then the redactions made to them on behalf of the Agency were impermissible and, without more, the application for judicial review must be allowed.

Dr. Lukacs' Submission -- "Publicly Available"

63 Dr. Lukacs argues that he is entitled to receive the Unredacted Documents because they were placed on the Agency's Public Record and, accordingly, any Personal Information that might be contained in them is Publicly Available. As such, he asserts that the prohibition in subsection 8(1) of the *Privacy Act* is inapplicable.

The Agency's Position -- "Publicly Available"

64 Counsel for the Agency asserts that Personal Information of each party to an adjudicative proceeding before the Agency is put into a personal information bank (a "Personal Information Bank"), as contemplated by section 10 of the *Privacy Act*, and therefore is not information that is Publicly Available. Further, counsel for the Agency asserts that this Court should reject the argument that, in absence of a confidentiality order, the Agency is required to disclose documents on its Public Record in an unredacted form. Finally, counsel for the Agency asserted that, if Parliament had intended that the right to disclosure of documents pursuant to the open court principle was to override subsection 8(1) of the *Privacy Act*, that legislation would have contained a specific provision to that effect.

The Attorney General of Canada's Position
-- "Publicly Available"

65 The Attorney General of Canada took no position with respect to the interpretation and application of subsection 69(2) of the *Privacy Act* in this appeal.

The Privacy Commissioner's Position
-- "Publicly Available"

66 Counsel for the Privacy Commissioner asserts that Personal Information cannot be Publicly

Available unless it is obtainable from another source or available in the public domain for ongoing use by the public when Dr. Lukacs made his request. In addition, the Privacy Commissioner asserts that information on the Agency's Public Record cannot be Publicly Available simply because the Agency is subject to the open court principle.

Discussion

67 To decide this issue, it is necessary to interpret the terms Publicly Available and Public Record. Unfortunately, the parties were unable to provide the Court with any determinative authorities in this regard.

The interpretative approach

68 In *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, the Supreme Court provided the following interpretative guidance at paragraph 10:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Emphasis added]

"Publicly Available"

69 The term Publicly Available appears to me to be relatively precise and unequivocal. I interpret these words as meaning available to or accessible by the citizenry at large. This interpretation is also consistent with the apparent context and purpose of subsection 69(2) of the *Privacy Act*. That provision is located in a portion of the *Privacy Act*, entitled "Exclusions", that sets out circumstances in which the *Privacy Act*, or sections thereof, do not apply. The purpose of subsection 69(2) of the *Privacy Act* is to render the use and disclosure limitations that are contained in sections 7 and 8 of the *Privacy Act* inapplicable to Personal Information if and to the extent that

the citizenry at large otherwise has the ability to access such information.

"Public Record"

70 In my view, the meaning of Public Record is not precise and unequivocal. Instead, the context in which this term appears is critical to the discernment of its meaning. The term appears in subsection 23(1) of the Old Rules.

71 In the judicial context, the record consists of a documentary memorialization of the proceedings that have come before the court. The documents on the record constitute the foundation upon which the court grounds its ultimate decision. The purpose of the record is to facilitate scrutiny of the court's decision, whether for the specific purpose of appellate review or the more general purpose of judicial transparency. Thus, when a court places documents on its record, it adheres to the open court principle.

72 However, as has been noted earlier in these reasons, there are circumstances in which unfettered access to the record before the court runs counter to competing societal interests. In those circumstances, the affected party may apply to the court for relief, either under the procedural rules of that court or on the basis of the *Dagenais/Mentuck* test in respect of *Charter*-based applications. In appropriate circumstances, the court will circumscribe the scope and application of the open court principle. When it does so, the court will have determined that, in the circumstances, safeguarding the integrity of the administration of justice and protecting the often vulnerable party who seeks that protection, outweigh the benefits of open access that the open court principle would otherwise provide. Thus, the open court principle mandates that the record of the court will be available for public access and scrutiny, except to the extent that the Court otherwise determines.

