Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant
(Responding Party)

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent
(Moving Party)

BOOK OF AUTHORITIES
(Motion to Strike)

Volume 2

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Appendix A

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 June 28, 2020

Last amended on August 28, 2019

À jour au 28 juin 2020

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to June 28, 2020. The last amendments came into force on August 28, 2019. Any amendments that were not in force as of June 28, 2020 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 28 juin 2020. Les dernières modifications sont entrées en vigueur le 28 août 2019. Toutes modifications qui n'étaient pas en vigueur au 28 juin 2020 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act respecting the Federal Court of Appeal and the Federal Court

TABLE ANALYTIQUE

Loi concernant la Cour d'appel fédérale et la Cour fédérale

(c) there is a claim against the Crown for injurious affection; or

(d) the claim is for damages under the *Crown Liability and Proceedings Act*.

Crown and subject: consent to jurisdiction

(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

(a) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada; and

(b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

Conflicting claims against Crown

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

Relief in favour of Crown or against officer

(5) The Federal Court has concurrent original jurisdiction

(a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

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.

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

d) une demande en dommages-intérêts formée au titre de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*.

Conventions écrites attributives de compétence

(3) Elle a compétence exclusive, en première instance, pour les questions suivantes :

a) le paiement d'une somme dont le montant est à déterminer, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

Demandes contradictoires contre la Couronne

(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

Actions en réparation

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

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.

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

L.R. (1985), ch. F-7, art. 18; 1990, ch. 8, art. 4; 2002, ch. 8, art. 26.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

Appendix B

Federal Court of Appeal | Cour d'appel fédérale

Date: 20111212

Docket: A-355-10

Citation: 2011 FCA 347

CORAM: **LÉTOURNEAU J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

AIR CANADA

Appellant

and

TORONTO PORT AUTHORITY
and PORTER AIRLINES INC.

Respondents

Heard at Toronto, Ontario, on June 6, 2011.

Judgment delivered at Ottawa, Ontario, on December 12, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

REASONS CONCURRING IN THE RESULT BY: LÉTOURNEAU AND DAWSON JJ.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20111212

Docket: A-355-10

Citation: 2011 FCA 347

CORAM: **LÉTOURNEAU J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

AIR CANADA

Appellant

and

TORONTO PORT AUTHORITY
and PORTER AIRLINES INC.

Respondents

REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of the Federal Court (*per* Justice Hughes): 2010 FC 774. The Federal Court dismissed two applications for judicial review brought by Air Canada.

[2] Air Canada brought the two applications for judicial review in response to two bulletins issued by the Toronto Port Authority concerning the Billy Bishop Toronto City Airport (the "City Airport"). The Toronto Port Authority manages and operates the City Airport.

[3] The Federal Court judge dismissed the applications for judicial review on a number of grounds. Three of those grounds and the Federal Court judge's rulings on them were as follows:

- The Toronto Port Authority's bulletins and its conduct described in the bulletins were not susceptible to judicial review. These matters did not trigger rights on the part of Air Canada to bring a judicial review.

- In issuing the bulletins and in engaging in the conduct described in the bulletins, the Toronto Port Authority was not acting as a "federal board, commission or other tribunal." Accordingly, judicial review was not available under the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Toronto Port Authority's conduct was private in nature, not public.

- Air Canada failed to establish that the bulletins and the conduct described in them offended duties of procedural fairness, were unreasonable, or were motivated by an improper purpose.

[4] Air Canada now appeals to this Court from the dismissal of both of its applications for judicial review.

[5] Following oral argument, we reserved our decision in this appeal. Somewhat later, the Supreme Court of Canada released its decision in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504. That decision was of potential significance to the second of these three grounds, and, in particular, to the public-private distinction and whether the Toronto Port Authority's conduct described in the bulletins is reviewable. Accordingly, we invited the parties to make further written submissions concerning that decision. We have now received the parties' further written submissions and we have considered them.

[6] For the reasons set out below, I agree with the Federal Court judge's dismissal of Air Canada's applications for judicial review. Like the Federal Court judge, I find that each of the above three grounds is fatal to the applications for judicial review. It follows that I would dismiss the appeal, with costs.

A. Basic facts

[7] The City Airport is located on Toronto Island. Once a quiet location frequented mainly by small aircraft and hobby fliers, it is now a bustling commercial airport. This transformation was years in the making.

[8] Key to this transformation was an agreement, entered into in 1983 among the City of Toronto, the Toronto Harbour Commissioners and the federal Minister of Transport. Known colloquially as the Tripartite Agreement, it granted to the Toronto Harbour Commissioners, and later its successor, the Toronto Port Authority, a 50-year lease for the City Airport and related facilities. Importantly, the Tripartite Agreement imposed an obligation on the Toronto Harbour Commissioners, and later the Toronto Port Authority, to regulate the number of takeoffs and landings in order to limit noise in the nearby residential neighbourhood.

[9] In 1990, Air Ontario, an Air Canada subsidiary, started operations at the City Airport. Later, another Air Canada affiliate, Jazz, operated at the City Airport.

[10] In 1998, the *Canada Marine Act*, S.C. 1998, c. 10 became law. A year later, under its provisions, the Toronto Port Authority was established and letters patent were issued to it: (1999) Canada Gazette Part I, vol. 133, no. 23 (supplement). These shall be examined later in these reasons. Under subsection 7.2(j) of the letters patent, the Toronto Port Authority was authorized to operate and manage the City Airport in accordance with the Tripartite Agreement.

[11] By 2002, the Toronto Port Authority was operating at a loss. As we shall later see, under the *Canada Marine Act*, the Toronto Port Authority was meant to be financially self-sufficient. To remedy its financial situation, the Toronto Port Authority tried to get Jazz to commit to the continuance and even the enhancement of its operations at the City Airport. In the meantime, the Toronto Port Authority started to enter into discussions with another proposed airline about

operating at the City Airport. That airline was later known as Porter, operated by the respondent Porter Airlines Inc.

[12] As part of this investigation, the Toronto Port Authority and the airline that was later to be known as Porter approached the Competition Bureau for advice about whether Porter could ramp up operations considerably at the City Airport, taking 143 of 167 takeoff and landing slots. The Competition Bureau responded. It defined the relevant market as including Lester B. Pearson International Airport, considered it to be a "close substitute" for the City Airport for Toronto air passengers, and noted Air Canada's dominance at Pearson Airport. It concluded that capping Air Canada's takeoff and landing slots at the City Airport at a low level and granting Porter a number of takeoff and landing slots at the City Airport would be justified "as an interim measure" to allow Porter to establish a viable new service at the City Airport.

[13] By 2004, Jazz reduced the number of locations served and the frequency of flights at the City Airport. By 2005, it ceased shuttle bus services to the ferry by which passengers travelled to and from the City Airport and it used only six takeoff and landing slots at the City Airport.

[14] Mindful of the coming expiration of Jazz's Commercial Carrier Operating Agreement for the City Airport, the Toronto Port Authority proposed a new agreement with Jazz. Jazz rejected the proposal and ceased all of its operations at the City Airport in 2006.

[15] Soon afterward, Porter announced the launch of its services from the City Airport. It had already signed a Commercial Carrier Agreement with the Toronto Port Authority during the previous year (2005). That agreement provided for an initial period during which Porter would receive a guaranteed number of takeoff and landing slots, following which Porter would be entitled to those slots on a "use it or lose it" basis. Porter was also entitled to participate "on a fair basis" concerning any additional slots that might become available.

[16] After Porter announced its launch, Air Canada announced plans to reinstate its services at the City Airport. In addition, Air Canada's affiliate, Jazz, started an action in the Ontario Superior Court against the Toronto Port Authority claiming damages. In this action, Jazz alleged, among other things, that the Toronto Port Authority gave Porter a monopoly on terminal facilities and the vast majority of takeoff and landing slots at the City Airport: see Amended Statement of Claim, paragraph 31, Appeal Book, volume 14, pages 5746-5747. In 2006, Jazz also filed applications for judicial review in the Federal Court, complaining of these same matters: see Notices of Application, Appeal Book, volume 15, pages 5894-5916 and 6189-6201. Later, Jazz discontinued or abandoned all of these proceedings.

[17] Porter's flights from the City Airport steadily increased. Porter, through its affiliate City Centre Terminal Corp., invested $49 million into the City Airport's infrastructure, including the building of a new terminal and, later, expanding it. For the first time in more than two decades, the City Airport began to enjoy an operating profit.

[18] Later, in September, 2009, Air Canada expressed new interest in starting service from the City Airport. At this time, the Toronto Port Authority was studying the possibility of allowing new takeoff and landing slots within the limits of the Tripartite Agreement and was open to additional carriers operating at the City Airport and engaged in discussions with all of them, including Air Canada. The Toronto Port Authority's studies and discussions continued into 2010.

[19] On December 24, 2009 and April 9, 2010, the Toronto Port Authority issued the two bulletins that are the subject of Air Canada's applications for judicial review in this case. Also on April 9, 2010, unknown to Air Canada at the time, the Toronto Port Authority and Porter entered into a new Commercial Carrier Operating Agreement, under which Porter's existing landing slots were grandparented, with the result that Porter received 157 of 202 available takeoff and landing slots at the City Airport.

[20] In its application for judicial review of the second bulletin, Air Canada seeks the setting aside of Porter's 2010 Commercial Carrier Operating Agreement, among other things. However, as we shall see, that application for judicial review concerns the Toronto Port Authority's "decisions" evidenced in the second bulletin, not the Toronto Port Authority's decision to enter into the 2010 Commercial Carrier Operating Agreement with Porter. Air Canada has not brought an application for judicial review of that decision.

B. Did the Toronto Port Authority's conduct described in the bulletins constitute administrative action susceptible to judicial review?

[21] As mentioned above, before the Federal Court were two applications for judicial review launched in response to the two bulletins. In response, the respondents submitted to the Federal Court that judicial review was not available because the Toronto Port Authority had not made a "decision" or "order" within the meaning of the *Federal Courts Act*. All that the Toronto Port Authority had done was to issue two information bulletins of a general nature. Air Canada disagreed with the respondents and submitted to the Federal Court that there was such a "decision" or "order" and so judicial review was available to it. The parties advanced substantially similar submissions in this Court.

[22] The Federal Court judge agreed with the respondents' submissions, finding that that no "decision" or "order" was present before him because the Toronto Port Authority's bulletins "do not determine anything" (at paragraph 73).

[23] Although the Federal Court judge and the parties focused on whether a "decision" or "order" was present, I do not take them to be saying that there has to be a "decision" or an "order" before any sort of judicial review can be brought. That would be incorrect.

[24] Subsection 18.1(1) of the *Federal Courts Act* provides that 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." A "matter" that can be subject of judicial review includes not only

a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.

[25] As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them must be made within 30 days after they were first communicated: subsection 18.1(2) of the *Federal Courts Act*.

[26] Although the parties and the Federal Court judge focused on whether a "decision" or "order" was present, in substance they were addressing something more basic: whether, in issuing the bulletins and in engaging in the conduct described in the bulletins, the Toronto Port Authority had done anything that triggered any rights on the part of Air Canada to bring a judicial review.

[27] On this, I agree with the respondents' submissions and the Federal Court judge's holding: in issuing the bulletins and in engaging in the conduct described in the bulletins, the Toronto Port Authority did nothing to trigger rights on the part of Air Canada to bring a judicial review.

[28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.

[29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149.

[30] The decided cases offer many illustrations of this situation: *e.g.*, *1099065 Ontario Inc. v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, 375 N.R. 368 (an official's letter proposing dates for a meeting); *Philipps v. Canada (Librarian and Archivist)*, 2006 FC 1378, [2007] 4 F.C.R. 11 (a courtesy letter written in reply to an application for reconsideration); *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3 (T.D.) (an advance ruling that constitutes nothing more than a non-binding opinion).

[31] In this case, Air Canada issued two notices of application:

- The first seeks judicial review of "the December 24, 2009 decision…of the Toronto Port Authority…announcing a process…through which it intends to award slots" at the City Airport. Like the Federal Court judge, I interpret this as a judicial review of

the December 24, 2009 bulletin issued by the Toronto Port Authority and the conduct described in it.

- The second seeks judicial review of "the April 9, 2010 decision…of the Toronto Port Authority…announcing a Request for Proposals process…to allocate slots and otherwise grant access to commercial carriers seeking access" to the City Airport. Like the Federal Court judge, I interpret this as a judicial review of the April 9, 2010 bulletin issued by the Toronto Port Authority and the conduct described in it.

[32] I shall examine each of the two bulletins and assess whether they, or the conduct described in them, affected Air Canada's legal rights, imposed legal obligations, or caused Air Canada prejudicial effects.

(1) The first bulletin

[33] The first bulletin is entitled "TPA announces capacity assessment results for Billy Bishop Toronto City Airport, begins accepting formal carrier proposals." This bulletin did five things, none of which, in reality, is attacked by Air Canada in its first application for judicial review:

- It announced the results of a noise impact study and capacity assessment for the City Airport and stated that the Toronto Port Authority anticipated that between 42 and 92 additional takeoff and landing slots would be available. Nowhere in its

application for judicial review of the bulletin does Air Canada attack this study or capacity assessment. Nowhere does it attack the Toronto Port Authority's assessment of the availability of takeoff and landing slots.

- It announced that the Toronto Port Authority intended to solicit formal business proposals for additional airline service at the City Airport. In its judicial review of this bulletin, Air Canada does not attack this intention.

- It disclosed the appointment of a slot coordinator to allocate available takeoff and landing slots at the City Airport. Air Canada does not say in its application for judicial review that the slot coordinator was improperly appointed, should not have been appointed, was biased, or conducted itself in some other inappropriate way.

- It stated that all airlines providing service from the City Airport will have to enter into a commercial carrier operating agreement with the Toronto Port Authority and secure appropriate terminal space from the City Centre Terminal Corp. Air Canada does not attack this aspect of the bulletin in its application for judicial review.

- It announced that further capital expenditures on the City Airport would be required to accommodate the additional air traffic. In its judicial review, Air Canada does not attack this aspect of the bulletin.

[34] In its first notice of application attacking this bulletin and the conduct described in it, Air Canada set out the grounds for its attack. The grounds focus on the Toronto Port Authority's alleged bias in favour of Porter. Air Canada says that the matters disclosed in the first bulletin perpetuate "Porter's existing anti-competitive advantage" and prevent "meaningful competition," something that is "contrary to the purposes of the *Canada Marine Act* and contrary to the common law." Air Canada complains about "Porter's exclusive access" to the City Airport and the "significant competitive advantages" offered by the City Airport compared to other airports in the Toronto area. It adds that when new takeoff and landing slots are awarded, Porter's dominance at the City Airport will be maintained – Porter will continue to enjoy a vast majority of the overall number of takeoff and landing slots.

[35] But the first bulletin and the conduct described in it does not do any of these things. On the subject of takeoff and landing slots, the first bulletin only sets out a process for the allocation of new slots and an approximate number to be allocated under that process. In reality, Air Canada does not attack anything that the first bulletin does or describes. Instead, Air Canada is really attacking the Toronto Port Authority's earlier allocation of takeoff and landing slots to Porter, an earlier decision that is not now the subject of judicial review. As mentioned in paragraph 16, above, Air Canada's affiliate, Jazz, attacked that matter and other allegedly monopolistic matters in 2006 by way of an action and judicial reviews, but it later discontinued and abandoned those proceedings.

[36] If Air Canada's application for judicial review concerning the first bulletin were granted and the matters described in the first bulletin were set aside, the pre-existing allocation of takeoff and

landing slots to Porter – the matter that is the real focus of its complaint – would remain. But in its notice of application Air Canada does not attack that pre-existing allocation of takeoff and landing slots to Porter.

[37] Therefore, the first bulletin and the matters described in it – the matters that Air Canada attacks in its first notice of application – do not affect Air Canada's legal rights, impose legal obligations, or cause Air Canada prejudicial effects. This bulletin and the matters described in it are not the proper subject of judicial review. Other matters may perhaps be causing prejudicial effects to Air Canada, but they are not the subject of its first notice of application.

(2) The second bulletin

[38] The second bulletin is entitled "Toronto Port Authority issues formal Request for Proposals for additional carriers at Billy Bishop Toronto City Airport." This bulletin did three things, none of which, in reality, is attacked by Air Canada in its second notice of application:

- It announced that two airlines, one of which was Air Canada, expressed informal interest in participating in the request for proposals for additional airline service at the City Airport. It invited others to participate in the request for proposal process.

- It appointed an independent party to review the proposals and allocate slots based on a methodology used at other airports.

- It announced results from a capacity assessment report and stated that, based on that report and the Tripartite Agreement, 90 new takeoff and landing slots could be made available.

[39] Again, in reality, Air Canada does not attack anything that the bulletin does. Nowhere in its second notice of application for judicial review does Air Canada suggest that these things affect its legal rights, impose legal obligations, or cause prejudicial effects upon it.

[40] In its second notice of application, Air Canada states that this bulletin implements the process that was proposed in the first bulletin. But, as we have seen, the process that was proposed in the first bulletin is not the real focus of Air Canada's attack. Air Canada's real focus is the pre-existing allocation of takeoff and landing slots, something over which Jazz launched challenges in 2006 but later abandoned.

[41] By the time of its second application for judicial review, Air Canada was aware of the allocation of takeoff and landing slots to Porter, set out in Porter's 2010 Commercial Carrier Operating Agreement. Its second notice of application alludes to that agreement. But the second bulletin and the conduct described in it – the subject-matter of the second application for judicial review – do not mention or allude to Porter's 2010 Commercial Carrier Operating Agreement. The second notice of application does not seek review of the Toronto Port Authority's decision to enter into that agreement and allocate a significant number of takeoff and landing slots to Porter.

[42] Therefore, for the foregoing reasons, Air Canada's two notices of application do not attack any matter that affects Air Canada's legal rights, impose legal obligations, or cause prejudicial effects. The notices of application did not place before the Federal Court any matter susceptible to review.

[43] This is sufficient to dismiss the appeal. However, I shall go on to consider two other grounds relied upon by the Federal Court judge to dismiss Air Canada's applications for judicial review.

C. Was the Toronto Port Authority acting as a "federal board, commission or other tribunal" when it engaged in the conduct described in the bulletins?

(1) This is a mandatory requirement

[44] An application for judicial review under the *Federal Courts Act* can only be brought against a "federal board, commission or other tribunal."

[45] Various provisions of the *Federal Courts Act* make this clear. Subsection 18(1) of the *Federal Courts Act* vests the Federal Court with exclusive original jurisdiction over certain matters where relief is sought against any "federal board, commission or other tribunal." In exercising that jurisdiction, the Federal Court can grant relief in many ways, but only against a "federal board, commission or other tribunal": subsection 18.1(3) of the *Federal Courts Act*. It is entitled to grant that relief where it is satisfied that certain errors have been committed by the "federal board, commission or other tribunal": subsection 18.1(4) of the *Federal Courts Act*.

(2) What is a "federal board, commission or other tribunal"?

[46] "Federal board, commission or other tribunal" is defined in subsection 2(1) of the *Federal Courts Act*. Subsection 2(1) tells us that only those that exercise jurisdiction or powers "conferred by or under an Act of Parliament" or "an order made pursuant to [Crown prerogative]" can be "federal boards, commissions or other tribunals":

2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" *« office fédéral »*	« office fédéral » "*federal board, commission or other tribunal*"
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown…	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale…

[47] These words require us to examine the particular jurisdiction or power being exercised in a particular case and the source of that jurisdiction or power: *Anisman v. Canada (Canada Border Services Agency)*, 2010 FCA 52, 400 N.R. 137.

[48] The majority of decided cases concerning whether a "federal board, commission or other tribunal" is present turn on whether or not there is a particular federal Act or prerogative underlying an administrative decision-maker's power or jurisdiction. *Anisman* is a good example. In that case the source of the administrative decision-maker's power was provincial legislation, and so judicial review under the *Federal Courts Act* was not available.

[49] In this case, all parties accept that the actions disclosed in the Toronto Port Authority's bulletins find their ultimate source in federal law.

[50] However, before us, the Toronto Port Authority submits that that alone is not enough to satisfy the requirement that an entity was acting as a "federal board, commission or other tribunal" when it engaged in the conduct or exercised the power that is the subject of judicial review. It has cited numerous cases to us in support of the proposition that the conduct or the power exercised must be of a public character. An authority does not act as a "federal board, commission or other tribunal" when it is conducting itself privately or is exercising a power of a private nature: see, for example, *DRL Vacations Ltd. v. Halifax Port Authority*, 2005 FC 860, [2006] 3 F.C.R. 516; *Halterm Ltd. v. Halifax Port Authority* (2000), 184 F.T.R. 16 (T.D.).

[51] The Toronto Port Authority's submission has much force.

[52] Every significant federal tribunal has public powers of decision-making. But alongside these are express or implied powers to act in certain private ways, such as renting and managing premises,

hiring support staff, and so on. In a technical sense, each of these powers finds its ultimate source in a federal statute. But, as the governing cases cited below demonstrate, many exercises of those powers cannot be reviewable. For example, suppose that a well-known federal tribunal terminates its contract with a company to supply janitorial services for its premises. In doing so, it is not exercising a power central to the administrative mandate given to it by Parliament. Rather, it is acting like any other business. The tribunal's power in that case is best characterized as a private power, not a public power. Absent some exceptional circumstance, the janitorial company's recourse lies in an action for breach of contract, not an application for judicial review of the tribunal's decision to terminate the contract.

[53] The Supreme Court has recently reaffirmed that relationships that are in essence private in nature are redressed by way of the private law, not public law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In that case, a government dismissed one of its employees who was employed under a contract governed by the ordinary laws of contract. The employee brought a judicial review, alleging procedural unfairness. The Supreme Court held that in the circumstances the matter was private in character and so there was no room for the implication of a public law duty of procedural fairness.

[54] Recently, on the same principles but on quite different facts, the Supreme Court found that a relationship before it was a public one and so judicial review was available: *Mavi*, *supra*.

[55] A further basis for this public-private distinction can be found in subsection 18(1) of the *Federal Courts Act* which provides that the main remedies on review are certiorari, mandamus and prohibition. Each of those is available only against exercises of power that are public in character. So said Justice Dickson (as he then was) in the context of *certiorari* in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; see also *R. v. Criminal Injuries Compensation Board, Ex p. Lain*, [1967] 2 Q.B. 864.

[56] The tricky question, of course, is what is public and what is private. In *Dunsmuir* and in *Mavi*, the Supreme Court did not provide a comprehensive answer to that question.

[57] Perhaps there can be no comprehensive answer. In law, there are certain concepts that, by their elusive nature, cannot be reduced to clear definition. For example, in the law of negligence, when exactly does a party fall below the standard of care? We cannot answer that in a short sentence or two. Instead, the answer emerges from careful study of the factors discussed in many cases decided on their own facts. In my view, determining whether a matter is public or private for the purposes of judicial review must be approached in the same way.

[58] Further, it may be unwise to define the public-private distinction with precision. The "exact limits" of judicial review have "varied from time to time" to "meet changing conditions." The boundaries of judicial review, in large part set by the public-private distinction, have "never been and ought not to be specifically defined." See the comments of Justice Dickson (as he then was) in *Martineau*, *supra* at page 617, citing Lord Parker L.J. in *Lain*, *supra* at page 882.

[59] While the parties, particularly the Toronto Port Authority, have supplied us with many cases that shed light on the public-private distinction for the purposes of judicial review, only preliminary comments necessary to adjudicate upon this case are warranted in these circumstances.

[60] In determining the public-private issue, all of the circumstances must be weighed: *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115 (T.D.); *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (T.D.). There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court. Some of the relevant factors disclosed by the cases are as follows:

- *The character of the matter for which review is sought.* Is it a private, commercial matter, or is it of broader import to members of the public? See *DRL v. Halifax Port Authority*, *supra*; *Peace Hills Trust Co. v. Moccasin*, 2005 FC 1364 at paragraph 61, 281 F.T.R. 201 (T.D.) ("[a]dministrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law…").

- *The nature of the decision-maker and its responsibilities.* Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative

body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?

- *The extent to which a decision is founded in and shaped by law as opposed to private discretion.* If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public: *Mavi*, *supra*; *Scheerer v. Waldbillig* (2006), 208 O.A.C. 29, 265 D.L.R. (4th) 749 (Div. Ct.); *Aeric, Inc. v. Canada Post Corp.*, [1985] 1 F.C. 127 (T.D.). This is all the more the case if that public source of law supplies the criteria upon which the decision is made: *Scheerer v. Waldbillig*, *supra* at paragraph 19; *R. v. Hampshire Farmer's Markets Ltd.*, [2004] 1 W.L.R. 233 at page 240 (C.A.), cited with approval in *MacDonald v. Anishinabek Police Service* (2006), 83 O.R. (3d) 132 (Div. Ct.). Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review: *Irving Shipbuilding Inc, supra*; *Devil's Gap Cottager (1982) Ltd. v. Rat Portage Band No. 38B*, 2008 FC 812 at paragraphs 45-46, [2009] 2 F.C.R. 276.

- *The body's relationship to other statutory schemes or other parts of government*. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter: *Onuschuk v. Canadian Society of Immigration*, 2009 FC 1135 at paragraph 23, 357 F.T.R. 22;

Certified General Accountants Association of Canada v. Canadian Public Accountability Board (2008), 233 O.A.C. 129 (Div. Ct.); *R. v. Panel on Take-overs and Mergers; Ex Parte Datafin plc.*, [1987] Q.B. 815 (C.A.); *Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner)*, [1994] N.W.T.R. 97, 22 Admin. L.R. (2d) 251 (C.A.); *R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan*, [1993] 2 All E.R. 853 at page 874 (C.A.); *R. v. Hampshire Farmer's Markets Ltd.*, *supra* at page 240 (C.A.). Mere mention in a statute, without more, may not be enough: *Ripley v. Pommier* (1990), 99 N.S.R. (2d) 338, [1990] N.S.J. No. 295 (S.C.).

- *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity.* For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature: *Masters v. Ontario* (1993), 16 O.R. (3d) 439, [1993] O.J. No. 3091 (Div. Ct.). A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant: *Aeric, supra*; *Canadian Centre for Ethics in Sport v. Russell*, [2007] O.J. No. 2234 (S.C.J.).

- *The suitability of public law remedies.* If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature: *Dunsmuir*, *supra*; *Irving Shipbuilding*, *supra* at paragraphs 51-54.

- *The existence of compulsory power.* The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction. See *Chyz v. Appraisal Institute of Canada* (1984), 36 Sask. R. 266 (Q.B.); *Volker Stevin*, *supra*; *Datafin*, *supra*.

- *An "exceptional" category of cases where the conduct has attained a serious public dimension*. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable: *Aga Khan*, *supra* at pages 867 and 873; see also Paul Craig, "Public Law and Control Over Private Power" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 196. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment: *Irving Shipbuilding*, *supra* at paragraphs 61-62.

(3) Application of these principles to the facts of this case

[61] In my view, the matters set out in the bulletins – the matters subject to review in this case – are private in nature. In dealing with these matters, the Toronto Port Authority was not acting as a "federal board, commission or other tribunal."

[62] While no one factor is determinative, there are several factors in this case that support this conclusion.

– I –

[63] First, in engaging in the conduct described in the bulletins, the Toronto Port Authority was not acting as a Crown agent.

[64] Section 7 of the *Canada Marine Act* provides that a port authority, such as the Toronto Port Authority, is a Crown agent only for the purposes of engaging in port activities referred to in paragraph 28(2)(*a*) of the Act. Those activities are "port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent." Port authorities can engage in "other activities that are deemed in the letters patent to be necessary to support port operations" (paragraph 28(2)(*b*) of the Act) but, by virtue of section 7 of the Act, they conduct those activities on their own account, not as Crown agents.

[65] The letters patent of the Toronto Port Authority draw a distinction between matters on which it acts as a Crown agent and matters on which it does not. In section 7.1, the letters patent set out what port activities under paragraph 28(2)(*a*) of the *Canada Marine Act* that the Toronto Port Authority may do – activities for which the Toronto Port Authority is a Crown agent. In section 7.2, the letters patent set out all other activities that are necessary to support port operations – activities for which the Toronto Port Authority acts on its own account, and not as a Crown agent.

[66] Subsection 7.2(*j*) of the letters patent is most significant. In that subsection, the Toronto Port Authority is authorized to manage and operate the City Airport. For this purpose, it is not a Crown agent. Subsection 7.2(*j*) reads as follows:

7.2 *Activities of the Authority Necessary to Support Port Operations.* To operate the port, the Authority may undertake the following activities which are deemed necessary to support port operations pursuant to paragraph 28(2)(*b*) of the Act:	**7.2** *Activités de l'Administration nécessaires aux opérations portuaires.* Pour exploiter le port, l'Administration peut se livrer aux activités suivantes jugées nécessaires aux opérations portuaires conformément à l'alinéa 28(2)*b*) de la Loi:
…	[…]
(*j*) the operation and maintenance of the Toronto City Centre Airport in accordance with the Tripartite Agreement among the Corporation of the City of Toronto, Her Majesty the Queen in Right of Canada and The Toronto Harbour Commissioners dated the 30th day of June, 1983 and ferry service, bridge or tunnel across	*j*) exploitation et entretien de l'aéroport du centre-ville de Toronto conformément à l'accord tripartite conclu entre la Corporation of the City of Toronto, Sa Majesté la Reine du chef du Canada et les Commissaires du havre de Toronto le 30 juin 1983, et service de traversier, pont ou tunnel au lieu dit

the Western Gap of the Toronto harbour to provide access to the Toronto City Centre Airport.	Western Gap dans le port de Toronto pour permettre l'accès à l'aéroport du centre-ville de Toronto;

[67] Air Canada submits that the allocation of takeoff and landing slots at the City Airport is a matter relating to licensing federal real property, a matter that falls under subsections 7.1(*c*), (*e*) and (*f*) of the letters patent. It submits that takeoff and landing slots are allocated by way of "licence." Air Canada also submits that subsection 7.1(*a*), which provides for the "issuance…of authorizations respecting use…of the port," embraces the granting of takeoff and landing slots. Accordingly, says Air Canada, when the Toronto Port Authority allocates takeoff and landing slots, it does so as a Crown agent.

[68] Air Canada is correct in saying that section 7.1 of the letters patent includes "licences" over "federal real property" and the issuance of "authorizations" for use of the port. Section 7.1 reads as follows:

7.1 *Activities of the Authority Related to Certain Port Operations.* To operate the port, the Authority may undertake the port activities referred to in paragraph 28(2)(*a*) of the Act to the extent specified below:	**7.1** *Activités de l'Administration liées à certaines opérations portuaires.* Pour exploiter le port, l'Administration peut se livrer aux activités portuaires mentionnées à l'alinéa 28(2)*a*) de la Loi dans la mesure précisée ci-dessous:
(*a*) development, application, enforcement and amendment of rules, orders, by-laws, practices or procedures and issuance and administration of authorizations respecting use, occupancy or operation of the port and enforcement of Regulations or making of	*a*) élaboration, application, contrôle d'application et modification de règles, d'ordonnances, de règlements administratifs, de pratiques et de procédures; délivrance et administration de permis concernant l'utilisation, l'occupation ou l'exploitation du port; contrôle

Regulations pursuant to subsection 63(2) of the Act;

d'application des Règlements ou prise de Règlements conformément au paragraphe 63(2) de la Loi;

…

[…]

(*c*) management, leasing or licensing the federal real property described in Schedule B or described as federal real property in any supplementary letters patent, subject to the restrictions contemplated in sections 8.1 and 8.3 and provided such management, leasing or licensing is for, or in connection with, the following:

c) sous réserve des restrictions prévues aux paragraphes 8.1 et 8.3, gestion, location ou octroi de permis relativement aux immeubles fédéraux décrits à l'Annexe « B » ou dans des lettres patentes supplémentaires comme étant des immeubles fédéraux, à condition que la gestion, la location ou l'octroi de permis vise ce qui suit:

(i) those activities described in sections 7.1 and 7.2;

(i) les activités décrites aux paragraphes 7.1 et 7.2;

(ii) those activities described in section 7.3 provided such activities are carried on by Subsidiaries or other third parties pursuant to leasing or licensing arrangements;

(ii) les activités décrites au paragraphe 7.3 pourvu qu'elles soient menées par des Filiales ou des tierces parties conformément aux arrangements de location ou d'octroi de permis;

(iii) the following uses to the extent such uses are not described as activities in section 7.1, 7.2 or 7.3:

(iii) les utilisations suivantes dans la mesure où elles ne figurent pas dans les activités décrites aux paragraphes 7.1, 7.2 ou 7.3 :

(A) uses related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods;

(A) utilisations liées à la navigation, au transport des passagers et des marchandises et à la manutention et à l'entreposage des marchandises;

(B) provision of municipal services or facilities in connection with such federal real property;

(B) prestation de services ou d'installations municipaux relativement à ces immeubles fédéraux;

(C) uses not otherwise within subparagraph 7.1(*c*)(iii)(A), (B)

(C) utilisations qui ne sont pas prévues aux divisions

or (D) that are described in supplementary letters patent;	7.1*c*)(iii)(A), (B) ou (D) mais qui sont décrites dans des lettres patentes supplémentaires;
(D) government sponsored economic development initiatives approved by Treasury Board;	(D) projets de développement économique émanant du gouvernement et approuvés par le Conseil du Trésor;
provided such uses are carried on by third parties, other than Subsidiaries, pursuant to leasing or licensing arrangements;	pourvu qu'elles soient menées par des tierces parties, à l'exception des Filiales, conformément aux arrangements de location ou d'octroi de permis;
…	...
(*e*) granting, in respect of federal real property described in Schedule B or described as federal real property in any supplementary letters patent, road allowances or easements, rights of way or licences for utilities, service or access;	*e*) octroi d'emprises routières, de servitudes ou de permis pour des droits de passage ou d'accès ou des services publics visant des immeubles fédéraux décrits à l'Annexe « B » ou dans des lettres patentes supplémentaires comme étant des immeubles fédéraux;
…	[...]
(*p*) carrying on activities described in section 7.1 on real property other than federal real property described in Schedule C or described as real property other than federal real property in any supplementary letters patent;	*p*) exécution des activités décrites au paragraphe 7.1 sur des immeubles, autres que des immeubles fédéraux, décrits à l'Annexe « C » ou décrits dans des lettres patentes supplémentaires comme étant des immeubles autres que des immeubles fédéraux;
provided that in conducting such activities the Authority shall not enter into or participate in any commitment, agreement or other arrangement whereby the Authority is liable jointly or jointly and severally with any other person for any debt, obligation, claim or liability.	pourvu que l'Administration ne s'engage pas de façon conjointe ou solidaire avec toute autre personne à une dette, obligation, réclamation ou exigibilité lorsqu'elle prend un engagement, conclut une entente ou participe à un arrangement dans l'exercice de ses activités.

[69] However, in my view, the licences and authorizations mentioned in section 7.1 of the letters patent do not relate to takeoff and landing slots at the City Airport. The granting of takeoff and landing slots, even if they are legally considered to be the granting of licences over federal real property, is an integral part of the operation of the City Airport, a matter that is dealt with under section 7.2.

[70] The power to operate and maintain the City Airport in section 7.2 of the letters patent is qualified by the words "in accordance with the Tripartite Agreement." Among other things, that Agreement deals with the quantity and timing of takeoffs and landings at the City Airport. As a matter of interpretation, section 7.2 explicitly embraces the subject-matter of takeoffs and landings at the City Airport. Section 7.1 cannot be interpreted to qualify or derogate from that subject-matter.

[71] I cannot interpret section 7.1 as somehow whittling down section 7.2 that vests specific power in the Toronto Port Authority to engage in "the operation and maintenance of the Toronto City Centre Airport." The normal rule of interpretation is that a specific provision such as section 7.2 prevails over a more general one such as section 7.1: *Canada v. McGregor*, [1989] F.C.J. No. 266, 57 D.L.R. (4th) 317 (C.A.).

[72] In any event, the bulletins do not grant any takeoff or landing slots. Fairly characterized, they announce studies, intentions and plans that concern the operation and maintenance of the City Airport. Takeoff and landing slots are granted under Commercial Carrier Operating Agreements.

– II –

[73] The private nature of the Toronto Port Authority is another factor leading me to conclude that the Toronto Port Authority was not acting as a "federal board, commission or other tribunal" in this case.

[74] As noted above, the Toronto Port Authority received letters patent. One condition of receiving letters patent was that the Toronto Port Authority was and would likely remain "financially self-sufficient": *Canada Marine Act*, paragraph 8(1)(*a*). Buttressing this condition is subsection 29(3) of the Act. It provides as follows:

29. (3) Subject to its letters patent, to any other Act, to any regulations made under any other Act and to any agreement with the Government of Canada that provides otherwise, a port authority that operates an airport shall do so at its own expense.	**29.** (3) Sous réserve de ses lettres patentes, des autres lois fédérales et de leurs règlements d'application ou d'une entente contraire avec le gouvernement du Canada, l'administration portuaire qui exploite un aéroport doit le faire à ses frais.

[75] Subsections 8(1) and 29(3) of the *Canada Marine Act* are indications that, in operating and maintaining the City Airport under section 7.2 of the letters patent, the Toronto Port Authority may pursue private purposes, such as revenue generation and enhancing its financial position. For the Toronto Port Authority, to a considerable extent, the matters discussed in the bulletins have a private dimension to them.

– III –

[76] I turn now to some of the other relevant factors commonly used in making the public-private determination for the purposes of judicial review. I mentioned these in paragraph 60, above.

[77] In no way can the Toronto Port Authority be said to be woven into the network of government or exercising a power as part of that network. The *Canada Marine Act* and the letters patent do the opposite.

[78] There is no statute or regulation that constrains the Toronto Port Authority's discretion. There is no statute or regulation that supplies criteria for decision-making concerning the subject-matters discussed in the bulletins. Put another way, the discretions exercised by the Toronto Port Authority that are evidenced in the bulletins are not founded upon or shaped by law, but rather are shaped by the Toronto Port Authority's private views about how it is best to proceed in all the circumstances.

[79] There is no evidence showing that on the matters described in the bulletins, and indeed in its operation and maintenance of the City Airport, the Toronto Port Authority is instructed, directed, controlled, or significantly influenced by government or another public entity. As well, there are no legislative provisions that would lead to any such finding of instruction, direction, control or influence.

[80] Finally, there is no evidence before this Court in this particular instance that would suggest that the matters described in the bulletin fall with the exceptional category of cases where conduct has attained a serious public dimension or that the matters described in the bulletin have caused or will cause a very serious, exceptional effect on the rights or interests of a broad segment of the public, such that a public law remedy is warranted.

[81] For the foregoing reasons, in engaging in the conduct described in the bulletins in this instance, the Toronto Port Authority was not acting in a public capacity, as that is understood in the jurisprudence. Therefore, judicial review does not lie in these circumstances.

D. Procedural fairness, reasonableness review and improper purpose

[82] Assuming for the moment that judicial review did lie in these circumstances, Air Canada submits that the "decisions" evidenced by the bulletins should be set aside for want of procedural fairness. However, in the particular circumstances of this case, no duty of procedural fairness arose. Such duties do not arise where, as here, the relationship is private and commercial, not public: *Dunsmuir*, *supra;* see also paragraphs 61-81, above. In different circumstances, as explained above, an action taken by the Toronto Port Authority could assume a public dimension and procedural duties could arise, but that is not the case here.

[83] Further, I find no reviewable error in the Federal Court judge's rejection of Air Canada's procedural fairness submissions and, in fact, substantially agree with his reasons at paragraphs 86-

95. In his reasons, the Federal Court judge rejected Air Canada's submission that the Toronto Port Authority was obligated to follow the World Scheduling Guidelines promulgated by the International Air Transport Association. He also held that the Toronto Port Authority did not create any legitimate expectation of consultation on the part of Air Canada, and that, in any event, Air Canada had made its views known fully to the Toronto Port Authority.

[84] Air Canada also submits that the "decisions" evidenced by the bulletins should be set aside because they are unreasonable. The Federal Court judge rejected this submission. Again, I find no reviewable error in the reasons of the Federal Court judge (at paragraphs 96-101), and substantially agree with them. In this case, the actions of the Toronto Port Authority described in the bulletins were within the range of defensibility and acceptability.

[85] Air Canada also submits that the Toronto Port Authority pursued an improper purpose. In its first notice of application, Air Canada describes this as "prefer[ring] Porter over new entrants and…perpetuat[ing] Porter's significant anti-competitive advantage into the future." Insofar as the bulletins and the conduct described in them are concerned – the only matters that are the subject of the judicial reviews in this case – the Federal Court judge stated that "[t]here is no evidence…to suggest that [the Toronto Port Authority] and Porter were doing anything more than engaging in normal, reasonable commercial activity." There is nothing to warrant interference with that factual finding. Therefore, I find no reviewable error in the Federal Court's judge's rejection of Air Canada's submissions on improper purpose. To the extent that Air Canada considers that the

bulletins, the conduct described in them, other matters or any or all of these things have resulted in damage to competition, it has its recourses under the *Competition Act*.

E. Proposed disposition

[86] For the foregoing reasons, I would dismiss the appeal with costs.

"David Stratas"

J.A.

<u>REASONS CONCURRING IN THE RESULT</u> (Létourneau and Dawson JJ.A.)

[87] We have read the reasons now received from our colleague Stratas J.A. We concur with his proposed disposition.

"Gilles Létourneau"
J.A.

"Eleanor R. Dawson"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-355-10
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE HUGHES DATED JULY, 21, 2010	
STYLE OF CAUSE:	Air Canada v. Toronto Port Authority and Porter Airlines Inc.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 6, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
REASONS CONCURRING IN THE RESULT BY:	Létourneau and Dawson JJ.A.
DATED:	December 12, 2011

APPEARANCES:

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: **MACTAVISH J.A.**

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 22, 2020.

REASONS FOR ORDER BY: MACTAVISH J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: **MACTAVISH J.A.**

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

MACTAVISH J.A.

[1] As is the case with so many other areas of life today, the airline industry and airline passengers have been seriously affected by the COVID-19 pandemic. International borders have been closed, travel advisories and bans have been instituted, people are not travelling for non-essential reasons and airlines have cancelled numerous flights.

[2] In response to this unprecedented situation, the Canadian Transportation Agency (CTA) issued two public statements on its website that suggest that it could be reasonable for airlines to provide passengers with travel vouchers when flights are cancelled for pandemic-related reasons, rather than refunding the monies that passengers paid for their tickets.

[3] Air Passenger Rights (APR) is an advocacy group representing and advocating for the rights of the public who travel by air. It has commenced an application for judicial review of the CTA's public statements, asserting that they violate the CTA's own *Code of Conduct*, and mislead passengers as to their rights when their flights are cancelled. In the context of this application, APR has brought a motion in writing seeking an interlocutory order that, among other things, would require that the statements be removed from the CTA's website. It also seeks to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the Agency's public statements.

[4] For the reasons that follow, I have concluded that APR has not satisfied the tripartite injunctive test. Consequently, the motion will be dismissed.

1. Background

[5] In early 2020, the effects of the COVID-19 coronavirus began to be felt in North America, rapidly reaching the level of a pandemic. On March 25, 2020, the CTA posted a statement on its website dealing with flight cancellations. The statement, entitled "Statement on

Vouchers" notes the extraordinary circumstances facing the airline industry and airline customers because of the pandemic, and the need to strike a "fair and sensible balance between passenger protection and airlines' operational realities" in the current circumstances.

[6] The Statement on Vouchers observes that passengers who have no prospect of completing their planned itineraries "should not be out-of-pocket for the cost of cancelled flights". At the same time, airlines facing enormous drops in passenger volumes and revenues "should not be expected to take steps that could threaten their economic viability".

[7] The Statement on Vouchers states that any complaint brought to the CTA will be considered on its own merits. However, the Statement goes on to state that, generally speaking, the Agency believes that "an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time". The Statement then suggests that a 24-month period for the redemption of vouchers "would be considered reasonable in most cases".

[8] Concurrent with the posting of the Statement on Vouchers, the CTA published an amendment to a notice already on its website entitled "Important Information for Travellers During COVID-19" (the Information Page), which incorporates references to the Statement on Vouchers.

[9] These statements are the subject of the underlying application for judicial review.

2. APR's Arguments

[10] APR submits that there is an established body of CTA jurisprudence that confirms passengers' right to a refund where air carriers are unable to provide air transportation, including cases where flight cancellations are for reasons beyond the airline's control. According to APR, this jurisprudence is consistent with the common law doctrine of frustration, the doctrine of *force majeure* and common sense. The governing legislation further requires airlines to develop reasonable policies for refunds when airlines are unable to provide service for any reason.

[11] According to APR, statements on the Information Page do not just purport to relieve air carriers from having to provide passenger refunds where flights are cancelled for reasons beyond the airlines' control, including pandemic-related situations. They also purport to relieve airlines from their obligation to provide refunds where flights are cancelled for reasons that are within the airlines' control, including where cancellation is required for safety reasons.

[12] APR further contends that the impugned statements by the CTA are tantamount to an unsolicited advance ruling as to how the Agency will treat passenger complaints about refunds from air carriers where flights are cancelled for reasons relating to the COVID-19 pandemic. The statements suggest that the CTA is leaning heavily towards permitting the issuance of vouchers in lieu of refunds, and that it will very likely dismiss passenger complaints with respect to airlines' failure to provide refunds during the pandemic, regardless of the reason for the flight cancellation. According to APR, this creates a reasonable apprehension that CTA members will not deal with passenger complaints fairly.

3. The Test for Injunctive Relief

[13] The parties agree that in determining whether APR is entitled to interlocutory injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[14] That is, the Court must consider three questions:

1) Whether APR has established that there is a serious issue to be tried in the underlying application for judicial review;

2) Whether irreparable harm will result if the injunction is not granted; and

3) Whether the balance of convenience favours the granting of the injunction.

[15] The *RJR-MacDonald* test is conjunctive, with the result that an applicant must satisfy all three elements of the test in order to be entitled to relief: *Janssen Inc. v. Abbvie Corp.*, 2014 FCA 112, 120 C.P.R. (4th) 385 at para. 14.

4. Has APR Raised a Serious Issue?

[16] The threshold for establishing the existence of a serious issue to be tried is usually a low one, and applicants need only establish that the underlying application is neither frivolous nor vexatious. A prolonged examination of the merits of the application is generally neither necessary nor desirable: *RJR-MacDonald*, above at 335, 337-338.

[17] With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

[18] However, APR also seeks mandatory orders compelling the CTA to remove the two statements from its website and directing it to "clarify any misconceptions for passengers who previously contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry". It further seeks a mandatory order requiring that the CTA bring this Court's order and the removal or clarification of the CTA's previous statements to the attention of airlines and a travel association.