73 In my view, there is no principled reason to employ a more limited interpretation of the term record simply because that term relates to a quasi-judicial adjudicative tribunal, such as the Agency, rather than a court. The record of the proceedings before the Agency performs essentially the same function as the record of a court.

74 In interpreting the term record, in subsection 23(1) of the Old Rules, I adopt the meaning referred to above, namely a documentary memorialization of the proceedings that have come before the Agency. The additional word "public" provides a useful contrast to the situation in which materials on the record have been determined by the Agency to be confidential. In other words, as noted in the excerpt from the Annotation referred to in paragraph 54 of these reasons, the Agency's Public Record can be viewed as a record that contains no confidential documents.

75 The Annotation provides an illustration of the Agency's perspective with respect to requests 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 documents 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 the 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.
>
> [Emphasis added]

Is the Agency's public record publicly available?

76 The Privacy Commissioner asserts that to be Publicly Available, the documents requested by Dr. Lukacs must have been freely obtainable from a source other than the Agency. However, the Privacy Commissioner offers no jurisprudential authority for this proposition, and I reject it.

77 This assertion ignores the bifurcated nature of the Agency's mandate. As noted above, the Agency functions as an economic regulator and as a quasi-judicial dispute resolution tribunal.

78 The documents initiating a dispute may well be required to be kept in Personal Information Banks, immediately after their receipt by the Agency. However, compliance by the Agency with its obligation in subsection 23(1) of the Old Rules means that those documents have left the cloistered confines of such banks and moved out into the sunlit Public Record of the Agency. In my view, the act of placing documents on the Public Record is an act of disclosure on the part of the Agency. Thus, documents placed on the Agency's Public Record are no longer "held" or "under the control" of the Agency acting as a Government Institution. From the time of their placement on the Public Record, such documents are held by the Agency acting as a quasi-judicial, or court-like body, and from that time they become subject to the full application of open court principle. It follows, in my view, that, once on the Public Record, such documents necessarily become Publicly Available.

79 In this regard, two comments are apposite. First, in placing documents on its Public Record, the Agency is acting properly and within the law. Such disclosure by the Agency is necessary for it to fulfill its dispute resolution mandate, and in particular to comply with the requirements of

subsection 23(1) of the Old Rules or subsection 7(2) of the New Rules. Secondly, either subsections 23(3) to (9) of the Old Rules or section 31 of the New Rules will permit the parties to the proceedings to request a confidentiality order from the Agency. These confidentiality provisions enable the Agency to protect the privacy interests of participants in dispute resolution proceedings before it. They do so in substantially the same way that such interests are protected in judicial proceedings, while preserving the presumptively open access to the Agency's proceeding in accordance with the open court principle. To underscore this point, it was open to the parties in the Cancun Matter to request a confidentiality order in relation to any Personal Information filed in that matter, but no such request was made.

80 In conclusion, it is my view that once the Agency placed the documents in the Cancun Matter on its Public Record, as required by subsection 23(1) of the Old Rules, those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act*, was no longer applicable by virtue of subsection 69(2) of the *Privacy Act*. Accordingly, Dr. Lukacs was entitled to receive the documents that he requested and the Agency's refusal to provide them to him was impermissible.

C. The Constitutional Issue

81 The resolution of the Refusal Issue makes it unnecessary for me to consider the Constitutional Issue.

V. DISPOSITION

82 For the foregoing reasons, I would allow the application for judicial review and direct the Agency to provide the Unredacted Documents to Dr. Lukacs. In view of the complexities of the issues that were raised in this application and the considerable time that was spent by Dr. Lukacs I would award Dr. Lukacs a moderate allowance in the amount of $750.00 plus reasonable disbursements, such amounts to be payable by the Agency.

RYER J.A.
NEAR J.A.:-- I agree.
BOIVIN J.A.:-- I agree.

Case Name:

Lukacs v. Canada (Canadian Transportation Agency)

Between
Dr. Gabor Lukacs, Appellant, and
Canadian Transportation Agency and
British Airways PLC, Respondents

[2015] F.C.J. No. 1398

2015 FCA 269

Docket: A-366-14

Federal Court of Appeal
Halifax, Nova Scotia

Dawson, Ryer and Near JJ.A.

Heard: September 15, 2015.
Judgment: November 27, 2015.

(61 paras.)

Transportation law -- Air transportation -- Regulations -- Federal -- Tariffs, rates and service charges -- Appeal by Lukacs from decision of Canadian Transportation Agency regarding British Airways' tariff for compensation payable to passengers denied boarding due to overbooking allowed -- Agency ordered British Airways to file Proposed Rule that would apply to flights from Canada to EU -- Agency's decision lacked clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from EU and did not address apparent tension between decision and Agency's prior decisions which seemed to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada.á

Appeal by Lukacs from a decision of the Canadian Transportation Agency regarding British Airways' tariff for compensation payable to passengers to whom it denies boarding as a result of overbooking a flight. The appellant had filed a complaint with the Agency alleging that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff were unclear or unreasonable. The appellant argued

that the amount payable under Rule 87(B)(3)(B) should reflect British Airways' obligations under Regulation (EC) which applied to all flights departing from an airport in the UK and operated by European Union airlines with a destination in the UK. The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation on the basis of the Agency's 2013 decision. In the 2013 decision the Agency considered an argument regarding the same EU Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that the Agency was able to enforce. The Agency then provided British Airways with the opportunity to show cause why it should not be required to amend Ruleá87(B)(3)(B) to bring it in conformity with one of three denied boarding compensation schemes listed by the Agency or to propose a new scheme. British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the UK, passengers who were denied boarding would be compensated CAD $400 for delays of zero to four hours and CAD $800 for delays of over four hours. The Agency concluded that the Proposed Rule was unreasonable, as the proposal applied only to flights from Canada to the UK. The Agency therefore concluded that British Airways had failed to show cause and ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the EU.

HELD: Appeal allowed. The Agency appeared to have implicitly decided that it was not necessary for an airline to include in its tariff a provision that clearly set out its obligations with respect to denied boarding compensation for flights departing the EU and coming to Canada. The Agency's 2013 decision offered little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada. The Agency's decision in the present case lacked clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the EU. In addition, there was an apparent tension between the current decision and the Agency's prior decisions which seemed to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada.áIt was necessary for the Agency to address this tension and apparent inconsistency directly. The Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada or whether the fact that British Airways passengers from the EU to Canada were covered by Regulation (EC) was sufficient.

Statutes, Regulations and Rules Cited:

Air Transportation Regulations, SOR/88-58, s. 110, s. 111, s. 113, s. 122(c)(iii)

Canada Transportation Act, S.C. 1996, c.á10, s. 41

Appeal From:

An appeal from a decision of the Canadian Transportation Agency dated May 26, 2014, Decision No. 201-C-A-2014.

Counsel:

Dr. Gabor Lukacs, for the Appellant (on his own behalf).

Allan Matte, for the Respondent, Canadian Transportation Agency.

Carol E. McCall, for the Respondent, British Airways PLC.

REASONS FOR JUDGMENT

Reasons for judgment were delivered by Near J.A., concurred in by Ryer J.A. Separate dissenting reasons were delivered by Dawson J.A.

NEAR J.A.:--

I. Introduction

1 The appellant appeals from a May 26, 2014 decision of the Canadian Transportation Agency (the Agency), which concerns the compensation that British Airways must pay to passengers to whom it denies boarding (Decision No. 201-C-A-2014). He contests both the substance of the decision and the fairness of the procedure leading up to it. This Court granted the appellant leave to appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10.