[19] A higher threshold must be met to establish a serious issue where a mandatory interlocutory injunction is sought compelling a respondent to take action prior to the determination of the underlying application on its merits. In such cases, the appropriate inquiry is whether the party seeking the injunction has established a strong *prima facie* case: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 at para. 15. That is, I must be satisfied upon a preliminary review of the case that there is a strong likelihood that APR will be ultimately successful in its application: *C.B.C.*, above at para. 17.

[20] As will be explained below, I am not persuaded that APR has established a strong *prima facie* case here as the administrative action being challenged in its application for judicial review is not amenable to judicial review.

[21] APR concedes that the statements on the CTA website do not reflect decisions, determinations, orders or legally-binding rulings on the part of the Agency. It notes, however, that subsection 18.1(1) of the *Federal Courts Act* does not limit the availability of judicial review to formal decisions or orders, stating rather that applications may be brought "by anyone directly affected by the matter in respect of which relief is sought" [my emphasis].

[22] Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[23] For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al*., 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's

statements "purport[t] to provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

[24] I will return to the issue of the impact of the CTA's statements on APR in the context of my discussion of irreparable harm, but suffice it to say at this juncture that there is no suggestion that APR is itself directly affected by the statements in issue. The statements on the CTA website also do not determine the right of airline passengers to refunds where their flights have been cancelled by airlines for pandemic-related reasons.

[25] Noting the current extraordinary circumstances, the statements simply suggest that having airlines provide affected passengers with vouchers or credits for future travel "could be" an appropriate approach in the present context, as long as these vouchers or credits do not expire in an unreasonably short period of time. This should be contrasted with the situation that confronted the Federal Court in *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750, relied on by APR, where the statement in issue included a clear statement of how, in the respondent's view, the law was to be interpreted and the statement in issue was intended to be coercive in nature.

[26] As a general principle, CTA policy documents are not binding on it as a matter of law: *Canadian Pacific Railway Company v. Cambridge (City)*, 2019 FCA 254, 311 A.C.W.S. (3d) 416 at para. 5. Moreover, in this case the Statement on Vouchers specifically states that "any specific situation brought before the Agency will be examined on its merits". It thus remains open to affected passengers to file complaints with the CTA (which will be dealt with once the

current suspension of dispute resolution services has ended) if they are not satisfied with a travel voucher, and to pursue their remedies in this Court if they are not satisfied with the Agency's decisions.

[27] It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

5. Irreparable Harm

[28] A party seeking interlocutory injunctive relief must demonstrate with clear and non-speculative evidence that it will suffer irreparable harm between now and the time that the underlying application for judicial review is finally disposed of.

[29] APR has not argued that it will itself suffer irreparable harm if the injunction is not granted. It relies instead on the harm that it says will befall Canadian airline passengers whose flights have been cancelled for pandemic-related reasons. However, while APR appears to be pursuing this matter as a public interest litigant, it has not yet sought or been granted public interest standing.

[30] As a general rule, only harm suffered by the party seeking the injunction will qualify under this branch of the test: *RJR-MacDonald*, above at 341; *Manitoba (Attorney General) v.*

Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 at 128. There is a limited exception to this principle in that the interests of those individuals dependent on a registered charity may also be considered under this branch of the test: *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, 440 N.R. 232 at paras. 33-34; *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265, [2010] 1 C.T.C. 161 at para. 17. While APR is a not-for-profit corporation, there is no suggestion that it is a registered charity.

[31] I am also not persuaded that irreparable harm has been established, even if potential harm to Canadian airline passengers is considered.

[32] Insofar as APR seeks to enjoin the CTA from dealing with passenger complaints, it asserts that the statements in issue were published contrary to the CTA's own *Code of Conduct*. This prohibits members from publicly expressing opinions on potential cases or issues relating to the work of the Agency that may create a reasonable apprehension of bias on the part of the member. According to APR, the two statements at issue here create a reasonable apprehension of bias on the part of the CTA's members such that they will be unable to provide complainants with a fair hearing.

[33] Bias is an attitude of mind that is unique to an individual. As a result, an allegation of bias must be directed against a specific individual who is alleged to be unable to bring an impartial mind to bear on a matter: *E.A. Manning Ltd. v. Ontario Securities Commission*, 23 O.R.

(3d) 257, 32 Admin. L.R. (2d) 1 (C.A.), citing *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (C.A.).

[34] As is the case with many administrative bodies, the CTA carries out both regulatory and adjudicative functions. It resolves specific commercial and consumer transportation-related disputes and acts as an industry regulator issuing permits and licences to transportation providers. The CTA also provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers.

[35] There is no evidence before me that the members of the CTA were involved in the formulation of the statements at issue here, or that they have endorsed them. Courts have, moreover, rejected the notion that a "corporate taint" can arise based on statements by non-adjudicator members of multi-function organizations: *Zündel v. Citron*, [2000] 4 FC 225,189 D.L.R. (4th) 131 at para. 49 (C.A.); *E.A. Manning Ltd.*, above at para. 24.

[36] Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing. The alleged harm is thus not irreparable.

[37] APR also asserts that passengers are being misled by the travel industry as to the import of the CTA's statements, and that airlines, travel insurers and others are citing the statements as a basis to deny reimbursement to passengers whose flights have been cancelled for pandemic-related reasons. If third parties are misrepresenting what the CTA has stated, recourse is available against those third parties and the alleged harm is thus not irreparable.

6. Balance of Convenience

[38] In light of the foregoing, it is unnecessary to deal with the question of the balance of convenience.

7. Other Matters

[39] Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

[40] APR asks that it be permitted to make submissions on the issue of costs once the Court has dealt with the merits of its motion. APR shall have 10 days in which to file submissions in writing in relation to the question of costs, which submissions shall not exceed five pages in length. The CTA shall have 10 days in which to respond with submissions that do not exceed

five pages, and APR shall have a further five days in which to reply with submissions that do not exceed three pages in length.

"Anne L. Mactavish"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-102-20
STYLE OF CAUSE:	AIR PASSENGERS RIGHTS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MACTAVISH J.A.
DATED:	MAY 22, 2020

WRITTEN REPRESENTATIONS BY:

Simon Lin	FOR THE APPLICANT
Allan Matte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Legal Services Directorate Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT

No. 39012

April 9, 2020

BETWEEN:

Bob Brown and Gábor Lukács

Applicants

- and -

Canadian Transportation Agency

Respondent

JUDGMENT

The application for leave to appeal from the judgment of the Federal Court of Appeal, Number 19-A-28, dated August 15, 2019, is dismissed without costs.

Le 9 avril 2020

ENTRE :

Bob Brown et Gábor Lukács

Demandeurs

- et -

Office des transports du Canada

Intimée

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel fédérale, numéro 19-A-28, daté du 15 août 2019, est rejetée sans dépens.

J.S.C.C.
J.C.S.C.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20131024

Docket: A-532-12

Citation: 2013 FCA 250

CORAM: **SHARLOW J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE AND CANADA REVENUE AGENCY

Appellants

and

JP MORGAN ASSET MANAGEMENT (CANADA) INC.

Respondent

Heard at Toronto, Ontario, on September 18, 2013.

Judgment delivered at Ottawa, Ontario, on October 24, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SHARLOW J.A.
NEAR J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20131024

Docket: A-532-12

Citation: 2013 FCA 250

CORAM: **SHARLOW J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE AND CANADA REVENUE AGENCY

Appellants

and

JP MORGAN ASSET MANAGEMENT (CANADA) INC.

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

[1] In this appeal, the Minister of National Revenue renews her attempt to strike out the application for judicial review brought by JP Morgan Asset Management (Canada) Inc. in the Federal Court.

[2] In that application for judicial review, JP Morgan alleges that the Minister departed from an administrative policy when she assessed it for tax under Part XIII of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for 2002, 2003 and 2004. This, JP Morgan says, was an improper exercise of discretion. The Minister counters that, in reality, JP Morgan is challenging the validity of the assessments, a matter that is within the exclusive jurisdiction of the Tax Court of Canada.

[3] Prothonotary Aalto dismissed the Minister's motion to strike: 2012 FC 651. In his view, the application raised an independent administrative law ground of review and was properly in the Federal Court. Mandamin J. declined to quash the Prothonotary's decision, finding no clear error on the part of the Prothonotary: 2012 FC 1366.

[4] For the reasons below, I would allow the Minister's appeal, set aside the orders below and strike out JP Morgan's application.

[5] JP Morgan's application fails to state a cognizable administrative law claim. Further, in reality it is a challenge to the assessment for which recourse can be obtained only in the Tax Court. Finally, the relief being sought is the setting aside or vacating of the Minister's assessments, a remedy the Federal Court cannot grant.

A. The basic facts

[6] JP Morgan is a Canadian corporation resident in Canada for the purposes of the *Income Tax Act*. It provides investment advice to Canadian clients. It also markets the selection of international stock by foreign related entities.

[7] JP Morgan's clients pay fees to it based on the value of assets they invest. In turn, to compensate the foreign related entities for their services, JP Morgan pays them fees.

[8] The Minister has assessed JP Morgan under Part XIII of the *Income Tax Act* concerning the fees paid by it to JF Asset Management Limited, a private Hong Kong corporation, for all periods ending December 31, 2002 to December 31, 2008, inclusive.

[9] Part XIII applies where certain amounts are paid or credited by a resident of Canada to a person who is not a resident of Canada. The resident of Canada must withhold a tax of 25% on those amounts and if it does not do so, it is itself liable for that tax (subsections 212(1), 215(1) and 215(6)). Under subsection 227(10), the Minister "may at any time" assess the resident of Canada for those amounts.

[10] Following the assessments, JP Morgan applied to the Federal Court for judicial review. The precise nature of its application for judicial review will be considered below. It seeks the quashing of the decision of the Minister to issue assessments for the periods ending December 31, 2002 to December 31, 2004, inclusive.

[11] JP Morgan alleges that the Minister abused her discretion by issuing assessments for Part XIII tax for so many years. It says she did not consider or sufficiently consider policies that would have limited the number of years subject to assessment.

[12] The Crown moved to strike JP Morgan's application. As mentioned, it has been unsuccessful before the Prothonotary and the Federal Court. It now appeals to this Court.

B. Relevant legislative provisions

[13] Various provisions of the *Income Tax Act* give the Minister the power to assess, additionally assess, or reassess tax. Also the Minister has many wide powers to administer, investigate, enforce and collect.

(1) The Minister's regime

[14] Subsection 152(1) of the *Income Tax Act* sets out the Minister's obligation to assess tax:

152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine	**152.** (1) Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine :
(*a*) the amount of refund, if any, to which the taxpayer may be	*a*) le montant du remboursement éventuel auquel il a droit en

entitled by virtue of section 129, 131, 132 or 133 for the year; or	vertu des articles 129, 131, 132 ou 133, pour l'année;
(*b*) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3),122.51(2), 122.7(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.	*b*) le montant d'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année.

[15] Subsection 152(4) of the *Income Tax Act* empowers the Minister to assess, reassess, or additionally assess tax for a taxation year, along with any interest and penalties:

152. (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if: [list of exceptions omitted].	**152.** (4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants : [le liste des exceptions est omise]

[16] Subsection 152(8) deems assessments to be binding until varied, vacated or replaced by a reassessment, notwithstanding any error, defect or omission in their making:

152. (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.	**152.** (8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

[17] The assessments issued against JP Morgan are based on certain liability provisions in Part XIII of the *Income Tax Act*: paragraph 212(1(a) and subsections 215(1) and 215(6).

[18] Paragraph 212(1)(*a*) of the *Income Tax Act* obligates a non-resident person, here JF Asset Management Limited, to pay a tax on certain fees received from a resident of Canada, here J.P. Morgan:

212. (1) Every non-resident person shall pay an income tax of 25% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to the non-resident person as, on account or in lieu of payment of, or in satisfaction of,	**212.** (1) Toute personne non-résidente doit payer un impôt sur le revenu de 25 % sur toute somme qu'une personne résidant au Canada lui paie ou porte à son crédit, ou est réputée en vertu de la partie I lui payer ou porter à son crédit, au titre ou en paiement intégral ou partiel :
(*a*) a management or administration fee or charge;	*a*) des honoraires ou frais de gestion ou d'administration;

The Minister alleges that the fees in issue are within the scope of this provision.

[19] Subsection 215(1) of the *Income Tax Act* obligates a resident of Canada, here JP Morgan, to withhold from the fees paid the tax payable under paragraph 212(1)(*a*) and remit it to the Crown:

215. (1) When a person pays, credits or provides, or is deemed to have paid, credited or provided, an amount on which an income tax is payable under this Part, or would be so payable if this Act were read without reference to subparagraph 94(3)(*a*)(viii) and to subsection 216.1(1), the person shall, notwithstanding any agreement or law to the contrary, deduct or withhold from it the amount of the tax and forthwith remit that amount to the Receiver General on behalf of the non-resident person on account of the tax and shall submit with the remittance a statement in prescribed form.	**215.** (1) La personne qui verse, crédite ou fournit une somme sur laquelle un impôt sur le revenu est exigible en vertu de la présente partie, ou le serait s'il n'était pas tenu compte du sous-alinéa 94(3)*a*)(viii) ni du paragraphe 216.1(1), ou qui est réputée avoir versé, crédité ou fourni une telle somme, doit, malgré toute disposition contraire d'une convention ou d'une loi, en déduire ou en retenir l'impôt applicable et le remettre sans délai au receveur général au nom de la personne non-résidente, à valoir sur l'impôt, et l'accompagner d'un état selon le formulaire prescrit.

[20] The Minister alleges that JP Morgan did not withhold and remit the tax under paragraph 212(1)(*a*) of the *Income Tax Act* as it was required to do and so it is liable for the tax under subsection 215(6):

215. (6) Where a person has failed to deduct or withhold any amount as required by this section from an amount paid or credited or deemed to have been paid or credited to a non-resident person, that person is liable to pay as tax under this Part on behalf of the non-resident person the whole of the amount that should have been deducted or withheld, and is entitled to deduct or withhold from any amount paid or credited by that	**215.** (6) Lorsqu'une personne a omis de déduire ou de retenir, comme l'exige le présent article, une somme sur un montant payé à une personne non-résidente ou porté à son crédit ou réputé avoir été payé à une personne non-résidente ou porté à son crédit, cette personne est tenue de verser à titre d'impôt sous le régime de la présente partie, au nom de la personne non-résidente, la totalité de la somme qui aurait dû

person to the non-resident person or otherwise recover from the non-resident person any amount paid by that person as tax under this Part on behalf thereof.	être déduite ou retenue, et elle a le droit de déduire ou de retenir sur tout montant payé par elle à la personne non-résidente ou portée à son crédit, ou par ailleurs de recouvrer de cette personne non-résidente toute somme qu'elle a versée pour le compte de cette dernière à titre d'impôt sous le régime de la présente partie.

[21] The Minister has assessed JP Morgan for the tax under subsection 215(6) of the *Income Tax Act*. The Minister's power to assess is found in subsection 227(10) of the *Income Tax Act*:

227. (10) The Minister may at any time assess any amount payable under	**227.** (10) Le ministre peut, en tout temps, établir une cotisation pour les montants suivants :
(*a*) subsection 227(8), 227(8.1), 227(8.2), 227(8.3) or 227(8.4) or 224(4) or 224(4.1) or section 227.1 or 235 by a person,	*a*) un montant payable par une personne en vertu des paragraphes (8), (8.1), (8.2), (8.3) ou (8.4) ou 224(4) ou (4.1) ou des articles 227.1 ou 235;
(*b*) subsection 237.1(7.4) or (7.5) or 237.3(8) by a person or partnership,	*b*) un montant payable par une personne ou une société de personnes en vertu des paragraphes 237.1(7.4) ou (7.5) ou 237.3(8);
(*c*) subsection 227(10.2) by a person as a consequence of a failure of a non-resident person to deduct or withhold any amount, or	*c*) un montant payable par une personne en vertu du paragraphe (10.2) pour défaut par une personne non-résidente d'effectuer une déduction ou une retenue;
(*d*) Part XIII by a person resident in Canada,	*d*) un montant payable en vertu de la partie XIII par une personne qui réside au Canada.
and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part	Les sections I et J de la partie I s'appliquent, avec les modifications

I apply with any modifications that the circumstances require.	nécessaires, à tout avis de cotisation que le ministre envoie à la personne ou à la société de personnes.

(2) The Tax Court regime

[22] The closing words of subsection 227(10) give an assessed taxpayer the right to object to the assessment under section 165 and to appeal to the Tax Court under subsection 169(1). JP Morgan has objected to all of the assessments under section 165. If its objections are unsuccessful, JP Morgan will be able to appeal to the Tax Court under subsection 169(1). This subsection provides as follows:

169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either	**169.** (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation :
(*a*) the Minister has confirmed the assessment or reassessed, or	*a*) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;
(*b*) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,	*b*) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation;
but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer	toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été envoyé

under section 165 that the Minister has confirmed the assessment or reassessed.	au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

[23] In an appeal, the Tax Court has specific powers concerning assessments:

171. (1) The Tax Court of Canada may dispose of an appeal by	**171.** (1) La Cour canadienne de l'impôt peut statuer sur un appel :
(a) dismissing it; or	*a*) en le rejetant;
(b) allowing it and	*b*) en l'admettant et en :
(i) vacating the assessment,	(i) annulant la cotisation,
(ii) varying the assessment, or	(ii) modifiant la cotisation,
(iii) referring the assessment back to the Minister for reconsideration and reassessment.	(iii) déférant la cotisation au ministre pour nouvel examen et nouvelle cotisation.

[24] Parliament has declared the Tax Court's powers concerning assessments to be exclusive:

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under…the *Income Tax Act*…when references or appeals to the Court are provided for in those Acts.	**12.** (1) La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application…de la *Loi de l'impôt sur le revenu*…dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

(*Tax Court of Canada Act*, R.S.C. 1985, c. T-2, subsection 12(1).)

(3) The Federal Court's judicial review authority

[25] The Federal Court determines judicial reviews from "federal board[s], commission[s] or other tribunal[s]." The Minister is a "federal board, commission or other tribunal" and, in appropriate circumstances, her decisions can be reviewed:

2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament…	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale…

[26] When a judicial review is properly before it, the Federal Court has wide powers:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18.** (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(*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	*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*) 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	*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.

relief against a federal board, commission or other tribunal.

(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.

(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*.

(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.

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

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.

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.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) On an application for judicial review, the Federal Court may

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(*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

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*) 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.

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.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

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*) 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;

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*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

(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.

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.

(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.

(4) A limitation on the Federal Court's judicial review authority

[27] Despite the broad powers the Federal Court has under the foregoing provisions, Parliament has forbidden it from dealing with matters that can be appealed to the Tax Court:

18.5. Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to…the Tax Court of Canada…from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings

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 canadienne de l'impôt…d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des

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.	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.

(*Federal Courts Act*, R.S.C. 1985, c. F-7, section 18.5.)

C. An introduction to the analysis

[28] Before considering this case, some opening observations are warranted.

[29] Time and time again, this Court strikes out taxpayers' applications for judicial review. What explains the flow of unmeritorious applications for judicial review in the area of tax?

[30] One reason, perhaps, is the Supreme Court's leading decision in this area: *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793. In the course of finding that the taxpayer's application for judicial review must fail in that case, the Supreme Court confirmed that in appropriate circumstances "[j]udicial review is available" but "[r]eviewing courts should be very cautious in authorizing judicial review" (at paragraphs 8 and 11). Undoubtedly both propositions are correct on administrative law principles. However, in its brief reasons, the Supreme Court did not identify those principles.

[31] In legal submissions, commentaries and conferences, some tax counsel have viewed the Supreme Court's words in *Addison & Leyen* in isolation, divorced from administrative law

principles. To them, the Supreme Court's words welcome taxpayers, albeit cautiously, to seek refuge in the Federal Court from the Minister's harsh or unfair treatment. Taxpayers also see cases that, on occasion, provide redress for "unfairness," "unreasonableness" and "abuses of discretion" – colloquially understood, more words of welcome. On this optimistic basis, some launch applications for judicial review. However, such a hopeful interpretation of *Addison & Layen* is based on a lack of awareness or misunderstanding of administrative law principles.

[32] Almost always, applications for judicial review of administrative actions by the Minister in connection with assessments fail, especially in this Court. The failure rate now has led some to conclude that the judiciary "is simply not fulfilling" the responsibility of "controlling, through administrative law procedures, the [Minister's] exercise of government powers and…protecting common citizens from abuses" in the exercise of tax audit and assessment powers: Guy Du Pont and Michael H. Lubetsky, "The Power to Audit is the Power to Destroy: Judicial Supervision of the Exercise of Audit Powers" (2013), 61 Can. Tax J. 103 at page 120.

[33] In another scholarly article, a lawyer notes a parade of "somewhat redundant" decisions and suggests the reasons prompting the lines drawn in the jurisprudence can be hard to discern or understand: David Jacyk, "The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts" (2008), 56 Can. Tax J. 661 at 707; see also David Sherman, Annotation to *Pine Valley Enterprises Inc. v. R.*, 2010 TCC 324 (in *Taxnet Pro*) (online).

[34] Administrative law has many moving parts, the interrelationship of which often is not understood. Collectively, these moving parts are what Du Pont and Lubetsky call "administrative

law procedures." They say administrative law procedures control government powers and protect citizens from abuses. That is partly true.

[35] But administrative law procedures also protect the ability of administrative decision-makers' to exercise the powers given to them by law. Sometimes that law sets out when and how those exercises of powers can be challenged. Absent a constitutional challenge or the need for review based on the constitutional principle of the rule of law (*Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220), courts must follow this legislation according to its terms. After all, the supremacy of laws passed by Parliament – a constitutional principle itself – forms part of the bedrock of administrative law.

[36] Broadly writ, administrative law courts enforce these and other principles and, when they clash, mediate them: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 27-30 (noting the tension between the rule of law and Parliamentary supremacy). Administrative law courts mediate the clashes by applying doctrines founded upon decades of well-considered solutions to practical problems – a mountain of decided cases. And in applying these doctrines, administrative law courts follow practices and procedures designed for this area of law.

[37] To deal with the appeal before us and to offer wider guidance, I begin with the practices and procedures governing notices of application for judicial review and motions to strike them. Then I shall turn to the doctrines underpinning judicial reviews in the area of tax.

D. Practice and procedure: notices of application for judicial review and motions to strike them

(1) Notices of application for judicial review: pleading requirements

[38] In a notice of application for judicial review, an applicant must set out a "precise" statement of the relief sought and a "complete" and "concise" statement of the grounds intended to be argued: *Federal Courts Rules*, SOR/98-106, Rules 301(d) and (e).

[39] A "complete" statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought.

[40] A "concise" statement of grounds must include the material facts necessary to show that the Court can and should grant the relief sought. It does not include the evidence by which those facts are to be proved.

[41] The evidence is supplied in the parties' affidavits at a later stage in the proceedings: Rules 306 and 307, subject to restrictions in the case law (see, *e.g.*, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297).

(2) The grounds stated in the notice of application for judicial review

[42] While the grounds in a notice of application for judicial review are supposed to be "concise," they should not be bald. Applicants who have some evidence to support a ground can state the ground with some particularity. Applicants without any evidence, who are just fishing for something, cannot.

[43] Thus, for example, it is not enough to say that an administrative decision-maker "abused her discretion." The applicant must go further and say what the discretion was and how it was abused. For example, the applicant should plead that "the decision-maker fettered her discretion by blindly following the administrative policy on reconsiderations rather than considering all the circumstances, as section Y of statute X requires her to do."