II. Facts

2 On January 30, 2013, the appellant filed a complaint with the Agency concerning a number of matters involving British Airways. On January 17, 2014, after an exchange of submissions by the parties, the Agency released its decision.

3 Only one of the matters figuring in the January 17, 2014 decision remains at issue in this appeal, namely the matter of "denied boarding compensation". This term refers to the compensation that an airline must pay to passengers to whom it denies boarding as a result of overbooking a flight. The amount that British Airways is required to pay is set out in Rule 87(B)(3)(B) of International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306.

4 In his initial complaint, the appellant argued that Rule 87(B)(3)(B) was unreasonable within the meaning of section 111 of the *Air Transportation Regulations*, SOR/88-58 (the *ATR*). The appellant put forward a number of arguments in support of this submission.

5 First, the appellant argued that the Rule should reflect British Airways' obligations under

European Union Regulation (EC) No. 261/2004, which applies to all flights departing from an airport in the United Kingdom (U.K.) and operated by European Union (E.U.) airlines (air carriers, or carriers) with a destination in the U.K. The appellant maintained that British Airways would not suffer any competitive disadvantage by amending the Rule to reflect the E.U. Regulation. He further submitted that British Airways has complied with the Regulation for flights from the U.K. to Canada, but has failed to comply with the Regulation for flights from Canada to the U.K. The appellant stated that he was not asking the Agency to enforce the E.U. Regulation. Rather, he was asking the Agency to consider the reasonableness of the Rule, and appropriate substitutes, in light of the Regulation.

6 The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation. The Agency based its conclusion on one of its previous decisions, Decision No. 432-C-A-2013 (*Nawrot et al v. Sunwing Airlines Inc.)*, in which it considered an argument regarding the same E.U. Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that it is able to enforce. The relevant paragraph of Decision No. 432-C-A-2013 reads as follows:

> [103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

7 Second, the appellant argued that Rule 87(B)(3)(B) was unreasonable because it was inconsistent with the principle of a flat rate of denied boarding compensation. Rule 87(B)(3)(B) provides that when a passenger is denied boarding to a flight from Canada to the U.K., British Airways will pay the full value of the replacement ticket to the passenger's next stopover, plus between $50 and $200.

8 The Agency concluded that the Rule may be unreasonable within the meaning of subsection 111(1) of the *ATR* because British Airways had not demonstrated how it would suffer a competitive disadvantage if it were to raise the amounts of denied boarding compensation.

9 Third and finally, the appellant argued that Rule 87(B)(3)(B) purports to pre-empt the rights of passengers who accept denied boarding compensation to seek damages under other laws and, as such, fails to provide passengers with a reasonable opportunity to fully assess their compensation options. The Agency agreed, finding the Rule unreasonable within the meaning of subsection 111(1) of the *ATR* insofar as it purports to provide a "sole remedy" for denied boarding.

10 In the Order issued with its January 17, 2014 decision, the Agency provided British Airways with the opportunity to "show cause" why it should not be required to amend Rule 87(B)(3)(B) to

bring it in conformity with one of three denied boarding compensation schemes listed by the Agency, or to propose a new scheme that the Agency may consider to be reasonable. The Order also stipulated that the appellant would have the opportunity to file comments on British Airways' answer to the show cause Order.

11 On March 17, 2014, British Airways filed its answer. In this answer, British Airways stated that it was choosing to implement one of the four schemes listed in the Order, namely "[t]he regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada)*". British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the U.K., passengers who were denied boarding would be compensated in the amount of CAD$400 in cash or equivalent for delays of zero to four hours, and in the amount of CAD$800 for delays of over four hours.

12 On March 26, 2014, in accordance with the show cause Order, the appellant filed comments in response to the answer given by British Airways.

13 On March 28, 2014, British Airways filed a reply to the appellant's March 26, 2014 submissions. On April 1, 2014, the appellant wrote to the Agency seeking permission to provide submissions in response to British Airways' March 28, 2014 reply.