[44] The statement of grounds in a notice of application for judicial review is not a list of categories of evidence the applicant hopes to find during the evidentiary stages of the application. Before a party can state a ground, the party must have some evidence to support it.

[45] It is an abuse of process to start proceedings and make entirely unsupported allegations in the hope that something will later turn up. See generally *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184 at paragraph 34; *AstraZeneca Canada Inc. v. Novopharm Ltd.*, 2010 FCA 112 at paragraph 5. Abuses of process can be redressed in many ways, such as adverse cost awards against parties, their counsel or both: Rules 401 and 404.

[46] Sometimes evidence that could support an application for judicial review is found after the deadline for starting an application for judicial review: *Federal Courts Act*, *supra*, subsection 18.1(2) (thirty days). For example, a taxpayer might obtain evidence during Tax Court proceedings or as a result of information requests made under the *Access to Information Act*, R.S.C. 1985, c. A-1. In appropriate circumstances, the Court can grant an extension of time: *Federal Courts Act*, *supra*, subsection 18.1(2).

(3) Motions to strike notices of application for judicial review

[47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf.*. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal*

Courts Act, *supra*, subsection 18.1(2) and section 18.4. An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective.

(4) Scrutinizing the notice of application for judicial review

[49] Armed with sophisticated wordsmithing tools and cunning minds, skilful pleaders can make Tax Court matters sound like administrative law matters when they are nothing of the sort. When those pleaders illegitimately succeed, they frustrate Parliament's intention to have the Tax Court exclusively decide Tax Court matters. Therefore, in considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application.

[50] The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form: *Canada v. Domtar Inc.*, 2009 FCA 218 at paragraph 28; *Canada v. Roitman*, 2006 FCA 266 at paragraph 16; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at paragraph 78.

(5) The admissibility of affidavits on a motion to strike

[51] As a general rule, affidavits are not admissible in support of motions to strike applications for judicial review.

[52] This general rule is justified by several considerations:

- Affidavits have the potential to trigger cross-examinations and refused questions and, thus, can delay applications for judicial review. This is contrary to Parliament's requirement that applications for judicial review proceed "without delay" and be heard "in a summary way."

- A respondent bringing a motion to strike a notice of application does not need to file an affidavit. In its motion, it must identify an obvious and fatal flaw in the notice of application, *i.e.*, one apparent on the face of it. A flaw that can be shown only with the assistance of an affidavit is not obvious. A respondent's inability to file evidence does not normally prejudice it. It can file evidence later on the merits of the review, subject to certain limitations, and often the merits can be heard within a few months. If an application has no merit, it will be dismissed soon enough. And if there is some need for faster determination of the merits, a respondent can always move for an order expediting the application.

- As for an applicant responding to a motion to strike an application, the starting point is that in such a motion the facts alleged in the notice of application are taken to be true: *Chrysler Canada Inc. v. Canada*, 2008 FC 727 at paragraph 20, aff'd on appeal, 2008 FC 1049. This obviates the need for an affidavit supplying facts. Further, an applicant must state "complete" grounds in its notice of application. Both the Court and opposing parties are entitled to assume that the notice of application

> includes everything substantial that is required to grant the relief sought. An affidavit cannot be admitted to supplement or buttress the notice of application.

[53] Exceptions to the rule against admitting affidavits on motions to strike should be permitted only where the justifications for the general rule of inadmissibility are not undercut, and the exception is in the interests of justice.

[54] For example, one exception, relevant in this case, is where a document is referred to and incorporated by reference in a notice of application. A party may file an affidavit merely appending the document, nothing more, for the assistance of the Court.

[55] In this case, before the Prothonotary, both parties filed evidence on the motion to strike.

[56] The Minister filed a short affidavit of an official who maintains records at the Canada Revenue Agency. The affidavit appends the assessments for Part XIII tax made against JP Morgan for the 2002, 2003 and 2004 taxation years – the documents under attack in the notice of application. The affidavit does not offer any editorial commentary or supplementary information concerning the assessments.

[57] The affidavit filed by the Minister is unobjectionable, as it merely appends a document referred to and incorporated by reference in a notice of application.

[58] JP Morgan filed an affidavit of its executive director responsible for managing its financial affairs. The affidavit offers evidence concerning JP Morgan, the nature of its business and considerable information about the Minister's audit and her shift to earlier taxation years. It appends letters sent by the Minister during the audit, an audit report, JP Morgan's notices of objection to the assessment for the 2002 taxation year, and the facts and reasons for the notices of objection.

[59] Before the Prothonotary, the Minister sought to strike JP Morgan's affidavit. The Prothonotary declined to strike the affidavit.

[60] The Prothonotary correctly observed (at paragraph 24) that "in the ordinary course affidavit evidence is not permitted on motions to strike" and "notices of application must be accepted on [their] face." However, the Prothonotary considered the affidavit proper, as it "goes to the issues of why this Court has jurisdiction to deal with the decision by way of judicial review" and "does not contain information which is unknown to the [Minister]" (at paragraph 24).

[61] In the end, the Prothonotary's admissibility ruling was of no consequence. JP Morgan's affidavit does not appear to have factored significantly into the Prothonotary's decision and the Federal Court did not refer to it when reviewing the Prothonotary's decision. Finally, in her notice of appeal to this Court, the Minister has not challenged the Prothonotary's admissibility ruling. Therefore, it is not necessary to consider the matter further.

[62] For the benefit of future cases, however, I will offer some brief guidance.

[63] In the circumstances of this case, I disagree with the Prothonotary's view that the affidavit tendered by JP Morgan was admissible because the Court's jurisdiction was in issue. In drafting the grounds in support of their notices of application, applicants should plead the reasons why the Court has jurisdiction. After all, the Court's jurisdiction is statutory, the Court must have jurisdiction to entertain the application and grant the relief sought, and Rule 301(e) requires relevant statutory provisions to be pleaded.

[64] In my view, the affidavit tendered by JP Morgan is admissible only to the extent it describes, in an uncontroversial way, the policies mentioned in the notice of application which, on a fair reading, are incorporated into the notice of application by reference. The remainder of the affidavit, however, is either irrelevant or adds information not included in the grounds offered in support of the application. Regardless of whether this additional information in the affidavit was known to the Minister, it should not have been before the Court on the motion to strike.

(6) Procedures after an unsuccessful motion to strike

[65] If a motion to strike fails, the judicial review proceeds according to Rules 306-319. The judicial review does not necessarily stop the Minister's pre-assessment or post-assessment processes or the Tax Court's appeal processes. The Minister and the Tax Court may continue with their respective processes unless the Federal Court issues a stay under the test in *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

E. General principles governing when notices of application for judicial review in tax matters should be struck

[66] Administrative law authorities from this Court and the Supreme Court of Canada – including the Supreme Court's decision in *Addison & Leyen, supra* – show that any of the following qualifies as an obvious, fatal flaw warranting the striking out of a notice of application:

(1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;

(2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; or

(3) the Federal Court cannot grant the relief sought.

I shall examine each of these objections in turn.

(1) The notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court

[67] Cognizable administrative law claims satisfy two requirements.

[68] First, the judicial review must be available under the *Federal Courts Act*. There are certain basic prerequisites imposed by sections 18 and 18.1 of the *Federal Courts Act*: *Air Canada v*.

Toronto Port Authority, 2011 FCA 347 (summary of many, but not necessarily all, of the relevant prerequisites).

[69] Overall, there is no doubt that, subject to the limitations discussed below, the Federal Court can review the Minister's actions under section 18 of the *Federal Courts Act* in certain situations: *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94; *Addison & Leyen*, *supra* at paragraph 8. Behind section 18 stands the Court's plenary "superintending power over the Minister's actions in administering and enforcing the Act": *M.N.R. v. Derakhshani*, 2009 FCA 190 at paragraphs 10-11 and *RBC Life Insurance Company*, *supra* at paragraph 35, interpreting and applying *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paragraphs 33. 36. 38 and 39.

[70] Second, the application must state a ground of review that is known to administrative law or that could be recognized in administrative law. Grounds known to administrative law include the following:

- *Lack of vires.* Administrative action must be based on or find its source in legislation, express or implied: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at paragraph 16. Administrative action cannot be unconstitutional in itself, be authorized by unconstitutional legislation or be taken under subordinate legislation that is not authorized by its governing statute. These are often called issues of *vires*.

- *Procedural unacceptability*. Most administrative action must be taken in a procedurally fair manner. On the threshold issue whether obligations of procedural fairness are owed, see *Canada (Minister of National Revenue) v. Coopers & Lybrand*, [1979] 1 S.C.R. 495; *Martineau v. Matsqui Inmate Disciplinary Board*, [1980] 1 S.C.R. 602; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643. Where procedural fairness obligations are owed, the level of procedural fairness can be dictated by statute or, in the absence of statutory dictation, varies according to a common law test: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21-28.

- *Substantive unacceptability*. Depending on which standard of review applies, administrative action must either be correct or fall within a range of outcomes that are acceptable or defensible on the facts and the law (*i.e.*, "reasonable"): *Dunsmuir*, *supra*; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. In the case of reasonableness, the range can be narrow or broad depending on the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. "Reasonableness" is a term of art defined by the cases – it does not carry its colloquial meaning.

[71] In many judicial reviews of decisions by the Minister, parties allege that the Minister "abused her discretion." The Supreme Court in *Addison & Layen, supra* at paragraph 8 contemplated that sometimes such abuses can form the basis of an application for judicial review.

[72] Two of the most noteworthy, recognized examples of abuse include:

- Pursuit of an improper purpose or bad faith decision-making – that is, decision-making for a purpose not authorized by the statute: *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1977), 14 O.R. (2d) 49 (C.A.); *Doctors Hospital v. Minister of Health et al.* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.); and see also *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

- Fettering of discretion or acting under the dictation of someone not authorized to make the decision: *e.g., Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 (tax context).

(See generally David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 100-13.)

[73] For the purposes of the above taxonomy, these two types of abuse of discretion are best regarded as matters of substantive unacceptability. Some analyze these as independent nominate

grounds of automatic review – if decision-makers do these things, their decisions are automatically invalid: see *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385. Others view these as examples of decisions that are outside the *Dunsmuir* range of acceptability or defensibility: *Stemijon Investments Ltd., supra* at paragraphs 20-24. Regardless of how these are analyzed, they are claims that sound in administrative law.

[74] At one time, the taking into account of irrelevant considerations and the failure to take into account relevant considerations were nominate grounds of review – if they happened, an abuse of discretion automatically was present. However, over time, calls arose for decision-makers to be given some leeway to determine whether or not a consideration is relevant: see, *e.g., Baker, supra* at paragraph 55; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 24. Today, the evolution is complete: courts must defer to decision-makers' interpretations of statutes they commonly use, including a decision-maker's assessment of what is relevant or irrelevant under those statutes: *Dunsmuir, supra* at paragraph 54; *Alberta Teachers' Association, supra* at paragraph 34. Accordingly, the current view is that these are not nominate categories of review, but rather matters falling for consideration under *Dunsmuir* reasonableness review: see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraphs 53-54.

[75] Some matters by themselves, without more, do not constitute an abuse of discretion, *i.e.*, they are not substantively unreasonable under *Dunsmuir*. Here are two examples:

- *Expectations of a substantive outcome.* Sometimes an administrative decision-maker may lead one to believe that a particular substantive decision will be made but then fails to make it. Even though the person has a legitimate expectation that a particular substantive outcome will be reached, that expectation is not enforceable: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 97; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, *per* Rand J., at page 220 ("there can be no estoppel in the face of an express provision of a statute"); *The King v. Dominion of Canada Postage Stamp Vending Co.*, [1930] S.C.R. 500; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at paragraph 79. In the tax context, see *M.N.R. v. Inland Industries*, [1974] S.C.R. 514; *Louis Sheff (1984) Inc. v. The Queen*, 2003 TCC 589 at paragraph 45 ("an estoppel cannot override the law of the land and…the Crown is not bound by the errors or omissions of its servants"); *Gibbon v. The Queen*, [1978] 1 F.C. 247 (T.D.).

- *Departures from policies.* Changes in policies or departures from policies, by themselves, do not constitute an abuse of discretion or make a decision unreasonable: *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12. Administrative decision-makers are bound to apply the law of the land, not their administrative policies, to the facts before them. For example, in the tax context, information bulletins do not create estoppels:

Vaillancourt v. Deputy M.N.R., [1991] 3 F.C. 663 at page 674 (C.A.); *Stickel v. Minister of National Revenue*, [1972] F.C. 672 at page 685 (T.D.).

[76] *Addison & Leyen, supra* was a case where the taxpayer failed to state a cognizable administrative law claim. The taxpayer alleged that the Minister had abused his discretion by delaying too long in assessing the taxpayer. The Supreme Court found that this, in itself, was not an established ground of review, because of statutory language allowing the Minister to assess "at any time" (at paragraph 10):

> The Minister is granted the discretion to assess a taxpayer at any time. This does not mean that the exercise of this discretion is never reviewable. However, in light of the words "at any time" used by Parliament in s. 160 [of the *Income Tax Act*], the length of the delay before a decision on assessing a taxpayer is made does not suffice as a ground for judicial review, except, perhaps, inasmuch as it allows for a remedy like mandamus to prod the Minister to act with due diligence once a notice of objection has been filed.

[77] On occasion in the tax context, parties have alleged that the Minister abused her discretion in making an assessment. To date, all such claims have been dismissed as not being cognizable because in assessing the tax liability of a taxpayer, the Minister generally has no discretion to exercise and, indeed, no discretion to abuse. Where the facts and the law demonstrate liability for tax, the Minister must issue an assessment: *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 at page 602 (C.A.) ("the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it").

[78] In this regard, as far as the assessments of a taxpayer's own liability are concerned, the Minister does not have "any discretion whatever in the way in which [she] must apply the *Income Tax Act*" and must "follow it absolutely": *Ludmer v. Canada*, [1995] 2 F.C. 3 at page 17 (C.A.); *Harris v. Canada*, [2000] 4 F.C. 37 at paragraph 36 (C.A.). This Court cannot stop the Minister from carrying out this duty: *Tele-Mobile Co. Partnership v. Canada (Revenue Agency)*, 2011 FCA 89 at paragraph 5 (in the context of the *Excise Tax Act*, R.S.C. 1985, c. E-15); *Ludmer*, *supra*, at page 9.

[79] This is supported by the principle that the Minister has no discretion to compromise a tax liability, *i.e.*, by issuing, pursuant to a settlement agreement, an assessment that is not supported by the facts and the law: *Galway*, *supra*; *Cohen v. The Queen*, [1980] C.T.C. 318, 80 D.T.C. 6250 (F.C.A.); *Harris*, *supra* at paragraph 37; *CIBC World Markets Inc. v. Canada*, 2012 FCA 3; *Longley v. Minister of National Revenue* (1992), 66 B.C.L.R. (2d) 238 at paragraph 19 (C.A.).

[80] In this section of the reasons, I have not tried to identify all claims that do or do not sound in administrative law. The key point, for present purposes, is that to survive a motion to strike, the applicant will have to point to some law capable of supporting the existence of a cognizable administrative law claim in the circumstances.

(2) The Federal Court is barred from dealing with the administrative law claim by section 18.5 of the *Federal Courts Act* or some other legal principle

[81] *Addison & Leyen*, *supra* aptly illustrates this objection. The essential character of the taxpayer's application for judicial review was a challenge to the validity of the Minister's

assessment of a person's liability under section 160 of the *Income Tax Act*. The taxpayer had adequate, effective recourse elsewhere: a Tax Court appeal. Applying section 18.5 of the *Federal Courts Act*, the Supreme Court found that judicial review did not lie (at paragraph 11):

> The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

Elsewhere, the Supreme Court explained that judicial review "is available, provided the matter is not otherwise appealable" in the Tax Court or will not be cured by way of appeal to the Tax Court: *Addison & Leyen*, *supra* at paragraph 8.

[82] In each of the following situations, an appeal to the Tax Court is available, adequate and effective in giving the taxpayer the relief sought, and so judicial review to the Federal Court is not available:

- *Validity of assessments.* The Tax Court has exclusive jurisdiction to review the correctness of assessments by way of appeal to that Court. Sections 165 and 169 of the *Income Tax Act* constitute a complete appeal procedure that allows taxpayers to raise in the Tax Court all issues relating to the correctness of the assessments, *i.e.*, whether the assessment is supported by the facts of the case and the applicable law: *Minister of National Revenue v. Parsons*, [1984] 2 F.C. 331

(C.A.); *Khan v. M.N.R.*, [1985] 1 C.T.C. 192, 85 D.T.C. 5140 (F.C.A.); *Bechthold Resources Limited v. Canada (M.N.R.)*, [1986] 3 F.C. 116 at page 122 (T.D.); *Optical Recording Corp. v. Canada*, [1991] 1 F.C. 309 at pages 320-321 (C.A.); *Brydges et al. v. Canada* (1992), 61 F.T.R. 240 (C.A.); *M.N.R. v. Devor* (1993), 60 F.T.R. 321 (C.A.); *Water's Edge Village Estates (Phase II) Ltd. v. The Queen* (1994), 74 F.T.R. 197 (T.D.); *Webster v. Canada*, 2003 FCA 388; *Walker v. Canada*, 2005 FCA 393 at paragraph 15; *Sokolowska v. The Queen*, 2005 FCA 29; *Angell v. Canada (M.N.R.)*, 2005 FC 782; *Heckendorn v. Canada*, 2005 FC 802; *Walsh v. Canada (M.N.R.)*, 2006 FC 56; *Roitman, supra* at paragraph 20; *Smith v. Canada (Attorney General)*, 2006 BCCA 237. Therefore, it is not possible to bring a judicial review in the Federal Court raising the substantive acceptability of an assessment.

- *The admissibility of evidence supporting an assessment*. On an appeal, the Tax Court can consider the admissibility of evidence before it. To the extent that the conduct of the Minister is alleged to affect the admissibility of evidence, that must be litigated in the Tax Court, not in Federal Court by way of judicial review: *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643 at paragraph 28 ("[w]here a taxpayer has concerns regarding certain evidence being used against him for the purposes of reassessment, the proper venue to challenge its admissibility is the Tax Court of Canada"). For example, the Tax Court is an adequate alternative forum for a ruling on the admissibility of

the evidence obtained by the Minister as a result of a violation of the Charter: *O'Neill Motors Ltd. v. Canada*, [1998] 4 F.C. 180 (C.A.).

- *Abuses of the Tax Court's own processes*. The Tax Court has jurisdiction to enforce its own rules, insist on standards of fairness, and prevent an abuse of its process: *Yacyshyn v. Canada*, [1999] 1 C.T.C. 139, 99 D.T.C. 5133 (F.C.A.); *Canada v. Guindon*, 2013 FCA 153 at paragraph 55. That Court also has a plenary jurisdiction to take necessary steps to ensure the fairness of proceedings before it and, further, to restrain any abuses of its process: *RBC Life Insurance Company, supra* at paragraph 35. Misconduct within the Tax Court's appeal process that can be dealt with by the Tax Court as part of its jurisdiction over its own processes must be litigated in the Tax Court, not in the Federal Court by way of judicial review. The availability of these remedies in the Tax Court limits the availability of a judicial review in the Federal Court on the basis of the acceptability of the Tax Court's procedure.

- *Inadequate procedures followed by the Minister in making the assessment*. Procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment: *Main Rehabilitation Co v Canada*, 2004 FCA 403 at paragraph 7; *Webster, supra* at paragraph 20; *Queen v. The Consumers' Gas Company Ltd.*, [1987] 2 F.C. 60 at page 67 (C.A.). To the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the General Procedure in the Tax Court is an adequate, curative

> remedy. In the Tax Court appeal, the parties will have the opportunity to discover and present documentary and oral evidence, and make submissions. Procedural rights available later can cure earlier procedural defects: *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330; *King v. University of Saskatchewan*, [1969] S.C.R. 678 at page 689; *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97 at paragraph 28; *Histed v. Law Society of Manitoba*, 2006 MBCA 89, 274 D.L.R. (4th) 326; *McNamara v. Ontario (Racing Commission)* (1998), 164 D.L.R. (4th) 99, 111 O.A.C. 375 (C.A.).

[83] The Tax Court does not have jurisdiction on an appeal to set aside an assessment on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness: *Ereiser v. Canada*, 2013 FCA 20 at paragraph 38; *Roitman*, *supra* at paragraph 21; *Main Rehabilitation Co. Ltd.*, *supra* at paragraph 6; *Bolton v. Canada*, [1996] 3 C.T.C. 3, 96 D.T.C. 6413 (F.C.A.); *Ginsberg v. Canada*, [1996] 3 F.C. 334 (C.A.); *Burrows v. Canada*, 2005 TCC 761; *Hardtke v. Canada*, 2005 TCC 263. If an assessment is correct on the facts and the law, the taxpayer is liable for the tax. To the extent the Tax Court cannot deal with the Minister's reprehensible conduct on appeal, the bar in section 18.5 of the Federal Courts Act against judicial review in the Federal Court does not apply. Does this mean that the taxpayer can proceed to Federal Court?

[84] Not necessarily. Another legal principle may stand in the way. A judicial review brought in the face of adequate, effective recourse elsewhere or at another time cannot be entertained: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929;

Peepeekisis Band v. Canada, 2013 FCA 191 at paragraphs 59-62; *Association des compagnies de téléphone du Québec Inc. v. Canada (Attorney General)*, 2012 FCA 203 at paragraph 26; *Buenaventura v. Telecommunications Workers Union*, 2012 FCA 69 at paragraphs 22-41. This is subject to unusual or exceptional circumstances supportable in the case law: see, *e.g.*, *C.B. Powell Ltd. v. Canada*, 2010 FCA 61, *supra* at paragraphs 30, 31 and 33 and authorities cited thereto.

[85] This principle is justified by the fact that judicial review remedies are remedies of last resort: *Addison & Leyen*, *supra* at paragraph 11; *Cheyenne Realty Ltd. v. Thompson*, [1975] 1 S.C.R. 87 at page 90; *Eli Lilly & Co. v. Apotex Inc.* (2000), 266 N.R. 339 (F.C.A.) at paragraph 9; *Kingsbury v. Heighton*, 2003 NSCA 80 at paragraph 102; Lord Woolf, "Judicial Review: A Possible Programme for Reform," [1992] P.L. 221 at page 235. Further, improper or premature recourse to judicial review can frustrate specialized schemes set up by Parliament and cause delay: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paragraph 36; *C.B. Powell*, *supra* at paragraphs 28 and 32; *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 at paragraph 68 and 69; Mullan, *supra* at page 489.

[86] Administrative law cases and textbooks express this principle in many different ways: adequate alternative forum, the doctrine of exhaustion, the doctrine against fragmentation or bifurcation of proceedings, the rule against interlocutory judicial reviews and the rule against premature judicial reviews. They all address the same idea: someone has rushed off to a judicial review court when adequate, effective recourse exists elsewhere or at another time.

[87] *Harelkin, supra* illustrates how an adequate, effective recourse elsewhere can bar a judicial review. Harelkin believed that a university committee made a procedurally unfair decision. He could have appealed that decision to the university's senate. But, instead, he launched a judicial review. The Supreme Court held that he should have pursued his appeal to the university senate. That body's rehearing of the matter could have cured any procedural unfairness. The judicial review was dismissed. To similar effect is *Weber, supra*: a statutory grievance process capable of providing adequate redress cannot be circumvented by judicial review.

[88] The existence of adequate, effective recourse in the forum where litigation is already taking place can bar a judicial review. *C.B. Powell, supra*, is a good example of this. There, a party to proceedings in the Canadian International Trade Tribunal started a judicial review during those proceedings. The party wanted the judicial review court to resolve an issue of statutory interpretation that it said was "jurisdictional." This Court held that CITT had the power to interpret the statute and was available to do so. That was an adequate recourse. Judicial review could be had only if necessary at the end of the CITT's proceedings.

[89] In the tax context, to the extent that the Minister has engaged in reprehensible conduct that is beyond the reach of the Tax Court's powers, adequate and effective recourses may be available by means other than an application for judicial review in the Federal Court: *Tele-Mobile, supra*; *Ereiser, supra* at paragraph 38. For example, breaches of agreements, careless, malicious or fraudulent actions, inexcusable delay, and abuses of process may be redressed by way of actions for breach of contract, regulatory negligence, negligent misrepresentation, fraud, abuse of process, or misfeasance in public office: in the tax context see, *e.g.*, *Swift v. The Queen*, 2004 FCA 316; *Leroux*

v. Canada Revenue Agency, 2012 BCCA 63 at paragraph 22; *Gardner v. Canada (Attorney General)*, 2012 ONSC 1837, rev'd on another point 2013 ONCA 423; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483. Whether these actually constitute adequate, effective recourses depends upon the circumstances of the particular case.

[90] In some circumstances, discretionary relief elsewhere in the *Income Tax Act* may provide an adequate, effective recourse. For example, under subsection 220(3.1) of the *Income Tax Act*, a taxpayer may obtain fairness relief against assessments of penalties and interest that are, in the circumstances, unfair. In some circumstances, this can address substandard conduct leading up to the assessment: *Hillier v. Canada (Attorney General)*, 2001 FCA 197 (undue delay in making the assessment could trigger fairness relief). It is true that the Minister who made the assessment also decides whether fairness relief should be granted under section 220. But the criteria underlying the two decisions are different. The Minister's section 220 decision is subject to judicial review in the Federal Court on administrative law principles. If the Minister approaches the issue of fairness relief with a closed mind or makes a decision that is substantively unacceptable or procedurally unacceptable in administrative law, her decision is liable to be quashed: *Guindon*, *supra* at paragraphs 56-59; *Stemijon Investments Ltd.*, *supra* (the Minister must have an open mind and cannot fetter her discretion).

[91] Consistent with *David Bull*, *supra* and the need for an obvious, fatal flaw, a notice of application for judicial review should not be brought on the basis of this objection unless the matter is clear. If, after discerning the true character of the application, the Court is not certain whether

section 18.5 of the *Federal Courts Act* applies to bar the judicial review or if the Court is not certain whether:

- there is recourse elsewhere, now or later;
- the recourse is adequate and effective; or
- the circumstances pleaded are the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto;

then the Court cannot strike the notice of application for judicial review.

(3) The Federal Court cannot grant the relief sought

[92] The third basis for striking out a notice of application for judicial review in the Federal Court is the inability of the Court to grant the relief sought. The Federal Court is limited to the remedies in the *Federal Courts Act*, *supra*, subsection 18.1(3) and any remedies associated with its plenary power (discussed in *Canadian Liberty Net*, *supra* and *RBC Life Insurance Company*, *supra*). The remedy must also be one that is not otherwise barred by statute or inconsistent with statute. If a notice of application seeks only remedies that cannot be granted, it must be struck.

[93] In the tax context, the Federal Court is not allowed to vary, set aside or vacate assessments: *Income Tax Act*, *supra*, subsection 152(8); *Redeemer Foundation*, *supra* at paragraphs 28 and 58;

Optical Recording Corp., *supra* at pages 320-321; *Rusnak v. Canada*, 2011 FCA 181 at paragraphs 2 and 3. Under subsection 152(8) of the *Income Tax Act*, an assessment is deemed by subsection 152(8) to be valid, subject only to a reassessment or variation or vacation by a successful objection (subsections 165(1) and 165(2)) or by a successful appeal of the assessment brought to the Tax Court (section 169). The assessments stand until varied or vacated by the Tax Court: *Optical Recording Corp.*, *supra* at pages 320-21. If the "essential character" of the relief sought is the setting aside of an assessment, it must be struck.

[94] In *Addison & Leyen*, the Supreme Court of Canada observed, at paragraph 8, that "[f]act-specific remedies may be crafted to address the wrongs or problems raised by a particular case." In this regard, in appropriate circumstances, the Federal Court can issue *mandamus* compelling the Minister to exercise her powers under the Act: *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55 (prerequisites for *mandamus*). Another possible remedy is injunction or prohibition. However, these remedies cannot be used to make the Minister act contrary to statute or to refrain from acting under statute where she must act: *Novopharm Ltd. v. Eli Lilly and Co.*, [1999] 1 F.C. 515 (T.D.).

[95] It must be recalled, however, that even though the Federal Court may have the ability to issue these remedies, a notice of application may still be struck if either of the first two objections are made out.

(4) Concluding comments: what's left?

[96] There are areas, well-recognized in the case law, where judicial review may potentially be had in tax matters. Examples include discretionary decisions under the fairness provisions, assessments that are purely discretionary (such as the assessment under subsection 152(4.2) at issue in *Abraham v. Canada (Attorney General)*, 2012 FCA 266, 440 N.R. 201, revg 2011 FC 638, 391 F.T.R. 1), and conduct during collection matters that is not acceptable or defensible on the facts and the law (*Walker*, *supra*; *Pintendre Autos Inc. v. The Queen*, 2003 TCC 818).

[97] As for other areas, it is unwise at this point to delineate for all time the circumstances in the tax area in which a judicial review may be brought. This should be left for development, case-by-case, on the basis of the above principles.

[98] Nevertheless, even at this juncture, one can imagine examples of judicial reviews that might avoid the three objections to judicial review. Suppose that the Minister launches aggressive methods of investigation against members of a political party because of hostility to that political party in circumstances where immediate, effective relief is required. Suppose that the Minister could issue an assessment under section 160 of the *Income Tax Act* against any one of the five directors of a corporation for the corporation's tax liability. Only one of the directors is a person of colour. The Minister issues an assessment only against that director, and only because of the colour of his skin, in circumstances where immediate, effective relief is required.

[99] After all, there must always be some forum where rights can be vindicated when they need vindication. In the words of McLachlin J. (as she then was), "if the rule of law is not to be reduced to a patchwork, sometime thing, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief": *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd*, [1996] 2 S.C.R. 495 at pages 501-502.

[100] Therefore, for taxpayers and their counsel, the question is not whether their clients' rights can be fully vindicated. They can. The question is how to do it consistent with proper practices and procedures, when to do it, in what forum, and by what means.

[101] For some, judicial review inthe Federal Court is a preferred tool of first resort. They are wrong. It is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought.

F. Applying the principles to this case

(1) The notice of application for judicial review

[102] As mentioned in paragraph 50, above, the first step is to gain "a realistic appreciation" of the "essential character" of the notice of application by reading it holistically and practically without fastening onto matters of form.

[103] JP Morgan pleads that at first the Minister audited its 2007 and 2008 taxation years with a view to imposing Part XIII tax upon it only for those years. But after the Minister completed her audit, she decided to expand it to include several earlier years. In the end, the Minister assessed JP Morgan Part XIII tax for all periods from 2002 through 2008. JP Morgan pleads that this was an improper exercise of discretion because it was contrary to the Minister's own administrative policies which, it says, would have limited the assessments to the two immediately preceding years:

> (k) By doing so, CRA improperly exercised its discretion and the decision [to assess Part XIII tax for certain taxation years] ought to be set aside. Amongst other things, CRA did not consider, or sufficiently consider, CRA's own policies, guidelines, bulletins, internal communiqués and practices which would otherwise have limited assessments to the current tax year and the two (2) immediately preceding years. CRA thus acted arbitrarily, unfairly, contrary to the rules of natural justice and in a manner inconsistent with CRA's treatment of other taxpayers.

(Notice of application for judicial review, grounds of review, paragraph (k).)

[104] The notice of application asserts that the Minister's failure to follow policies is an abuse of discretion or a violation of natural justice. In essence, this is an allegation that the Minister can assess for certain periods and not others. Paragraph (l) of the notice of application recognizes this: "[t]he issue in this judicial review application therefore is the number of years for which CRA will assess JP Morgan for Part XIII tax." Simply put, was the Minister legally entitled to assess Part XIII tax for the years in question? The essential character of the notice of application is an attack on the legal validity of the assessment.

[105] The Prothonotary (at paragraph 27) attached importance to the particular form of the notice of application – a judicial review of the decision to assess – rather than its essential character. This is a clear error that affected his analysis and prevented him from examining and applying certain

objections to judicial review. The Federal Court did not detect that error. On appeal, this Court can intervene.

(2) Should the notice of application for judicial review be struck?

[106] In this case, all three objections to the notice of application are present. Any one of these objections would warrant striking it out.

(a) Has the applicant failed to state a cognizable administrative law claim?

[107] Yes. JP Morgan has not offered any authority in support of the proposition that a failure to follow policies is, by itself, an abuse of discretion. The Court is unaware of any such authority.

[108] Indeed, there is ample authority to the contrary. Policies do not have the force of law and administrative decision-makers can depart from them: *Pinto v. Canada (Minister of Employment & Immigration)*, [1991] 1 F.C. 619 (T.D.); *Bajwa v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 864 at paragraphs 44-45; and see authorities in paragraph 75, above. Substantive expectations created by policies are unenforceable: see authorities in paragraph 75, above. Indeed, an administrative decision-maker who follows policies blindly commits an abuse of discretion: see authorities in paragraph 72, above.

[109] In my view, in these circumstances, the Minister did not exercise any discretion independent of the assessment. Therefore, there was no discretion that could be abused. The word "may" in

subsection 227(10), the authority for the assessment here, does not vest the Minister with a general, sweeping discretion not to assess tax. Rather, it allows the Minister to forego making a formal assessment of Part XIII tax in situations where the tax was properly withheld and remitted.

(b) Is the application for judicial review barred by section 18.5 of the *Federal Courts Act* or some other legal principle?

[110] Yes. The Tax Court can consider the question whether the Minister was legally entitled to assess Part XIII tax for the years in question: see authorities in paragraph 83, above; see also *Income Tax Act*, *supra*, sections 165, 169 and 171; *Tax Court of Canada Act*, *supra*, subsection 12(1); *Federal Courts Act*, *supra*, section 18.5. As was the case in *Addison & Leyen*, *supra*, in this case there is no "reason why it would have been impossible to deal with the tax liability issues relating to…the assessments …through the regular appeal process" in the Tax Court (at paragraph 10).

(c) Is the Federal Court unable to grant the relief sought?

[111] Yes. JP Morgan seeks *certiorari*, setting aside (or vacating) certain of the assessments. Only the Tax Court can grant this relief: subsection 152(8) of the *Income Tax Act*; and see paragraph 93, above.

(d) Conclusion

[112] JP Morgan's notice of application for judicial review is fatally flawed within the meaning of *David Bull*, *supra*. Accordingly, it should have been struck out.

G. Proposed disposition

[113] Therefore, for the foregoing reasons, I would allow the appeal, set aside the order of the Federal Court dated November 26, 2012, grant the Minister's motion to quash the order of the Federal Court dated May 28, 2012, and grant the Minister's motion to strike the notice of application for judicial review, with costs to the Minister throughout.

"David Stratas"

J.A.

"I agree
K. Sharlow J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-532-12

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MANDAMIN DATED NOVEMBER 26, 2012, NO. T-1278-11

STYLE OF CAUSE:	THE MINISTER OF NATIONAL REVENUE AND CANADA REVENUE AGENCY v. JP MORGAN ASSET MANAGEMENT (CANADA) INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 18, 2013
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	SHARLOW AND NEAR JJ.A.
DATED:	OCTOBER 24, 2013

APPEARANCES:

Naomi Goldstein Laurent Bartleman	FOR THE APPELLANTS
Gerald L.R. Ranking	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANTS
Fasken Martineau DuMoulin Toronto, Ontario	FOR THE RESPONDENT

Date: 20090121

Docket: A-174-08

Citation: 2009 FCA 15

CORAM: **RICHARD C.J.**
DÉCARY J.A.
NOËL J.A.

BETWEEN:

DEMOCRACY WATCH

Applicant

and

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

Heard at Ottawa, Ontario, on January 21, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on January 21, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: RICHARD C.J.

Date: 20090121

Docket: A-174-08

Citation: 2009 FCA 15

CORAM: **RICHARD C.J.**
DÉCARY J.A.
NOËL J.A.

BETWEEN:

DEMOCRACY WATCH

Applicant

and

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on January 21, 2009)

RICHARD C.J.

[1] This is an application for judicial review by Democracy Watch pursuant to section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 arising out of a request to the Conflict of Interest and Ethics Commissioner (the 'Commissioner) dated November 26, 2007 for an investigation of and ruling on decisions and participation in decisions by Prime Minister Stephen Harper and Minister of Justice

and Attorney General Robert Nicholson, and for a recusal ruling for all Cabinet ministers concerning the Mulroney-Schreiber situation.

[2] On January 7, 2007, the Commissioner responded to the applicant, explaining that she did not have sufficient credible evidence to suggest that Mr. Harper, Mr. Nicholson, or any other individual mentioned in the applicant's letter was in a conflict of interest in violation of the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2 (the 'Act'). Accordingly, the Commissioner found that she did not have sufficient grounds to begin an examination pursuant to subsection 45(1) of the Act.

[3] The applicant requests the following in its notice of application:

- An order quashing the decision of the Commissioner and directing the Commissioner to proceed with a full investigation into the applicant's complaint or, in the alternative, an order quashing the decision of the Commissioner and sending it back with directions for reconsideration by the Commissioner;
- A declaration that Democracy Watch was deprived of its right to a fair hearing; and
- A declaration that subsections 44(1) to 44(6) of the *Conflict of Interest Act* violate sections 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms*

Legislative Scheme

[4] *An Act to establish conflict of interest and post-employment rules for public office holders* (the *Conflict of Interest Act*) was introduced on April 11, 2006 during the first session of the

39th Parliament as part of Bill C-2, now entitled the *Federal Accountability Act,* S.C. 2006, c. 9. This legislation was given Royal Assent in December 2006 and came into force on July 9, 2007.

[5] Section 3 of the *Conflict of Interest Act* (the 'Act') declares that the purpose of the Act is to:

(a) establish clear conflict of interest and post-employment rules for public office holders;	a) d'établir à l'intention des titulaires de charge publique des règles de conduite claires au sujet des conflits d'intérêts et de l'après-mandat;
(b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;	b) de réduire au minimum les possibilités de conflit entre les intérêts personnels des titulaires de charge publique et leurs fonctions officielles, et de prévoir les moyens de régler de tels conflits, le cas échéant, dans l'intérêt public;
(c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;	c) de donner au commissaire aux conflits d'intérêts et à l'éthique le mandat de déterminer les mesures nécessaires à prendre pour éviter les conflits d'intérêts et de décider s'il y a eu contravention à la présente loi;
(d) encourage experienced and competent persons to seek and accept public office; and	d) d'encourager les personnes qui possèdent l'expérience et les compétences requises à solliciter et à accepter une charge publique;
(e) facilitate interchange between the private and public sector.	e) de faciliter les échanges entre les secteurs privé et public.

[6] The Conflict of Interest and Ethics Commissioner was created to replace the position of the Ethics Commissioner. In addition to certain supervisory and enforcement roles, the Act gives the Commissioner investigatory powers to determine whether a contravention of the Act has occurred.

[7] Specifically, the Act contemplates two mechanisms by which an investigation may be commenced by the Commissioner. First, under subsection 44(3) of the Act, the Commissioner must examine possible contraventions of the Act if a member of the Senate or the House of Commons so requests, as long as the Commissioner does not determine that the request is frivolous, vexatious, or is made in bad faith. Second, subsection 45(1) provides that the Commissioner may conduct an examination on his or her own initiative if he or she has reason to believe that the Act has been contravened.

[8] Section 66 states that all decisions and orders of the Commissioner are final and are not reviewable in any court except in accordance with the *Federal Courts Act*.

Analysis

[9] We are all of the view that the Commissioner's letter is not judicially reviewable by this Court, since the Commissioner did not issue a decision or order within the meaning of section 66 of the Act or subsection 18.1(3) of the *Federal Courts Act*.

[10] Where administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review (*Pieters v. Canada (Attorney General)*, 2007 FC 556 at paragraph 60; *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue*) (1998), 148 F.T.R. 3 at paragraph 28; see also *Canadian Institute of Public and Private Real Estate Cos. v. Bell Canada*, 2004 FCA 243 at paragraphs 5 & 7).

[11] The applicant has no statutory right to have its complaint investigated by the Commissioner and the Commissioner has no statutory duty to act on it. There is no provision in the Act that allows a member of the public to request that the Commissioner begin an examination. Indeed, the Act specifically contemplates the route which a member of the public should take if it wishes to present information to the Commissioner:

44. …	**44.** […]
(4) In conducting an examination, the Commissioner may consider information from the public that is brought to his or her attention by a member of the Senate or House of Commons indicating that a public office holder or former public office holder has contravened this Act. The member shall identify the alleged contravention and set out the reasonable grounds for believing a contravention has occurred. …	(4) Dans le cadre de l'étude, le commissaire peut tenir compte des renseignements provenant du public qui lui sont communiqués par tout parlementaire et qui portent à croire que l'intéressé a contrevenu à la présente loi. Le parlementaire doit préciser la contravention présumée ainsi que les motifs raisonnables qui le portent à croire qu'une contravention a été commise. […]

[12] Furthermore, any statement made by the Commissioner in her letter does not have any binding legal effect. The Commissioner retains the discretion to commence an investigation into the applicant's complaint if, in the future, she has reason to believe that there has been a contravention of the Act.

[13] The applicant submits that a similar decision made by the Ethics Counsellor, the predecessor to the Ethics Commissioner, was deemed to be judicially reviewable by the Federal Court in *Democracy Watch v. Canada (Attorney General)*, [2004] 4 F.C. 83, 2004 FC 969. While we take no position as to whether the Ethics Counsellor's decision was properly reviewable by the Federal

Court, it is nonetheless clear that this decision was made pursuant to a different regime than the one with which we are concerned. The Ethics Counsellor was not acting pursuant to the legislation with which we are presently concerned.

[14] Since we find that the Commissioner's letter was not a reviewable decision or order under section 66 of the Act, this Court does not have the jurisdiction to grant the remedies requested by the applicant.

[15] With respect to the applicant's request for a declaration that subsections 44(1) to 44(6) violate their section 2(b) and 2(d) Charter rights, we find that while this Court can properly hear constitutional challenges within applications for judicial review, the applicant cannot simply tack a constitutional challenge onto an application for judicial review which was inappropriately brought.

[16] Accordingly, the application for judicial review will be dismissed with costs to the respondent only.

"J. Richard"

Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-174-08
STYLE OF CAUSE:	DEMOCRACY WATCH v. CONFLICT OF INTEREST AND ETHICS COMMISSIONER and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 21, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(Richard C.J., Décary J.A. and Noël J.A.)
DELIVERED FROM THE BENCH BY:	Richard C.J.

APPEARANCES:

Peter Rosenthal and Yavar Hameed	FOR THE APPLICANT
Ronald D. Lunau and Nancy Bélanger	FOR THE RESPONDENT
Christopher Rupar	FOR THE INTERVENER

SOLICITORS OF RECORD:

Hameed Farrokhzad St-Pierre	FOR THE APPLICANT
Gowling Lafleur Henderson LLP	FOR THE RESPONDENT
Office of the Conflict of Interest and Ethics Commissioner	FOR THE RESPONDENT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE INTERVENER

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160203

Docket: A-512-15

Citation: 2016 FCA 35

Coram: **NADON J.A.**
STRATAS J.A.
RYER J.A.

BETWEEN:

MAGDALENA FORNER

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 3, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
RYER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160203

Docket: A-512-15

Citation: 2016 FCA 35

Coram: **NADON J.A.**
STRATAS J.A.
RYER J.A.

BETWEEN:

MAGDALENA FORNER

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] Before the Court is an application for judicial review. The respondent moves to strike it out on the ground that it is premature.

[2] The applicant has not responded to the motion. However, motions such as this are not granted by default. The Court must be satisfied that the application should be struck out on the basis of the material before it and the applicable law.

A. Background and the application for judicial review

[3] The applicant has submitted a complaint to the Public Service Labour Relations and Employment Board. She alleges that her former bargaining agent, the respondent, breached its duty to represent her fairly.

[4] In response, the Board asked the applicant to provide more particulars concerning her complaint. It asked her to fill out a "Request for Particulars" form. The applicant responded by endorsing "see attached documents" at various places on the form. She submitted the form along with a box of documents.

[5] The Board decided to reject her submission and returned the box of documents to her. It asked her again to submit the particulars concerning her complaint using the "Request for Particulars" form.

[6] Rather than complying with the Board's decision, the applicant immediately launched this application for judicial review, seeking to set it aside.

B. The respondent's submissions on the motion to strike

[7] The respondent submits that we should strike the application for judicial review on the ground that it is premature. It relies upon our jurisprudence suggesting that applications for judicial review of interlocutory decisions by administrators will often be struck. The respondent

adds that although motions to strike applications should rarely be entertained (citing *David Bull Laboratories (Can.) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.)), the motion to strike should be granted in the circumstances of this case.

C. Analysis

[8] I agree with the respondent's submissions and would strike the application for judicial review.

[9] Currently, the leading case in this Court on motions to strike applications for judicial review is *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557. At paragraphs 47-48, this Court set out the test for striking an application for judicial review:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> [48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, [R.S.C. 1985, c. F-7], subsection 18.1(2) and section 18.2. An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective.

[10] In a decision postdating *JP Morgan*, the Supreme Court has emphasized the need for modern litigation to proceed to resolution faster and more simply: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. This underscores the important role that motions to strike can play in removing clearly unmeritorious cases from the court system. This case is a good example.

[11] This threshold for a motion to strike is met here. The applicant challenges a decision made by the Board right at the outset of its administrative proceedings. Its administrative proceedings are far from completed. The respondent's objection that the application for judicial review is premature is, in the circumstances of this case, a "show stopper." In these circumstances, it is clear that this Court cannot entertain the application for judicial review.

[12] Applications for judicial review of decisions made at the outset of administrative proceedings or during administrative proceedings normally do not lie.

[13] The general rule is that applications for judicial review can be brought only after the administrative decision-maker has made its final decision. At that time, administrative decisions made at the outset of administrative proceedings or during administrative proceedings can be the subject of challenge along with the final decision.

[14] The relevant law on point and the rationale for it is as follows:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: [citations omitted]

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway…

(*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paragraphs 30-32; see also *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, 467 N.R. 201 at paragraphs 30-32.)

[15] As *C.B. Powell* recognizes (at paragraph 33), there are exceptional circumstances where this Court will entertain an application for judicial review of an administrative decision made at the outset of administrative proceedings or during administrative proceedings: for a more complete explanation of what qualifies as exceptional circumstances, see *Wilson*, above at paragraph 33. Many of these exceptional circumstances mirror those where prohibition lies.

[16] On the record before us in this case, the prematurity objection is made out and there are no exceptional circumstances warranting the hearing of this application for judicial review at this time.

[17] After the Board has finally decided upon the applicant's complaint, she may launch an application for judicial review advancing the grounds she raises in this application and any other relevant, admissible grounds.

D. Proposed disposition

[18] Accordingly, I would grant the motion and strike out the application for judicial review. The applicant does not seek its costs and so none shall be granted.