14 In Decision No. LET-C-A-25-2014, dated April 16, 2014, the Agency struck from the record the submissions made by British Airways on March 28, 2014 and those made by the appellant on April 1, 2014. The Agency also directed the appellant to amend his March 26, 2014 comments by removing any submissions unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).

15 On April 23, 2014, the appellant asked the Agency to reconsider its April 16, 2014 decision. On May 2, 2014, in Decision No. LET-C-A-29-2014, the Agency denied the appellant's request for reconsideration. The appellant filed a redacted version of his March 26, 2014 submissions "under protest" shortly thereafter, on May 8, 2014.

16 On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 (the final decision), the decision at issue in this appeal.

17 In this decision, the Agency first summarized the appellant's response, which was that the Proposed Rule was unreasonable because it only applied to flights from Canada to the U.K., and not to flights from the U.K. to Canada. In support of this argument, the appellant referenced Decision No. 227-C-A-2013 (*Lukacs v. WestJet*), in which the Agency had determined that:

> ... The failure to establish conditions governing denied boarding compensation for flights <u>to and from Canada</u> is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

(At para. 39; emphasis added)

18 In its analysis, the Agency determined that British Airways' Proposed Rule was consistent with the proposal made by Air Canada in Decision No. 442-C-A-2013 in terms of the amount of compensation. However, the Agency determined that, in terms of its application, the Proposed Rule was inconsistent with Air Canada's proposal in Decision No. 442-C-A-2013. Air Canada's proposal applied to flights from Canada to the E.U., whereas British Airways' proposal applied only to flights from Canada to the U.K.

19 The Agency therefore concluded that the Proposed Rule was unreasonable, and that, as a result, British Airways had failed to show cause. The Agency ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the E.U.

III. Legislative Framework

20 Section 110 of the *Air Transportation Regulations* requires air carriers operating international service in Canada to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is a contract between the carrier and its passengers.

21 Paragraph 122(*c*)(iii) of the *ATR* stipulates that carriers are required to include in their tariff terms and conditions relating to denied boarding compensation:

> **122.** Every tariff shall contain
>
> ...
>
> (*c*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> ...
>
> (iii) compensation for denial of boarding as a result of overbooking,
>
> ...

* * *

122. Les tarifs doivent contenir :

[...]

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

[...]

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

[...]

22 Section 111 of the *ATR* sets out the requirements by which carriers must abide when setting terms and conditions of carriage:

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

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(*a*) make any unjust discrimination against any person or other air carrier;

(*b*) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(*c*) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under

substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

* * *

111. (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

23 Section 113 of the *ATR* allows the Agency to disallow any tariff, or any portion of a tariff, that does not comply with the requirements of section 111:

113. The Agency may

(*a*) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(*b*) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).

* * *

113. L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa *a*).

IV. Positions of the Parties

24 The appellant submits that the Agency's final decision is unreasonable, as it neglects to impose any denied boarding compensation on British Airways flights departing from the E.U., contrary to paragraph 122(*c*)(iii) of the *ATR*. The appellant also submits that the Agency deprived him of a meaningful opportunity to reply to British Airways' response to the show cause Order, and thus breached its duty of procedural fairness.

25 The appellant asks this Court to allow the appeal and to set aside the final decision of the Agency. He also asks the Court to set aside the Agency's procedural decisions, to the extent that these decisions direct the appellant to delete portions of his submissions. The appellant seeks his disbursements in any event of the cause and, if he is successful, a moderate allowance for the time that he devoted to this appeal.

26 The respondent British Airways submits that the Agency's final decision is reasonable, and asks this Court to dismiss the appeal, with costs. The respondent Agency has not provided any written submissions in this appeal.

V. Issues

27 There are two issues in this appeal:

1. Does the substance of the Agency's final decision contain a reversible

error?