"David Stratas"

J.A.

"I agree
M. Nadon J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-512-15
STYLE OF CAUSE:	MAGDALENA FORNER v. THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. RYER J.A.
DATED:	FEBRUARY 3, 2016

WRITTEN REPRESENTATIONS BY:

Steven Welchner	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Welchner Law Office Professional Corporation Ottawa, Ontario	FOR THE RESPONDENT

Robert Hryniak *Appellant*

v.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith *Respondents*

and

Ontario Trial Lawyers Association and Canadian Bar Association *Interveners*

Indexed as: Hryniak *v.* Mauldin

2014 SCC 7

File No.: 34641.

2013: March 26; 2014: January 23.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Summary judgment — Investors bringing action in civil fraud and subsequently bringing a motion for summary judgment — Motion judge granting summary judgment — Purpose of summary judgment motions — Access to justice — Proportionality — Interpretation of recent amendments to Ontario Rules of Civil Procedure — Trial management orders — Standard of review for summary judgment motions — Whether motion judge erred in granting summary judgment — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20.

In June 2001, two representatives of a group of American investors met with H and others to discuss an investment opportunity. The group wired US$1.2 million, which was pooled with other funds and transferred to H's company, Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank and the money disappeared. The investors brought an action for

Robert Hryniak *Appelant*

c.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White et Athena Smith *Intimés*

et

Ontario Trial Lawyers Association et Association du Barreau canadien *Intervenantes*

Répertorié : Hryniak *c.* Mauldin

2014 CSC 7

N° du greffe : 34641.

2013 : 26 mars; 2014 : 23 janvier.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Procédure civile — Jugement sommaire — Investisseur intentant une action pour fraude civile et présentant ensuite une requête en jugement sommaire —Requête en jugement sommaire accueillie — Objectif des requêtes en jugement sommaire — Accès à la justice — Proportionnalité — Interprétation des modifications récentes apportées aux Règles de procédure civile de l'Ontario — Ordonnances de gestion de l'instance — Norme de contrôle applicable aux requêtes en jugement sommaire — Le juge saisi de la requête a-t-il commis une erreur en accueillant la requête en jugement sommaire? — Règles de procédure civile, R.R.O. 1990, Règl. 194, règle 20.

Au mois de juin 2001, deux représentants d'un groupe d'investisseurs américains ont rencontré H et d'autres personnes afin de discuter d'une possibilité d'investissement. Le groupe a viré 1,2 million de dollars américains et cette somme a été mise en commun avec d'autres fonds et transférée à Tropos, la société de H. Quelques mois plus tard, Tropos a transféré plus de

civil fraud against H and others and subsequently brought a motion for summary judgment. The motion judge used his powers under Rule 20.04(2.1) of the Ontario *Rules of Civil Procedure* (amended in 2010) to weigh the evidence, evaluate credibility, and draw inferences. He concluded that a trial was not required against H. Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that H had committed the tort of civil fraud against the investors, and therefore dismissed H's appeal.

Held: The appeal should be dismissed.

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. Summary judgment motions provide an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Rule 20 was amended in 2010 to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the

10 millions de dollars américains à une banque étrangère et l'argent a disparu. Les investisseurs ont intenté contre H et d'autres personnes une action pour fraude civile et ont ensuite présenté une requête en jugement sommaire. Le juge saisi de la requête a exercé les pouvoirs que lui confère le par. 20.04(2.1) des *Règles de procédure civile* de l'Ontario (modifiées en 2010) pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions. Il a conclu que la tenue d'un procès n'était pas nécessaire dans l'instance intentée contre H. Bien qu'elle ait conclu que cette affaire ne se prêtait pas à un jugement sommaire, la Cour d'appel était convaincue que le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile à l'endroit des investisseurs et elle a par conséquent rejeté l'appel de H.

Arrêt : Le pourvoi est rejeté.

Notre système de justice civile repose sur le principe que le processus décisionnel doit être juste et équitable. Ce principe ne souffre aucun compromis. Or, les formalités excessives et les procès interminables occasionnant des dépenses et des délais inutiles peuvent faire obstacle au règlement juste et équitable des litiges. Si la procédure est disproportionnée par rapport à la nature du litige et aux intérêts en jeu, elle n'aboutira pas à un résultat juste et équitable.

Un virage culturel s'impose. Le principe de la proportionnalité trouve aujourd'hui son expression dans les règles de procédure de nombreuses provinces et peut constituer la pierre d'assise de l'accès au système de justice civile. Le principe de la proportionnalité veut que le meilleur forum pour régler un litige ne soit pas toujours celui dont la procédure est la plus laborieuse. La requête en jugement sommaire offre une possibilité de simplifier les procédures préalables au procès et d'insister moins sur la tenue d'un procès conventionnel et plus sur des procédures proportionnées et adaptées aux besoins de chaque affaire. Les règles régissant les jugements sommaires doivent recevoir une interprétation large et propice à la proportionnalité et à l'accès équitable à un règlement abordable, expéditif et juste des demandes.

La règle 20 a été modifiée en 2010 afin d'améliorer l'accès à la justice. Ces réformes incarnent l'évolution des règles régissant les jugements sommaires, lesquelles passent du statut d'outil à usage très restreint visant à écarter les demandes ou défenses manifestement dénuées de fondement à celui de solution de rechange légitime pour trancher et régler les litiges d'ordre juridique. Les juges disposent ainsi de nouveaux outils importants qui leur permettent de trancher plus de litiges sur requête

entire case. The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.

Summary judgment motions must be granted whenever there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

The new fact-finding powers granted to motion judges in Rule 20.04 may be employed on a motion for summary judgment unless it is in the interest of justice for them to be exercised only at trial. When the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. The power to hear oral evidence should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard. Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge and to provide a description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). Their use will not be against

en jugement sommaire et qui atténuent les risques lorsque pareille requête ne permet pas de trancher l'affaire dans son ensemble. Les nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles augmentent le nombre d'affaires qui ne soulèvent pas de véritable question litigieuse nécessitant la tenue d'un procès en permettant au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables.

La requête en jugement sommaire doit être accueillie dans tous les cas où il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès. Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de statuer justement et équitablement au fond sur une requête en jugement sommaire. Ce sera le cas lorsque la procédure (1) permet au juge de tirer les conclusions de fait nécessaires, (2) lui permet d'appliquer les règles de droit aux faits et (3) constitue un moyen proportionné, plus expéditif et moins coûteux d'arriver à un résultat juste.

Le juge saisi d'une requête en jugement sommaire peut exercer les nouveaux pouvoirs en matière de recherche des faits que lui confère la règle 20.04 à moins qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès. Lorsqu'il permettrait au juge de trancher une demande de manière juste et équitable, l'exercice des nouveaux pouvoirs serait généralement dans l'intérêt de la justice. Le pouvoir d'entendre des témoignages oraux devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée. Ce sera plus probablement le cas lorsque le témoignage oral requis est succinct, mais dans certains cas, la requête en jugement sommaire comportera l'audition de longs témoignages oraux. La partie qui cherche à présenter des témoignages oraux doit être prête à démontrer en quoi ils aideraient le juge saisi de la requête et à fournir un exposé de la preuve proposée afin de permettre au juge d'établir la portée de ces témoignages oraux.

Lors de l'audition d'une requête en jugement sommaire aux termes de la règle 20.04, le juge devrait en premier lieu décider, compte tenu uniquement de la preuve dont il dispose et *sans* recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse nécessitant la tenue d'un procès. Il n'y aura pas de question de ce genre si la procédure de jugement sommaire fournit au juge la preuve nécessaire pour trancher justement et équitablement le litige et constitue une procédure expéditive, abordable et proportionnée selon l'al. 20.04(2)a) des Règles. S'il semble y avoir une véritable question nécessitant la tenue d'un procès,

the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Failed, or even partially successful, summary judgment motions add to costs and delay. This risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction. These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

Absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law which should not be overturned, absent palpable and overriding error. Similarly, the determination of whether it is in the interest of justice for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) is also a question of mixed fact and law which attracts deference.

The motion judge did not err in granting summary judgment in the present case. The tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss. In granting summary judgment to the group against H, the motion judge did not explicitly address the correct test for civil fraud but his findings are sufficient to make out the cause of action. The motion

le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles permettra d'écarter la nécessité d'un procès. L'exercice de ces pouvoirs ne sera pas contraire à l'intérêt de la justice s'il aboutit à un résultat juste et équitable et permettra d'atteindre les objectifs de célérité, d'accessibilité économique et de proportionnalité, compte tenu du litige dans son ensemble.

Qu'elle soit rejetée ou même accueillie en partie, la requête en jugement sommaire occasionne des frais et des délais additionnels. Le juge peut toutefois atténuer ce risque en exerçant la compétence inhérente du tribunal et les pouvoirs de gestion de l'instance prévus à la règle 20.05. Ces pouvoirs permettent au juge de mettre à profit les connaissances acquises lors de l'audition de la requête en jugement sommaire pour élaborer une procédure d'instruction de nature à régler le litige en tenant compte de la complexité et de l'importance de la question soulevée, de la somme en jeu et des efforts déployés lors de l'instruction de la requête rejetée. Le juge qui rejette une requête en jugement sommaire devrait également se saisir de l'instance à titre de juge du procès à moins que des raisons impérieuses l'en empêchent.

En l'absence d'une erreur de droit, l'exercice des pouvoirs que confère la nouvelle règle relative au jugement sommaire commande la retenue. Lorsque le juge saisi d'une requête exerce les nouveaux pouvoirs en matière de recherche des faits que lui confère le par. 20.04(2.1) des Règles et détermine s'il existe une véritable question litigieuse nécessitant la tenue d'un procès, il s'agit d'une question mixte de fait et de droit et sa décision ne doit pas être infirmée en l'absence d'erreur manifeste et dominante. De même, la décision quant à savoir s'il est dans l'intérêt de la justice que le juge saisi d'une requête exerce les nouveaux pouvoirs en matière de recherche des faits prévus au par. 20.04(2.1) des Règles constitue également une question mixte de fait et de droit qui commande la retenue.

Le juge saisi de la requête n'a pas eu tort de rendre un jugement sommaire en l'espèce. Le délit de fraude civile comporte quatre éléments dont il faut prouver l'existence selon la prépondérance des probabilités : (1) une fausse déclaration du défendeur; (2) une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); (3) le fait que la fausse déclaration a amené le demandeur à agir; (4) le fait que les actes du demandeur ont entraîné une perte. Lorsqu'il a prononcé contre H un jugement sommaire en faveur du groupe, le juge saisi de la requête n'a pas traité explicitement du critère qu'il convient d'appliquer à la fraude

judge found no credible evidence to support H's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

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Referred to: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII); *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

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civile mais ses conclusions suffisent pour établir la cause d'action. Le juge saisi de la requête a conclu qu'il n'existait pas d'élément de preuve crédible à l'appui de la prétention de H selon laquelle ce dernier était un courtier légitime et l'issue était donc claire; ainsi le juge a conclu qu'il n'y avait pas de question litigieuse nécessitant la tenue d'un procès. L'exercice, par le juge, de ses pouvoirs en matière de recherche des faits n'allait pas à l'encontre de l'intérêt de la justice, et sa décision discrétionnaire d'exercer ces pouvoirs n'était pas non plus entachée d'erreur.

Jurisprudence

Arrêts mentionnés : *Bruno Appliance and Furniture, Inc. c. Hryniak*, 2014 CSC 8, [2014] 1 R.C.S. 126; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46; *Medicine Shoppe Canada Inc. c. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley c. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto c. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII); *Vaughan c. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Procureur général) c. Lameman*, 2008 CSC 14, [2008] 1 R.C.S. 372; *Aguonie c. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

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APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Laskin, Sharpe, Armstrong and Rouleau JJ.A.), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 93 B.L.R. (4th) 1, 344 D.L.R. (4th) 193, 10 C.L.R. (4th) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515 (*sub nom. Combined Air Mechanical Services Inc. v. Flesch*), affirming a decision of Grace J., 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Appeal dismissed.

Sarit E. Batner, *Brandon Kain* and *Moya J. Graham*, for the appellant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* and *Jonathan A. Odumeru*, for the respondents.

Allan Rouben and *Ronald P. Bohm*, for the intervener the Ontario Trial Lawyers Association.

Paul R. Sweeny and *David Sterns*, for the intervener the Canadian Bar Association.

The judgment of the Court was delivered by

[1] Karakatsanis J. — Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (le juge en chef Winkler et les juges Laskin, Sharpe, Armstrong et Rouleau), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 93 B.L.R. (4th) 1, 344 D.L.R. (4th) 193, 10 C.L.R. (4th) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515 (*sub nom. Combined Air Mechanical Services Inc. c. Flesch*), qui a confirmé une décision du juge Grace, 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Pourvoi rejeté.

Sarit E. Batner, *Brandon Kain* et *Moya J. Graham*, pour l'appelant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* et *Jonathan A. Odumeru*, pour les intimés.

Allan Rouben et *Ronald P. Bohm*, pour l'intervenante Ontario Trial Lawyers Association.

Paul R. Sweeny et *David Sterns*, pour l'intervenante l'Association du Barreau canadien.

Version française du jugement de la Cour rendu par

[1] La juge Karakatsanis — De nos jours, garantir l'accès à la justice constitue le plus grand défi à relever pour assurer la primauté du droit au Canada. Les procès sont de plus en plus coûteux et longs. La plupart des Canadiens n'ont pas les moyens d'intenter une action en justice lorsqu'ils subissent un préjudice ou de se défendre lorsqu'ils sont poursuivis; ils n'ont pas les moyens d'aller en procès. À défaut de moyens efficaces et accessibles de faire respecter les droits, la primauté du droit est compromise. L'évolution de la common law ne peut se poursuivre si les affaires civiles ne sont pas tranchées en public.

[2] On reconnaît de plus en plus qu'un virage culturel s'impose afin de créer un environnement favorable à l'accès expéditif et abordable au système de justice civile. Ce virage implique que

procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[3] Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (Ontario *Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, address the proper interpretation of the amended Rule 20 (summary judgment motion).

[4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

[6] As the Court of Appeal observed, the inappropriate use of summary judgment motions creates

l'on simplifie les procédures préalables au procès et que l'on insiste moins sur la tenue d'un procès conventionnel et plus sur des procédures proportionnées et adaptées aux besoins de chaque affaire. L'équilibre entre la procédure et l'accès à la justice qu'établit notre système de justice doit en venir à refléter la réalité contemporaine et à reconnaître que de nouveaux modèles de règlement des litiges peuvent être justes et équitables.

[3] La requête en vue d'obtenir un jugement sommaire offre une occasion d'atteindre ces objectifs. À la suite du rapport de 2007 intitulé *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (le rapport Osborne), l'Ontario a modifié ses *Règles de procédure civile*, R.R.O. 1990, Règl. 194 (les *Règles* de l'Ontario ou les Règles) afin d'améliorer l'accès à la justice. Le présent pourvoi et le pourvoi connexe, *Bruno Appliance and Furniture, Inc. c. Hryniak*, 2014 CSC 8, [2014] 1 R.C.S. 126, portent sur l'interprétation correcte de la règle 20 (requête en jugement sommaire) modifiée.

[4] Lorsqu'elle a interprété les dispositions de cette règle, la Cour d'appel de l'Ontario a accordé trop d'importance à la « pleine appréciation » que l'on peut faire de la preuve lors d'un procès conventionnel, étant donné que pareil procès ne constitue pas une solution de rechange réaliste pour la plupart des parties à un litige. À mon avis, la tenue d'un procès n'est pas nécessaire si une requête en jugement sommaire peut déboucher sur une décision juste et équitable, si elle offre un processus qui permet au juge de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit à ces faits et si elle constitue, par rapport au procès, un moyen proportionné, plus expéditif et moins onéreux d'arriver à un résultat juste.

[5] Je conclus à cette fin que les règles régissant les jugements sommaires doivent recevoir une interprétation large et propice à la proportionnalité et à l'accès équitable à un règlement abordable, expéditif et juste des demandes.

[6] Comme l'a indiqué la Cour d'appel, le recours inapproprié à la requête en jugement sommaire

its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

[7] While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

[8] More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital Inc., which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

[9] In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

[10] At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos' funds, including the funds contributed by the Mauldin Group, were stolen.

[11] Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

occasionne lui-même des frais et des délais. Or, le juge peut atténuer ces risques en exerçant ses pouvoirs de gérer et de circonscrire la procédure et, si possible, en demeurant saisi de l'instance.

[7] Bien que mon interprétation de la règle 20 diffère en partie de celle de la Cour d'appel, je souscris à sa décision en l'espèce et je suis d'avis de rejeter le pourvoi.

I. Les faits

[8] Il y a plus de 10 ans, un groupe d'investisseurs américains, dirigé par Fred Mauldin (le Groupe Mauldin), ont confié leur argent à des « courtiers » canadiens. Robert Hryniak était le dirigeant de la société Tropos Capital Inc., qui faisait le commerce des obligations et des titres de créance; Gregory Peebles, un avocat spécialisé en droit des sociétés et en droit commercial (ancien avocat du cabinet Cassels Brock & Blackwell), représentait M. Hryniak, Tropos et Robert Cranston, l'ancien dirigeant d'une société panaméenne, Frontline Investments Inc.

[9] Au mois de juin 2001, deux membres du Groupe Mauldin ont rencontré MM. Cranston, Peebles et Hryniak pour discuter d'une possibilité d'investissement.

[10] À la fin juin 2001, le Groupe Mauldin a viré 1,2 million de dollars américains à Cassels Brock; cette somme a été mise en commun avec d'autres fonds et transférée à Tropos. Quelques mois plus tard, Tropos a transféré plus de 10 millions de dollars américains à une banque étrangère et l'argent a disparu. M. Hryniak soutient qu'à ce stade, les fonds appartenant à Tropos, y compris ceux versés par le Groupe Mauldin, ont été dérobés.

[11] À part un paiement modique de 9 600 dollars américains versé en février 2002, le Groupe Mauldin a perdu son placement.

II. Judicial History

A. *Ontario Superior Court of Justice, 2010 ONSC 5490 (CanLII)*

[12] The Mauldin Group joined with Bruno Appliance and Furniture, Inc. (the appellants in the companion appeal) in an action for civil fraud against Hryniak, Peebles and Cassels Brock. They brought motions for summary judgment, which were heard together.

[13] In hearing the motions, the judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He found that the Mauldin Group's money was disbursed by Cassels Brock to Hryniak's company, Tropos, but that there was no evidence to suggest that Tropos had ever set up a trading program. Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore New Savings Bank, and then disappeared. He rejected Hryniak's claim that members of the New Savings Bank had stolen the Mauldin Group's money.

[14] The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

II. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2010 ONSC 5490 (CanLII)*

[12] Le Groupe Mauldin s'est joint à Bruno Appliance and Furniture, Inc. (l'appelante dans le pourvoi connexe) en vue d'intenter une action pour fraude civile contre M. Hryniak, M. Peebles et Cassels Brock. Ils ont présenté des requêtes en jugement sommaire qui ont été instruites ensemble.

[13] Lors de l'audition des requêtes, le juge a exercé les pouvoirs que lui confère le nouveau par. 20.04(2.1) des Règles pour apprécier la preuve, évaluer la crédibilité des témoins et tirer des conclusions de la preuve. Il a conclu que les fonds du Groupe Mauldin avaient été versés par Cassels Brock à la société de M. Hryniak, Tropos, mais qu'aucune preuve ne tendait à démontrer que Tropos ait jamais établi un programme de transaction de titres. Contrairement à la stratégie de placement que M. Hryniak avait présentée aux investisseurs, les fonds du Groupe Mauldin ont été placés dans un compte ouvert à une banque étrangère, la New Savings Bank, pour ensuite disparaître. Le juge a rejeté la prétention de M. Hryniak que des employés de la New Savings Bank avaient dérobé les fonds du Groupe Mauldin.

[14] Le juge saisi de la requête a conclu que la tenue d'un procès n'était pas nécessaire dans l'instance à l'égard de M. Hryniak. Toutefois, il a rejeté la requête du Groupe Mauldin visant à obtenir un jugement sommaire contre M. Peebles parce que cette demande soulevait des questions de fait, particulièrement en ce qui concerne la crédibilité de M. Peebles et sa participation à une réunion importante, questions qui nécessitaient la tenue d'un procès. Par conséquent, il a rejeté également la requête visant à obtenir un jugement sommaire contre Cassels Brock, puisque les demandes en cause reposaient sur la thèse selon laquelle ce cabinet était responsable du fait d'autrui pour la conduite de M. Peebles.

B. *Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1*

[15] The Court of Appeal simultaneously heard Hryniak's appeal of this matter, the companion *Bruno Appliance* appeal, and three other matters which are not before this Court. This was the first occasion on which the Court of Appeal considered the new Rule 20.

[16] The Court of Appeal set out a threshold test for when a motion judge could employ the new evidentiary powers available under Rule 20.04(2.1) to grant summary judgment under Rule 20.04(2)(a). Under this test, the "interest of justice" requires that the new powers be exercised only at trial, unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings on a motion for summary judgment. The motion judge should assess whether the benefits of the trial process, including the opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand, are necessary to fully appreciate the evidence in the case.

[17] The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

[18] The Court of Appeal advised motion judges to make use of the power to hear oral evidence, under Rule 20.04(2.2), to hear only from a limited number of witnesses on discrete issues that are determinative of the case.

B. *Cour d'appel de l'Ontario, 2011 ONCA 764, 108 O.R. (3d) 1*

[15] La Cour d'appel a entendu en même temps l'appel interjeté par M. Hryniak, l'appel connexe contre Bruno Appliance et trois autres affaires dont notre Cour n'est pas saisie. C'était la première occasion pour la Cour d'appel d'examiner la nouvelle règle 20.

[16] La Cour d'appel a énoncé un critère préliminaire applicable pour déterminer dans quelles circonstances un juge saisi d'une requête peut exercer les nouveaux pouvoirs en matière de preuve prévus au par. 20.04(2.1) des Règles pour rendre un jugement sommaire en vertu de l'al. 20.04(2)a). Selon ce critère, « l'intérêt de la justice » exige que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire. Le juge saisi de la requête doit déterminer si les avantages qu'offre la tenue d'un procès, notamment la possibilité d'entendre et d'observer les témoins, de faire présenter les éléments de preuve sous forme de récit et de participer soi-même à la recherche des faits, sont nécessaires pour apprécier pleinement la preuve au dossier.

[17] Selon la Cour d'appel, il ne convient pas en général de trancher de cette manière les affaires qui exigent du tribunal qu'il tire de multiples conclusions de fait, dans lesquelles plusieurs témoins ont fait des dépositions contradictoires et dont le dossier est volumineux. À l'inverse, les affaires qui se prêtent bien au jugement sommaire sont celles dans lesquelles les documents occupent une place prépondérante; il y a peu de témoins et les questions de fait litigieuses sont limitées.

[18] La Cour d'appel a conseillé aux juges saisis d'une requête d'exercer le pouvoir d'entendre des témoignages oraux, aux termes du par. 20.04(2.2) des Règles, et de n'entendre qu'un nombre restreint de témoins sur des questions distinctes qui sont déterminantes pour l'issue de l'affaire.