2. Did the Agency breach its duty of procedural fairness?

VI. Standard of Review

28 The standard of review applicable to the first issue, the Agency's substantive decision, is reasonableness. The issue of whether British Airways had indeed "shown cause" is a question of mixed fact and law. As such, the standard of review is presumed to be reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 51, [2008] 1 S.C.R. 190). Furthermore, the courts have generally reviewed decisions of the Agency -- an administrative body with specialized expertise -- on a deferential standard (*Canadian National Railway Company v. Canadian Transportation Agency*, 2013 FCA 270 at para. 3, 454 N.R. 125, citing *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 100, [2007] 1 S.C.R. 650).

29 Issues of procedural fairness are reviewable on the correctness standard (*Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502). Correctness is therefore the standard of review applicable to the second issue in this appeal.

VII. Analysis

A. *Reasonableness of the Decision*

30 The appellant submits that the final decision of the Agency is unreasonable because it imposes on British Airways a tariff relating to denied boarding compensation that only covers passengers travelling from Canada to the E.U., and not those travelling from the E.U. to Canada.

31 The appellant submits that this outcome is unreasonable because it is contrary to paragraph 122(*c*)(iii) of the *ATR*, and creates a legal loophole, defeating the purpose for which paragraph 122(*c*)(iii) of the *ATR* was enacted.

32 The appellant submits that paragraph 122(*c*)(iii), which requires carriers to include in their tariff a policy concerning denied boarding compensation, applies to both service from Canada to destinations abroad, and to service from destinations abroad to Canada. The appellant supports this submission by reference to the Agency's Decision No. 227-C-A-2013 (*Lukacs v. WestJet*). The appellant also refers to the more recent Agency Decision No. 148-C-A-2015 (*Ahmad v. Pakistan International Airlines Corporation*). The Agency found in both of these cases that an airline's tariff must include provisions that deal with denied boarding compensation both to and from Canada.

33 As the appellant correctly points out, in Decision No. 227-C-A-2013, the Agency found that a tariff rule that WestJet had proposed was unreasonable because it did not set out compensation for flights to and from Canada. The relevant paragraph which the appellant has relied upon reads as

follows:

> [39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

34 Similarly, in Decision No. 148-C-A-2015 the Agency found as follows:

> [29] As PIA's Tariff does not contain terms and conditions of carriage that clearly state its policy in respect of denied boarding and compensation for denied boarding as a result of overbooking for travel to and from Canada, the Agency finds that PIA contravened paragraph 122(*c*) and subparagraph 122(*c*)(iii) of the ATR.

35 In the case before us the Agency appears to have implicitly decided that it is not necessary for an airline to include in its tariff a provision that clearly sets out its obligations with respect to denied boarding compensation for flights departing the E.U. and coming to Canada. The Agency found that British Airways need not reference E.U. Regulation (EC) No. 261/2004 in its Tariff. It is accepted by all parties to this appeal that British Airways is bound by E.U. Regulation (EC) No. 261/2004 for its flights departing the E.U. to other countries, including Canada.

36 The Agency supported this finding on the basis of its prior Decision No. 432-C-A-2013, in which it stated:

> [103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

37 In my view, the finding in paragraph 103 merely sets forth a policy decision that the Agency will not force an airline to incorporate by reference a provision of another jurisdiction's legislation on the basis that the Agency cannot enforce the provisions of foreign legislation. It does not specifically address whether a tariff must include a provision that deals with denied boarding compensation quite independent of another jurisdiction's legislation for flights to and from Canada.

38 It is instructive to note that British Airways' existing Tariff did in fact cover denied boarding compensation for flights "between points in Canada and points in the United Kingdom served by British Airways" (Rule 87(B)). No clear explanation was provided by the Agency as to why this was no longer required. Further, in Decision No. 432-C-A-2013 at paragraphs 71 and 72, the Agency found that the absence of language providing that passengers affected by denied boarding will be eligible for compensation is unreasonable. In the case before us there is also no language dealing with denied boarding compensation for flights from the E.U. to Canada. It seems to me that Decision No. 432-C-A-2013 offers little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada.

39 In addition, the option chosen by British Airways pursuant to the show cause Order was "The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (Azar v. Air Canada)". While the regime proposed by Air Canada in *Azar v. Air Canada* dealt only with flights from Canada to the E.U. pursuant to the facts of that case, it is important to note that the tariff in respect of which the proposal applied also covers flights from the E.U. to Canada. This is pursuant to Rule 90(A) of Air Canada's tariff regime, which adopts by reference E.U. Regulation (EC) No. 261/2004 for flights originating in the E.U. and Switzerland.

40 The Agency decision in the case before us lacks clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the E.U. In addition, there is an apparent tension between the decision before us and the Agency's prior decisions, which seem to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada. In my view it is necessary for the Agency to address this tension and apparent inconsistency directly. In light of this, in my view this matter should be returned to the Agency for re-determination. The Agency must clearly address how British Airways is to "meet its tariff obligations of clarity" so that "the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning" in situations where the tariff is silent with respect to denied boarding compensation for inbound flights to Canada (Decision No. 432-C-A-2013, referencing Decision No. 344-C-A-2013 (*Lukacs v. Porter Airlines Inc.*)). In particular, the Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada, or whether the fact that British Airways passengers from the E.U. to Canada are covered by E.U. Regulation (EC) No. 261/2004 is sufficient.

B. *Procedural Fairness*

41 The appellant submits that the Agency breached its duty of procedural fairness when it ordered him to redact the majority of his March 26, 2014 submissions. He submits that in doing so, the Agency deprived him of his right to make meaningful submissions in response to British Airways' proposal. Given the decision to refer this matter back to the Agency there is no need to consider the procedural fairness issue raised by the appellant. The Agency is best positioned to

determine the extent of submissions it will require for the redetermination of the issue set out above.

VIII. Conclusion

42 I would allow the appeal and remit the matter to the Agency for redetermination in accordance with these reasons.

43 This Court has previously seen fit to award this appellant his disbursements, on the basis that his appeal was in the nature of public interest litigation and that the issue raised was not frivolous (*Lukacs v. Canada (Transportation Agency*), 2014 FCA 76 at para 62, 456 N.R. 186). I would award the appellant costs in the amount of $250.00 and his disbursements in this Court, such amounts to be payable by British Airways.

NEAR J.A.
RYER J.A.:-- I agree.

44 DAWSON J.A. (dissenting):-- I would dismiss this appeal for the following reasons.

45 As noted by the majority, on January 30, 2013, the appellant, Gabor Lukacs, filed a complaint with the Canadian Transportation Agency. The complaint alleged that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 were unclear and/or unreasonable. Amongst other relief, the appellant requested that the Agency disallow Rule 87(B)(3)(B) of the Tariff and direct British Airways to incorporate into the Tariff the obligations contained in Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004.

46 Regulation (EC) No. 261/2004 deals with compensation to be paid to passengers in the event they are denied boarding. It applies to every flight departing from an airport in the United Kingdom, and every flight operated by a European Union carrier with a destination in the United Kingdom. The appellant argued that British Airways' Tariff should reflect its legal obligation under the regulation.

47 In response, British Airways noted that while it complies with Regulation (EC) No. 261/2004, it would be inappropriate for the Agency to enforce foreign laws by requiring carriers to include provisions of a European regulation in their Canadian contracts of carriage.

48 In his reply to British Airways' response, the appellant:

i) accepted British Airways' evidence that it complies with the provisions of Regulation (EC) No. 261/2004 with respect to passengers flying from the United Kingdom to Canada;

ii) submitted that British Airways was currently not complying with its

obligations under Regulation (EC) No. 261/2004 with respect to passengers flying from Canada to the United Kingdom;

iii) submitted that the Agency ought to substitute in the relevant portion of the Tariff a provision that reflects British Airways' current practice with respect to denied boarding compensation paid to passengers flying from the United Kingdom to Canada; and

iv) submitted that the Tariff should require British Airways to pay denied boarding compensation to passengers flying from Canada to the United Kingdom in the amounts prescribed by Regulation (EC) No. 261/ 2004.