[19] The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

[20] Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

III. Outline

[21] In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

[22] Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. *Access to Civil Justice: A Necessary Culture Shift*

[23] This appeal concerns the values and choices underlying our civil justice system, and the ability

[19] La Cour d'appel a conclu que l'action intentée par le Groupe Mauldin était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux. L'action exigeait l'audition de nombreux témoins, l'examen de plusieurs thèses relatives à la responsabilité de multiples défendeurs, l'examen de questions importantes de crédibilité et il n'y avait pas d'éléments de preuve documentaire fiables. De plus, puisque MM. Hryniak et Peebles avaient présenté des demandes entre défendeurs et qu'un procès serait néanmoins nécessaire contre les autres défendeurs, le jugement sommaire ne favoriserait pas le principe d'un meilleur accès à la justice, la proportionnalité et les économies.

[20] Bien qu'elle ait conclu que la présente affaire ne se prêtait pas à un jugement sommaire, la Cour d'appel était convaincue que le dossier étayait la conclusion selon laquelle M. Hryniak avait commis le délit de fraude civile à l'endroit du Groupe Mauldin et elle a par conséquent rejeté l'appel de M. Hryniak.

III. Aperçu

[21] Pour établir les principes généraux applicables en matière de jugement sommaire, je me pencherai d'abord sur les valeurs qui sous-tendent l'accès expéditif, abordable et équitable à la justice. J'examinerai ensuite de façon générale le rôle de la requête en jugement sommaire et, plus particulièrement, l'interprétation de la règle 20. J'examinerai alors les outils judiciaires précis de gestion des risques posés par la requête en jugement sommaire.

[22] Enfin, j'examinerai la norme de contrôle applicable et la question de savoir s'il y avait lieu de rendre un jugement sommaire en faveur des intimés.

IV. Analyse

A. *Accès au système de justice civile : un virage culturel nécessaire*

[23] Le présent pourvoi traite des valeurs et des choix à la base de notre système de justice

of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

[24] However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

[25] Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great,

1 For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46), or for cases involving certain minority rights (see the Language Rights Support Program).

2 In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top 10 countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

civile, ainsi que de la faculté, pour les Canadiens ordinaires, d'avoir accès à ce système. Notre système de justice civile repose sur le principe que le processus décisionnel doit être juste et équitable. Ce principe ne souffre aucun compromis.

[24] Or, les formalités excessives et les procès interminables occasionnant des dépenses et des délais inutiles peuvent *faire obstacle* au règlement juste et équitable des litiges. La tenue d'un procès complet est devenue largement illusoire parce que, sans une contribution financière de l'État[1], les Canadiens ordinaires n'ont pas les moyens d'avoir accès au règlement judiciaire des litiges civils[2]. Les coûts et les délais associés au processus traditionnel font en sorte que, comme l'a mentionné l'avocat de l'intervenante Advocates' Society (dans *Bruno Appliance*) à l'audition du présent pourvoi, le procès prive les gens ordinaires de la possibilité de faire trancher le litige. Alors que l'instruction d'une action en justice est depuis longtemps considérée comme une mesure de dernier recours, d'autres mécanismes de règlement des litiges, comme la médiation et la transaction, sont davantage susceptibles de donner des résultats justes et équitables lorsque la décision judiciaire demeure une solution de rechange réaliste.

[25] Le règlement expéditif des litiges par les tribunaux permet aux personnes concernées d'aller de l'avant. Toutefois, lorsque les coûts et les délais

1 Par exemple, l'État peut accorder des fonds dans des cas de protection de l'enfance à la suite d'ordonnances fondées sur l'arrêt *G. (J.)* même lorsque l'aide juridique n'est pas offerte (voir *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46), ou encore dans des cas où certains droits des minorités sont en jeu (voir le Programme d'appui aux droits linguistiques).

2 Dans l'édition de 2011 du *Rule of Law Index* de M. D. Agrast, J. C. Botero et A. Ponce, publié par le World Justice Project, le Canada se classait au 9e rang parmi 12 pays de l'Europe et de l'Amérique du Nord au chapitre de l'accès à la justice. Bien que le Canada se soit classé parmi les 10 premiers pays au monde dans quatre catégories liées à la primauté du droit (pouvoirs limités du gouvernement, maintien de l'ordre et de la sécurité, transparence du gouvernement et système de justice pénale efficace), il a enregistré ses résultats les plus faibles dans la catégorie de l'accès au système de justice civile. Ce classement [TRADUCTION] « s'explique en partie par les failles relevées dans l'accessibilité économique des conseils juridiques et des services de représentation ainsi que par la longue durée des instances civiles » (p. 23).

people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

[26] In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

[27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the

judiciaires deviennent excessifs, les gens cherchent d'autres solutions ou renoncent tout simplement à obtenir justice. Ils décident parfois de se représenter eux-mêmes, ce qui entraîne souvent d'autres difficultés en raison de leur méconnaissance du droit.

[26] Dans certains milieux, l'arbitrage privé est de plus en plus considéré comme une solution de rechange à un processus judiciaire lent. Or, ce n'est pas la solution : en l'absence d'un forum public accessible pour faire trancher les litiges, la primauté du droit est compromise et l'évolution de la common law, freinée.

[27] Les solutions de rechange au règlement des différents recueillent de plus en plus d'appuis et il se dégage un consensus sur le fait que l'équilibre traditionnel entre les longues procédures préalables au procès et le procès conventionnel ne correspond plus à la réalité actuelle et doit être rajusté. L'atteinte d'un juste équilibre exige la mise en place de procédures de règlement des litiges simplifiées et proportionnées, et influe sur le rôle des avocats et des juges. Il faut reconnaître par cet équilibre qu'un processus peut être juste et équitable sans entraîner les dépenses et les délais propres au procès, et que les autres modèles de règlement des litiges sont aussi légitimes que le procès conventionnel.

[28] Un virage culturel s'impose. L'objectif principal demeure le même : une procédure équitable qui aboutit au règlement juste des litiges. Une procédure juste et équitable doit permettre au juge de dégager les faits nécessaires au règlement du litige et d'appliquer les principes juridiques pertinents aux faits établis. Or, cette procédure reste illusoire si elle n'est pas également accessible — soit proportionnée, expéditive et abordable. Le principe de la proportionnalité veut que le meilleur forum pour régler un litige ne soit pas toujours celui dont la procédure est la plus laborieuse.

[29] De toute évidence, il existe toujours un certain tiraillement entre l'accessibilité et la fonction de recherche de la vérité, mais, tout comme l'on ne s'attend pas à la tenue d'un procès avec jury dans le cas d'une contravention de stationnement contestée, les procédures en place pour trancher des

nature of the dispute and the interests involved, then it will not achieve a fair and just result.

[30] The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and (1.1) provide:

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[31] Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation": *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53.

[32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks,

3 This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); Ontario *Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312, at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, at para. 12.

litiges civils doivent être adaptées à la nature de la demande. Si la procédure est disproportionnée par rapport à la nature du litige et aux intérêts en jeu, elle n'aboutira pas à un résultat juste et équitable.

[30] Le principe de la proportionnalité trouve aujourd'hui son expression dans les règles de procédure de nombreuses provinces et peut constituer la pierre d'assise de l'accès au système de justice civile[3]. Par exemple, les par. 1.04(1) et (1.1) des *Règles* de l'Ontario prévoient ce qui suit :

1.04 (1) Les présentes règles doivent recevoir une interprétation large afin d'assurer la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse.

(1.1) Lorsqu'il applique les présentes règles, le tribunal rend des ordonnances et donne des directives qui sont proportionnées à l'importance et au degré de complexité des questions en litige ainsi qu'au montant en jeu dans l'instance.

[31] Même si la proportionnalité n'est pas expressément codifiée, l'application de règles de procédure qui font intervenir un pouvoir discrétionnaire [TRADUCTION] « englobe [. . .] un principe sous-jacent de proportionnalité, selon lequel il faut tenir compte de l'opportunité de la procédure, de son coût, de son incidence sur le litige et de sa célérité, selon la nature et la complexité du litige » : *Szeto c. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, par. 53.

[32] Ce virage culturel oblige les juges à gérer activement le processus judiciaire dans le respect du principe de la proportionnalité. La requête en jugement sommaire peut permettre d'économiser temps et ressources, mais, à l'instar de la plupart des procédures préalables au procès, elle peut ralentir l'instance si elle est utilisée de manière

3 Ce principe a été expressément codifié en Colombie-Britannique, en Ontario et au Québec : *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 1-3(2); *Règles* de l'Ontario, par. 1.04(1.1); et *Code de procédure civile*, L.R.Q., ch. C-25, art. 4.2. Certaines dispositions des règles de procédure de l'Alberta et de la Nouvelle-Écosse ont également été considérées comme illustrant la proportionnalité : *Medicine Shoppe Canada Inc. c. Devchand*, 2012 ABQB 375, 541 A.R. 312, par. 11; *Saturley c. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, par. 12.

counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[33] A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. *Summary Judgment Motions*

[34] The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

[35] Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values

4 Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 *et seq.* of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). Moreover, s. 165(4) of the *Code* provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

inappropriée. Bien que les juges puissent contribuer à la réduction de ce risque, et devraient le faire, les avocats doivent, conformément aux traditions de leur profession, agir de manière à faciliter plutôt qu'à empêcher l'accès à la justice. Ils devraient ainsi tenir compte des moyens limités de leurs clients et de la nature de leur dossier et élaborer des moyens proportionnés d'arriver à un résultat juste et équitable.

[33] Une demande complexe peut comporter un dossier volumineux et exiger un investissement important en temps et en argent. Toutefois, la proportionnalité est forcément de nature comparative; même les procédures lentes et coûteuses peuvent s'avérer proportionnées lorsqu'elles constituent la solution la plus rapide et la plus efficace. La question est de savoir si les frais et les délais additionnels occasionnés par la recherche des faits lors du procès sont essentiels à un processus décisionnel juste et équitable.

B. *Requêtes en jugement sommaire*

[34] La requête en jugement sommaire constitue un outil important pour faciliter l'accès à la justice parce qu'elle peut offrir une solution de rechange au procès complet plus abordable et plus rapide que celui-ci. À l'exception du Québec, toutes les provinces prévoient dans leurs règles de procédure civile respectives des dispositions relatives au jugement sommaire[4]. En règle générale, le tribunal peut rendre un jugement sommaire si aucune véritable question litigieuse ne requiert un procès.

[35] La règle 20 énonce la procédure de jugement sommaire à suivre en Ontario; une partie peut demander, par voie de requête, un jugement sommaire accueillant ou rejetant en totalité ou en partie la demande. Bien que la règle 20 de l'Ontario

4 Le Québec dispose d'un mécanisme procédural pour écarter sommairement les demandes abusives : voir les art. 54.1 et suiv. du *Code de procédure civile*. Bien qu'il ait une portée plus circonscrite à première vue, ce mécanisme a été assimilé au jugement sommaire : voir *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). De plus, selon le par. 165(4) du *Code*, le défendeur peut solliciter le rejet de l'action si la demande « n'est pas fondée en droit ».

and principles underlying its interpretation are of general application.

[36] Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

[37] Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed.[5] Summary judgment existed to avoid the waste of a full trial in a clear case.

[38] In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes.[6] However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage".[7]

aille en quelque sorte plus loin que d'autres règles applicables ailleurs au pays, les valeurs et les principes sur lesquels repose son interprétation sont d'application générale.

[36] Afin d'améliorer l'accès à la justice, la règle 20 a été modifiée en 2010 suivant les recommandations formulées dans le rapport Osborne. Ces réformes incarnent l'évolution des règles régissant les jugements sommaires, lesquelles passent du statut d'outil à usage très restreint visant à écarter les demandes ou défenses manifestement dénuées de fondement à celui de solution de rechange légitime pour trancher et régler les litiges d'ordre juridique.

[37] Les premières règles régissant les jugements sommaires avaient une portée assez limitée et seul pouvait y avoir recours le demandeur dont la réclamation visait une créance ou des dommages-intérêts conventionnels et à laquelle aucune véritable défense ne pouvait être opposée[5]. La procédure de jugement sommaire avait pour raison d'être de prévenir le recours injustifié au procès complet dans un cas manifeste.

[38] En 1985, ce qui était alors la nouvelle règle 20 a permis tant au demandeur qu'au défendeur de solliciter un jugement sommaire et a élargi l'éventail des affaires pouvant être tranchées sur requête en ce sens. Au départ, les dispositions de cette règle étaient interprétées libéralement, en conformité avec l'objet des modifications apportées à la règle[6]. Toutefois, les cours d'appel ont limité les pouvoirs des juges et circonscrit en fait l'objet des requêtes en jugement sommaire pour simplement faire en sorte que « les demandes qui n'ont aucune chance de succès soient écartées tôt dans le processus »[7].

5 For a thorough review of the history of summary judgment in Ontario, see T. Walsh and L. Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2013* (2013), 419, at pp. 422-32.

6 Walsh and Posloski, at p. 426; for example, see *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242 (H.C.J.).

7 *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 10.

5 Pour un examen approfondi de l'historique du jugement sommaire en Ontario, voir T. Walsh et L. Posloski, « Establishing a Workable Test for Summary Judgment : Are We There Yet? », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation 2013* (2013), 419, p. 422-432.

6 Walsh et Posloski, p. 426; voir, p. ex., *Vaughan c. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242 (H.C.J.).

7 *Canada (Procureur général) c. Lameman*, 2008 CSC 14, [2008] 1 R.C.S. 372, par. 10.

[39] The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne, Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project. The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

[40] The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

[41] Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case.

[42] Rule 20.04 now reads in part:[8]

20.04 . . .

(2) [General] The court shall grant summary judgment if,

8 The full text of Rule 20 is attached as an Appendix.

[39] Le gouvernement de l'Ontario a demandé à l'ancien juge en chef adjoint de l'Ontario, M. Coulter Osborne, c.r., d'envisager des réformes pour rendre le système de justice civile ontarien plus accessible et abordable, ce qui a mené au rapport du Projet de réforme du système de justice civile. Le rapport Osborne conclut que peu de requêtes en jugement sommaire ont été présentées et que si la règle du jugement sommaire devait donner les résultats escomptés, il fallait infirmer les arrêts des cours d'appel qui en avaient restreint la portée et l'utilité (p. 35). L'auteur du rapport recommande entre autres choses que l'on rende plus accessible le recours à la procédure de jugement sommaire, que l'on accorde au juge saisi d'une requête en jugement sommaire le pouvoir d'apprécier la preuve, et que l'on confère au juge le pouvoir d'ordonner la présentation de témoignages oraux (p. 35-36).

[40] L'auteur du rapport recommande également l'adoption d'une procédure de procès sommaire semblable à celle appliquée en Colombie-Britannique (p. 37). Cette recommandation particulière n'a pas été adoptée et le législateur a choisi de maintenir la procédure de jugement sommaire comme procédure accessible.

[41] Bon nombre des recommandations du rapport Osborne ont été adoptées et mises en œuvre en 2010. Comme je l'ai déjà mentionné, ces modifications codifient le principe de la proportionnalité et prévoient un processus décisionnel efficace dans les cas où la tenue d'un procès conventionnel n'est pas nécessaire. Les juges disposent ainsi de nouveaux outils importants qui leur permettent de trancher plus de litiges sur requête en jugement sommaire et qui atténuent les risques lorsque pareille requête ne permet pas de trancher l'affaire dans son ensemble.

[42] Aujourd'hui, la règle 20.04 prévoit notamment ce qui suit[8] :

20.04 . . .

(2) [Dispositions générales] Le tribunal rend un jugement sommaire si, selon le cas :

8 Le texte intégral de la règle 20 figure en annexe.

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[43] The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

a) il est convaincu qu'une demande ou une défense ne soulève pas de véritable question litigieuse nécessitant la tenue d'une instruction;

b) il est convaincu qu'il est approprié de rendre un jugement sommaire et les parties sont d'accord pour que tout ou partie de la demande soit décidé par jugement sommaire.

(2.1) [Pouvoirs] Lorsqu'il décide, aux termes de l'alinéa (2)a), s'il existe une véritable question litigieuse nécessitant la tenue d'une instruction, le tribunal tient compte des éléments de preuve présentés par les parties et, si la décision doit être rendue par un juge, ce dernier peut, à cette fin, exercer l'un ou l'autre des pouvoirs suivants, à moins qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès :

1. Apprécier la preuve.

2. Évaluer la crédibilité d'un déposant.

3. Tirer une conclusion raisonnable de la preuve.

(2.2) [Témoignage oral (mini-procès)] Un juge peut, dans le but d'exercer les pouvoirs prévus au paragraphe (2.1), ordonner que des témoignages oraux soient présentés par une ou plusieurs parties, avec ou sans limite de temps pour leur présentation.

[43] Les modifications apportées en Ontario ont eu pour effet de modifier le critère applicable aux jugements sommaires en remplaçant la question de savoir si la cause ne « soulève pas de question litigieuse » par celle de savoir si la cause soulève une « véritable question litigieuse nécessitant la tenue d'une instruction ». Il appert de la nouvelle règle, qui prévoit des pouvoirs accrus en matière de recherche des faits, que la tenue d'un procès ne constitue pas la procédure par défaut. En outre, afin de ne pas dissuader les parties de recourir à cette procédure, la nouvelle règle a eu pour effet de supprimer la présomption suivant laquelle l'auteur de la requête débouté devait être condamné aux dépens d'indemnisation substantielle.

[44] The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.[9]

[45] These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

[46] I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

(1) When Is There No Genuine Issue Requiring a Trial?

[47] Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine

9 As fully canvassed by the Court of Appeal, the powers in Rule 20.04(2.1) were designed specifically to overrule a number of long-standing appellate decisions that had dramatically restricted the use of the rule; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

[44] Les nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles augmentent le nombre d'affaires qui ne soulèvent pas de véritable question litigieuse nécessitant la tenue d'un procès en permettant au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables[9].

[45] Ces nouveaux pouvoirs en matière de recherche des faits ont un caractère discrétionnaire et sont présumés pouvoir être exercés; ils peuvent l'être *à moins* qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès; par. 20.04(2.1) des Règles. Par conséquent, les modifications font en sorte que la règle 20 ne soit plus seulement un moyen d'écarter des demandes sans fondement mais qu'elle devienne un important modèle de rechange pour les décisions.

[46] Premièrement, j'examinerai les circonstances où le tribunal peut rendre un jugement sommaire en raison de l'absence de « véritable question litigieuse nécessitant la tenue d'une instruction » (al. 20.04(2)a) des Règles). Deuxièmement, j'examinerai les circonstances dans lesquelles il est contraire à « l'intérêt de la justice » d'exercer les nouveaux pouvoirs en matière de recherche des faits prévus au par. 20.04(2.1) des Règles lors de l'audition d'une requête en jugement sommaire. Troisièmement, j'examinerai le pouvoir d'ordonner la présentation de témoignages oraux et, enfin, j'énoncerai la procédure à suivre dans le cas d'une requête en jugement sommaire.

(1) Dans quels cas n'y a-t-il aucune véritable question litigieuse nécessitant la tenue d'un procès?

[47] La requête en jugement sommaire doit être accueillie dans tous les cas où il n'existe pas de véritable question litigieuse nécessitant la tenue

9 Comme l'a expliqué en détail la Cour d'appel, les pouvoirs prévus au par. 20.04(2.1) des Règles visaient explicitement à infirmer plusieurs arrêts de longue date des cours d'appel qui avaient restreint considérablement le recours à la règle; *Aguonie c. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (C.A. Ont.).

whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

[48] The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[50] These principles are interconnected and all speak to whether summary judgment will provide

d'un procès (al. 20.04(2)a) des Règles). Pour exposer la façon de déterminer l'existence d'une telle question, je m'attache aux objectifs et aux principes sous-jacents à la décision d'accueillir ou non une requête en jugement sommaire. Une telle façon de faire permet l'évolution naturelle de l'application de la règle, sinon les catégories de cas seront considérées comme des règles ou des conditions préalables qui risquent de nuire à la métamorphose du système en décourageant le recours au jugement sommaire.

[48] La Cour d'appel n'a pas explicitement déterminé les circonstances dans lesquelles il existe une véritable question litigieuse nécessitant la tenue d'un procès. Or, en se demandant si l'exercice des nouveaux pouvoirs en matière de recherche des faits est contraire à l'intérêt de la justice, elle a laissé entendre qu'il est le plus souvent indiqué de rendre un jugement sommaire dans des affaires où les documents occupent une place prépondérante, où il y a peu de témoins et de questions de fait litigieuses, ou encore des affaires dans lesquelles il est possible de compléter le dossier en présentant des témoignages oraux sur des points distincts. Voilà autant d'observations utiles qui, comme la Cour d'appel l'a elle-même reconnu, ne devraient cependant pas être considérées comme circonscrivant des catégories étanches de cas où il convient ou non de rendre un jugement sommaire. Par exemple, malgré la complexité de la présente affaire et son dossier volumineux, la Cour d'appel a finalement reconnu l'absence de question litigieuse nécessitant la tenue d'un procès.

[49] Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de statuer justement et équitablement au fond sur une requête en jugement sommaire. Ce sera le cas lorsque la procédure de jugement sommaire (1) permet au juge de tirer les conclusions de fait nécessaires, (2) lui permet d'appliquer les règles de droit aux faits et (3) constitue un moyen proportionné, plus expéditif et moins coûteux d'arriver à un résultat juste.

[50] Ces principes sont interreliés et reviennent tous à se demander si le jugement sommaire

a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[51] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

(2) The Interest of Justice

[52] The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

[53] To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

[54] The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of

constituera une décision juste et équitable. Lorsqu'une requête en jugement sommaire permet au juge d'établir les faits nécessaires et de régler le litige, la tenue d'un procès ne serait généralement ni proportionnée, ni expéditive, ni économique. Dans le même ordre d'idées, un processus qui ne permet pas au juge de tirer ses conclusions avec confiance ne saurait jamais constituer un moyen proportionné de régler un litige. Il importe de répéter que la norme d'équité consiste à déterminer non pas si la procédure visée est aussi exhaustive que la tenue d'un procès, mais si elle permet au juge de pouvoir, avec confiance, établir les faits nécessaires et appliquer les principes juridiques pertinents pour régler le litige.

[51] Souvent, il est possible de dissiper les doutes concernant la crédibilité ou d'éclaircir la preuve par la présentation de témoignages oraux au moment de l'audition de la requête elle-même. Toutefois, il peut y avoir des cas où, vu la nature des questions soulevées et la preuve à produire, le juge ne peut tirer les conclusions de fait nécessaires, ni appliquer les principes juridiques qui permettent d'arriver à une décision juste et équitable.

(2) L'intérêt de la justice

[52] Lors de l'audition d'une requête en jugement sommaire, le juge peut exercer les pouvoirs accrus en matière de recherche des faits que lui confère le par. 20.04(2.1) des Règles, à moins qu'il ne soit dans « l'intérêt de la justice » de ne les exercer que lors d'un procès. L'expression « intérêt de la justice » n'est pas définie dans les Règles.

[53] Pour déterminer s'il était dans l'intérêt de la justice que le juge saisi d'une requête exerce ses nouveaux pouvoirs, la Cour d'appel a obligé ce dernier à se poser la question suivante : [TRADUCTION] « . . . la pleine appréciation de la preuve et des questions litigieuses qui s'impose pour tirer des conclusions décisives peut-elle se faire par voie de jugement sommaire ou uniquement au moyen d'un procès? » (par. 50).

[54] La Cour d'appel a recensé les avantages de la tenue d'un procès qui contribuent à cette pleine

the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

[55] The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

[56] While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.

[57] On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and (2.2) can provide an equally valid, if less extensive, manner of fact finding.

appréciation de la preuve, à savoir l'exposé que l'avocat peut présenter lors d'un procès, la possibilité pour les témoins de s'exprimer dans leurs propres mots et l'aide des avocats pour passer en revue les éléments de preuve (par. 54).