49 In Decision No. 10-C-A-2014, the Agency rejected the appellant's submissions on Regulation (EC) No. 261/2004, stating at paragraph 113 of the decision that it would "not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation". In reaching this conclusion, the Agency quoted as follows from its earlier Decision No. 432-C-A-2013:

> As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determination on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or had been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

50 The order which accompanied the decision required British Airways "to amend its Tariff and conform to this Order and the Agency's findings set out in [the] Decision".

51 The order went on to provide, at paragraph 144, that:

> [...] the Agency provides British Airways with the opportunity to show cause, by no later than February 17, 2014, why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:
>
> 1. The regime applicable in the United States of America;
>
> 2. The regime proposed by Mr. Lukacs in the proceedings related to

Decision No. 342-C-A-2013;

3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or

4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

52 Decision No. 442-C-A-2013, referred to in the third option offered to British Airways, dealt with the reasonableness of Air Canada's tariff as it related to denied boarding compensation for travel from Canada to the European Union. The Agency found Air Canada's existing denied boarding compensation in connection with flights from Canada to the European Union to be unreasonable. In the result, the Agency ordered Air Canada to amend its tariff by filing its proposed denied boarding compensation amounts for travel from Canada to the European Union.

53 As argued by British Airways, the appellant did not seek leave to appeal Decision No. 10-C-A-2014 (British Airways' memorandum of fact and law at paragraph 18).

54 In response to this decision, British Airways proposed to apply the compensation regime proposed by Air Canada as set out in Agency Decision No. 442-C-A-2013. The text of British Airways' proposed tariff was clear that it applied only to compensation payable for flights from Canada to the United Kingdom. The proposed tariff was silent with respect to compensation payable for flights from the United Kingdom to Canada.

55 The appellant replied to the proposal advanced by British Airways, challenging the reasonableness of the proposal on the ground that it failed to establish conditions governing denied boarding compensation for flights from the United Kingdom to Canada. The appellant submitted that British Airways' proposal purported, albeit implicitly, to exempt it from the obligation to pay denied boarding compensation for flights from the United Kingdom to Canada.

56 Subsequently, in Decision No. LET-C-A-25-2014, the Agency found that parts of the appellant's reply submissions were unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in the proceeding that led to Decision No. 442-C-A-2013. In result, the Agency directed the appellant to refile his reply submissions, deleting all submissions that were unrelated to the denied boarding compensation regime proposed previously by air Canada in the proceeding that led to Decision No. 442-C-A-2013.

57 Later, the Agency dismissed a request that it reconsider this decision (Decision No. LET-C-A-29-2014).

58 From this chronology it is apparent that in Decision No. 10-C-A-2014, the Agency made a final decision that it would not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into its tariff. By allowing British Airways the option to propose the same compensation regime previously proposed by Air Canada, the Agency also made a final decision that British Airways could, as it did, propose a tariff that dealt only with denied boarding compensation amounts for travel from Canada to the United Kingdom.

59 Any challenge to these decisions ought to have been brought as an application for leave to appeal Decision No. 10-C-A-2014. The appellant cannot challenge these decisions under the guise of a challenge to Decision No. 201-C-A-2014.

60 It further follows that the Agency did not breach procedural fairness by ordering that the appellant delete submissions in his final reply that were not relevant to the proposed tariff regime advanced by Air Canada that led to Decision No. 442-C-A-2013. The impugned submissions were not relevant to the remaining issue before the Agency, and it was not unfair for the Agency to ignore them and order that they be removed from the record.

61 For these reasons, I would dismiss the appeal with costs.

DAWSON J.A.