[55] Les intimés ainsi que les intervenants, soit l'Association du Barreau canadien, le procureur général de l'Ontario et l'Advocates' Society, plaident que l'importance accordée par la Cour d'appel aux vertus du procès traditionnel est injustifiée et indûment restrictive. De plus, selon certains intervenants, cette approche peut donner lieu à la création de catégories de cas qui ne se prêtent pas à un jugement sommaire, ce qui aura pour effet de freiner l'évolution de la procédure de jugement sommaire.

[56] Je conviens certes que le juge saisi d'une requête doit avoir une connaissance de la preuve nécessaire pour tirer des conclusions décisives, mais le procès n'est pas le seul moyen d'acquérir cette connaissance. Mettre l'accent sur la quantité et la nature des éléments de preuve qui peuvent être présentés au procès, plutôt que sur la question de savoir si la tenue d'un procès est « nécessaire », comme le prévoit la règle, pourrait amener le juge à fixer un critère trop exigeant. L'intérêt de la justice ne saurait être limité aux caractéristiques avantageuses du procès conventionnel et il doit tenir compte de la proportionnalité, de la célérité et de l'accessibilité économique. Sinon, le processus décisionnel permis par les nouveaux pouvoirs — ainsi que l'objet des modifications — seraient contrecarrés.

[57] Dans le cadre de la procédure par jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge soit confiant de pouvoir résoudre équitablement le litige. La preuve documentaire, surtout si elle est complétée au moyen des nouveaux outils de recherche des faits, y compris des témoignages oraux, est souvent suffisante pour trancher des questions importantes de manière juste et équitable. L'exercice des pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles peut déboucher sur une recherche des faits tout aussi valable, voire plus brève.

[58] This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

[58] Cette analyse de l'intérêt de la justice est, de par sa nature, comparative. La proportionnalité se mesure à l'aune du procès complet. Le juge saisi d'une requête peut devoir évaluer l'efficacité relative de la procédure de jugement sommaire par rapport au procès. Cette analyse impliquerait une comparaison, entre autres facteurs, du coût et de la rapidité des deux procédures. (La procédure de jugement sommaire peut s'avérer onéreuse et prendre beaucoup de temps, comme en l'espèce, mais la tenue d'un procès peut être encore plus coûteuse et plus lente.) L'analyse peut impliquer aussi une comparaison de la preuve qui sera présentée au procès et de la preuve qui accompagne la requête, ainsi que de la possibilité d'apprécier équitablement la preuve. (Même si la preuve présentée avec la requête est limitée, il n'y a peut-être aucune raison de croire qu'une meilleure preuve sera présentée lors du procès.)

[59] In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

[59] En pratique, la question de savoir si l'exercice des nouveaux pouvoirs en matière de recherche des faits est contraire à « l'intérêt de la justice » équivaudra souvent à se demander s'il existe une « véritable question litigieuse nécessitant la tenue d'une instruction ». Logiquement, lorsqu'il permettrait au juge de trancher une demande de manière juste et équitable, l'exercice des nouveaux pouvoirs serait généralement dans l'intérêt de la justice. Le caractère juste et équitable de la décision dépend de la nature des questions litigieuses, de la nature et de la valeur probante de la preuve, ainsi que de ce qui constitue la procédure proportionnée.

[60] The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance

[60] L'analyse de « l'intérêt de la justice » va plus loin et tient également compte des répercussions de la requête dans le contexte du litige dans son ensemble. Par exemple, si certaines des demandes contre certaines des parties seront de toute façon tranchées à l'issue d'un procès, il peut ne pas être dans l'intérêt de la justice d'exercer les nouveaux pouvoirs en matière de recherche des faits pour rendre un jugement sommaire contre un seul défendeur. Un tel jugement sommaire partiel risque d'entraîner des procédures répétitives ou de mener à des conclusions de fait contradictoires; par conséquent, l'exercice de ces pouvoirs n'est peut-être pas dans

access to justice, and be the most proportionate, timely and cost effective approach.

(3) The Power to Hear Oral Evidence

[61] Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

[62] The Court of Appeal suggested the motion judge should only exercise this power when

(1) oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time;

(2) any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and

(3) any such issue is narrow and discrete — *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

[63] This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard

l'intérêt de la justice. Par contre, le règlement d'une demande importante visant une partie clé pourrait favoriser nettement l'accès à la justice et constituer la mesure la plus proportionnée, expéditive et économique.

(3) Le pouvoir d'entendre des témoignages oraux

[61] Le paragraphe 20.04(2.2) des Règles confère au juge saisi d'une requête le pouvoir d'entendre des témoignages oraux pour tirer plus facilement des conclusions aux termes du par. 20.04(2.1). La décision d'autoriser la présentation d'un témoignage oral appartient au juge puisque, comme l'a souligné la Cour d'appel, [TRADUCTION] « c'est le juge saisi de la requête, et non les avocats, qui peut exercer un contrôle sur l'étendue de la preuve à présenter et sur les questions auxquelles se rapporte celle-ci » (par. 60).

[62] Selon la Cour d'appel, le juge saisi d'une requête ne devrait exercer ce pouvoir que lorsque

[TRADUCTION]

(1) il est possible d'entendre, dans un délai raisonnable, les témoignages oraux d'un nombre restreint de témoins;

(2) toute question à traiter par la présentation d'un témoignage oral aura vraisemblablement une incidence importante sur l'accueil ou le rejet de la requête en jugement sommaire; et

(3) une telle question est précise et distincte — c'est-à-dire que la question peut être tranchée séparément et n'est pas liée aux autres questions sur lesquelles porte la requête. [par. 103]

Ces indications sont utiles pour assurer que l'audition des témoignages oraux ne devient pas ingérable; toutefois, comme l'a reconnu la Cour d'appel, ces règles ne sont pas absolues.

[63] Ce pouvoir devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée. Ce sera plus probablement le cas lorsque le témoignage oral requis est succinct, mais dans certains cas, la requête en jugement

on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

[64] Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

[65] Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

(4) The Roadmap/Approach to a Motion for Summary Judgment

[66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will

sommaire comportera l'audition de longs témoignages oraux, ce qui permettra d'éviter des procès plus longs et plus complexes sans compromettre l'équité de la procédure.

[64] La partie qui cherche à présenter des témoignages oraux doit être prête, d'une part, à démontrer en quoi ils aideraient le juge saisi de la requête à apprécier la preuve, à évaluer la crédibilité des déposants ou à tirer des conclusions de la preuve et, d'autre part, à fournir une déclaration anticipée ou un autre exposé de la preuve proposée afin de permettre au juge d'établir la portée des témoignages oraux.

[65] Ainsi, le pouvoir d'ordonner la présentation de témoignages oraux devrait servir à favoriser le règlement juste et équitable du litige compte tenu des principes de proportionnalité, de célérité et d'accessibilité économique. Lorsqu'il établit la nature et l'étendue des témoignages oraux qui seront entendus, le juge saisi de la requête devrait s'inspirer de ces principes et se rappeler que ce processus ne constitue pas un procès complet sur le fond mais qu'il vise plutôt à déterminer s'il existe une véritable question litigieuse nécessitant la tenue d'un procès.

(4) Marche à suivre pour trancher une requête en jugement sommaire

[66] Lors de l'audition d'une requête en jugement sommaire aux termes de la règle 20.04, le juge devrait en premier lieu décider, compte tenu uniquement de la preuve dont il dispose et *sans* recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse nécessitant la tenue d'un procès. Il n'y aura pas de question de ce genre si la procédure de jugement sommaire lui fournit la preuve nécessaire pour trancher justement et équitablement le litige et constitue une procédure expéditive, abordable et proportionnée selon l'al. 20.04(2)a) des Règles. S'il semble y avoir une véritable question nécessitant la tenue d'un procès, le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles écartera la nécessité d'un procès. Le juge peut exercer ces

serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[67] Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

[68] While summary judgment *must* be granted if there is no genuine issue requiring a trial,[10] the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary.[11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion

10 Rule 20.04(2): "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial . . . ."

11 Rule 20.04(2.1): "In determining . . . whether there is a genuine issue requiring a trial . . . if the determination is being made by a judge, the judge may exercise any of the following powers . . . 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence." Rule 20.04(2.2): "A judge may . . . order that oral evidence be presented . . . ."

pouvoirs à son gré, pourvu que leur exercice ne soit pas contraire à l'intérêt de la justice. Leur exercice ne sera pas contraire à l'intérêt de la justice s'il aboutit à un résultat juste et équitable et permettra d'atteindre les objectifs de célérité, d'accessibilité économique et de proportionnalité, compte tenu du litige dans son ensemble.

[67] En cherchant d'abord à déterminer si l'exercice des pouvoirs prévus au par. 20.04(2.1) des Règles permettra de régler le litige par voie de jugement sommaire, avant de se demander s'il est dans l'intérêt de la justice que ces pouvoirs ne soient exercés que lors d'un procès, on souligne le fait que ces pouvoirs peuvent être exercés en règle générale, plutôt qu'à titre exceptionnel, conformément à l'objectif d'un règlement des litiges proportionné, économique et expéditif. De même, lorsqu'on détermine en premier lieu les conséquences du recours à ces nouveaux pouvoirs, les avantages qu'offre leur exercice apparaissent plus clairement. Cette façon de procéder aidera à déterminer s'il est dans l'intérêt de la justice que ces pouvoirs ne soient exercés que lors d'un procès.

[68] Bien qu'un jugement sommaire *doive* être rendu en l'absence d'une véritable question litigieuse nécessitant la tenue d'un procès[10], la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire[11]. Ce caractère discrétionnaire de la décision du juge lui laisse une certaine latitude lorsqu'il décide de la marche à suivre. De plus, la nature discrétionnaire de cette décision peut servir de soupape dans les cas où l'exercice de ces pouvoirs serait de toute évidence inapproprié. Le risque de recours abusif à des requêtes en jugement sommaire clairement dénuées

10 Paragraphe 20.04(2) des Règles : « Le tribunal rend un jugement sommaire si, selon le cas : a) il est convaincu qu'une demande ou une défense ne soulève pas de véritable question litigieuse nécessitant la tenue d'une instruction . . . »

11 Paragraphe 20.04(2.1) des Règles : « Lorsqu'il décide [. . .] s'il existe une véritable question litigieuse nécessitant la tenue d'une instruction [. . .] et, si la décision doit être rendue par un juge, ce dernier peut, à cette fin, exercer l'un ou l'autre des pouvoirs suivants [. . .] 1. Apprécier la preuve. 2. Évaluer la crédibilité d'un déposant. 3. Tirer une conclusion raisonnable de la preuve. » Paragraphe 20.04(2.2) des Règles : « Un juge peut [. . .] ordonner que des témoignages oraux soient présentés . . . »

to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

de fondement comme tactique pour entraîner des frais et des retards est toujours présent. Dans ces cas, le juge peut refuser d'exercer son pouvoir discrétionnaire et rejeter la requête en jugement sommaire sans procéder à l'analyse complète exposée ci-dessus.

C. *Tools to Maximize the Efficiency of a Summary Judgment Motion*

(1) Controlling the Scope of a Summary Judgment Motion

C. *Outils permettant d'optimiser l'efficacité de la requête en jugement sommaire*

(1) Circonscrire la portée de la requête en jugement sommaire

[69] The Ontario *Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

[69] Les *Règles* de l'Ontario et la compétence inhérente d'une cour supérieure permettent au juge saisi d'une requête d'intervenir rapidement après la présentation de la requête afin de limiter la taille du dossier, et de continuer de jouer un rôle actif si la requête ne permet pas de trancher tout le litige.

[70] The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

[70] Les Règles prévoient l'intervention hâtive du tribunal par l'application de la règle 1.05, qui permet de lui demander par requête des directives pour gérer les délais et les dépens afférents à une requête en jugement sommaire. Le juge peut ainsi donner des directives relatives aux délais de dépôt des affidavits, à la durée des contre-interrogatoires et à la nature et la quantité des éléments de preuve à déposer. Toutefois, le juge doit également prendre garde d'imposer des mesures administratives qui entraînent des frais supplémentaires non nécessaires.

[71] Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

[71] La requête en jugement sommaire ne nécessite pas dans tous les cas une demande de directives. Toutefois, l'omission de présenter une telle demande lorsqu'il était évident que le dossier serait complexe ou volumineux peut être prise en compte au moment d'attribuer des dépens en application de l'al. 20.06a) des Règles. Conformément au principe de la proportionnalité, le juge qui instruit la requête en vue d'obtenir des directives devrait généralement être saisi de la requête en jugement sommaire elle-même pour assurer que la connaissance qu'il a acquise du dossier ne serve pas à rien.

[72] I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity

[72] Je suis d'accord avec la Cour d'appel (par. 58 et 258) pour dire que la requête en vue d'obtenir des directives donne également à l'intimé l'occasion de

to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

[73] A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

(2) Salvaging a Failed Summary Judgment Motion

[74] Failed, or even partially successful, summary judgment motions add — sometimes astronomically — to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

[75] Rules 20.05(1) and (2) provide in part:

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just . . . .

[76] Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the

demander la suspension ou le rejet d'une requête en jugement sommaire prématurée ou irrégulière. Une telle demande peut permettre de contester des requêtes longues et complexes, surtout lorsque celles-ci ne feraient pas progresser suffisamment l'instance ou ne favoriseraient pas les objectifs de proportionnalité, de célérité et d'accessibilité économique.

[73] La requête en jugement sommaire ne constituera pas toujours le moyen le plus proportionné de trancher une action en justice. Par exemple, il arrive qu'un court procès puisse avoir lieu tôt ou que les parties soient disposées à procéder par procès sommaire. Les avocats devraient toujours tenir compte de la procédure la plus proportionnée pour leur client et le dossier.

(2) Mettre à profit les éléments d'une requête en jugement sommaire rejetée

[74] Qu'elle soit rejetée ou même accueillie en partie, la requête en jugement sommaire occasionne des frais et des délais additionnels — parfois astronomiques. Le juge peut toutefois atténuer ce risque en exerçant la compétence inhérente du tribunal et les pouvoirs de gestion de l'instance prévus à la règle 20.05.

[75] Les paragraphes 20.05(1) et (2) des Règles prévoient notamment ce qui suit :

20.05 (1) Si le jugement sommaire est refusé ou n'est accordé qu'en partie, le tribunal peut rendre une ordonnance dans laquelle il précise les faits pertinents qui ne sont pas en litige et les questions qui doivent être instruites. Il peut également ordonner que l'action soit instruite de façon expéditive.

(2) Le tribunal qui ordonne l'instruction d'une action en vertu du paragraphe (1) peut donner les directives ou imposer les conditions qu'il estime justes . . .

[76] Les alinéas 20.05(2)a) à p) des Règles énumèrent plusieurs ordonnances précises de gestion de l'instance qui peuvent convenir. Le tribunal peut dresser un calendrier, établir un plan d'enquête préalable assorti de limites, fixer la date du procès, ordonner la consignation de la somme demandée ou le versement d'un cautionnement pour dépens. Le

parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

tribunal peut aussi ordonner la remise par les parties d'un résumé concis de leur déclaration préliminaire, la remise par les parties d'un résumé écrit de la déposition prévue d'un témoin, la limitation de la durée de tout interrogatoire oral d'un témoin au procès, ou la présentation par affidavit de tout ou partie de la déposition d'un témoin.

[77] These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted to a judge under Rule 20.05(2).

[77] Ces pouvoirs permettent au juge de mettre à profit les connaissances acquises lors de l'audition de la requête en jugement sommaire pour élaborer une procédure d'instruction de nature à régler le litige en tenant compte de la complexité et de l'importance de la question soulevée, de la somme en jeu et des efforts déployés lors de l'instruction de la requête rejetée. Le juge saisi de la requête devrait s'inspirer de la procédure d'instruction sommaire, en particulier lorsque les affidavits déposés serviraient de dépositions, sous réserve d'interrogatoires et de contre-interrogatoires d'une durée limitée. Bien que les Règles n'aient pas adopté le modèle de l'instruction sommaire recommandé dans le rapport Osborne, ce modèle est déjà prévu par les règles simplifiées ou peut être utilisé du consentement des parties. À mon avis, le modèle de l'instruction sommaire pourrait également s'appliquer si le juge exerce les vastes pouvoirs que lui confère le par. 20.05(2) des Règles.

[78] Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout

[78] Le juge qui rejette une requête en jugement sommaire devrait également se saisir de l'instance à titre de juge du procès à moins que des raisons impérieuses l'en empêchent. Je suis d'accord avec le rapport Osborne pour dire que la gestion du litige par un seul fonctionnaire judiciaire

> saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

> permet à la cour d'économiser du temps étant donné que les parties n'ont pas à mettre un juge différent au fait chaque fois qu'un problème survient relativement à la cause. Elle peut également avoir un effet de modération sur le comportement des parties litigantes et des avocats, qui en viendront à prévoir la façon dont le fonctionnaire judiciaire affecté à la cause pourrait statuer sur une question donnée. [p. 105]

[79] While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the

[79] Une telle approche risque de compliquer l'établissement du calendrier, dans la mesure où les pratiques actuelles en la matière empêchent de recourir de façon efficace et économique à la

courts should be prepared to change their practices in order to facilitate access to justice.

D. *Standard of Review*

[80] The Court of Appeal concluded that determining the appropriate test for summary judgment — whether there is a genuine issue requiring a trial — is a legal question, reviewable on a correctness standard, while any factual determinations made by the motion judge will attract deference.

[81] In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[82] Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

[83] Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

requête en jugement sommaire, mais les tribunaux devraient être disposés à modifier leurs habitudes afin de faciliter l'accès à la justice.

D. *Norme de contrôle*

[80] La Cour d'appel a conclu que le choix du critère à appliquer en matière de jugement sommaire — déterminer s'il existe une véritable question litigieuse nécessitant la tenue d'un procès — est une question de droit, susceptible de révision selon la norme de la décision correcte, alors que les conclusions de fait tirées par le juge saisi de la requête commandent la retenue.

[81] À mon avis, en l'absence d'une erreur de droit, l'exercice des pouvoirs que confère la nouvelle règle relative au jugement sommaire commande la retenue. Lorsque le juge saisi d'une requête exerce ses nouveaux pouvoirs en matière de recherche des faits, que lui confère le par. 20.04(2.1) des Règles, et détermine s'il existe une véritable question litigieuse nécessitant la tenue d'un procès, il s'agit d'une question mixte de fait et de droit. Lorsqu'il n'y a aucune erreur de principe isolable, les conclusions mixtes de fait et de droit ne doivent pas être infirmées en l'absence d'erreur manifeste et dominante : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 36.

[82] De même, la réponse à la question de savoir s'il est dans « l'intérêt de la justice » que le juge saisi d'une requête exerce les nouveaux pouvoirs en matière de recherche des faits prévus au par. 20.04(2.1) des Règles dépend de la preuve relative présentée lors de l'audition de la requête en jugement sommaire et au procès, de la nature, de l'envergure, de la complexité et du coût du litige, ainsi que d'autres facteurs contextuels. Cette décision constitue également une question mixte de fait et de droit qui commande la retenue.

[83] Pourvu qu'elle ne soit pas contraire à « l'intérêt de la justice », la décision du juge saisi d'une requête d'exercer les nouveaux pouvoirs est de nature discrétionnaire. Par conséquent, à moins que le juge ne se soit fondé sur des considérations erronées ou que sa décision soit erronée au point de créer une injustice, il n'y a pas lieu de modifier sa décision.

[84] Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard: *Housen*, at para. 8.

E. *Did the Motion Judge Err by Granting Summary Judgment?*

[85] The motion judge granted summary judgment in favour of the Mauldin Group. While the Court of Appeal found that the action should not have been decided by summary judgment, it nevertheless dismissed the appeal. Hryniak argues this constituted "prospective overruling" but, in light of my conclusion that the motion judge was entitled to proceed by summary judgment, I need not consider these submissions further. For the reasons that follow, I am satisfied that the motion judge did not err in granting summary judgment.

(1) The Tort of Civil Fraud

[86] The action underlying this motion for summary judgment was one for civil fraud brought against Hryniak, Peebles, and Cassels Brock.

[87] As discussed in the companion *Bruno Appliance* appeal, the tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

(2) Was There a Genuine Issue Requiring a Trial?

[88] In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil

[84] Évidemment, si le juge saisi d'une requête applique un mauvais principe de droit ou fait erreur relativement à une pure question de droit, comme les éléments dont le demandeur doit prouver l'existence pour établir sa cause d'action, la norme de contrôle applicable sera celle de la décision correcte : *Housen*, par. 8.

E. *Le juge saisi de la requête a-t-il eu tort de rendre un jugement sommaire?*

[85] Le juge saisi de la requête a rendu un jugement sommaire en faveur du Groupe Mauldin. Bien qu'elle ait conclu que l'action n'aurait pas dû être tranchée par jugement sommaire, la Cour d'appel a quand même rejeté l'appel. Selon M. Hryniak, la Cour d'appel a fait un [TRADUCTION] « revirement pour l'avenir » mais, vu ma conclusion selon laquelle le juge pouvait à bon droit trancher l'action par jugement sommaire, je n'ai pas à examiner plus à fond ces arguments. Pour les motifs qui suivent, je suis convaincue que le juge n'a pas eu tort de rendre un jugement sommaire.

(1) Le délit de fraude civile

[86] C'est une action pour fraude civile intentée contre M. Hryniak, M. Peebles et le cabinet Cassels Brock qui est à l'origine de la requête en jugement sommaire.

[87] Comme il est expliqué dans le pourvoi connexe *Bruno Appliance*, le délit de fraude civile comporte quatre éléments dont il faut prouver l'existence selon la prépondérance des probabilités : (1) une fausse déclaration du défendeur; (2) une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); (3) le fait que la fausse déclaration a amené le demandeur à agir; (4) le fait que les actes du demandeur ont entraîné une perte.

(2) Existait-il une véritable question litigieuse nécessitant la tenue d'un procès?

[88] Le juge saisi de la requête n'a pas traité explicitement du critère qu'il convient d'appliquer à la fraude civile lorsqu'il a prononcé un jugement

fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

[89] The first element of civil fraud is a false representation by the defendant. The Court of Appeal agreed with the motion judge that "[u]nquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin" at the meeting of June 19, 2001 (at para. 158), and this was not disputed in the appellant's factum.

[90] The motion judge found the requisite knowledge or recklessness as to the falsehood of the representation, the second element of civil fraud, based on Hryniak's lack of effort to ensure that the funds would be properly invested and failure to verify that the eventual end-point of the funds, New Savings Bank, was secure. The motion judge also rejected the defence that the funds were stolen, noting Hryniak's feeble efforts to recover the funds, waiting some 15 months to report the apparent theft of US$10.2 million.

[91] The motion judge also found an intention on the part of Hryniak that the Mauldin Group would act on his false representations, the third requirement of civil fraud. Hryniak secured a US$76,000 loan for Fred Mauldin and conducted a "test trade", actions which, in the motion judge's view, were "undertaken . . . for the purpose of dissuading the Mauldin group from demanding the return of its investment" (para. 113). Moreover, the motion judge detailed Hryniak's central role in the web of deception that caused the Mauldin Group to invest its funds and that dissuaded them from seeking their return for some time after they had been stolen.

[92] The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested

sommaire en faveur du Groupe Mauldin contre M. Hryniak. Toutefois, à l'instar de la Cour d'appel, je suis convaincue que les conclusions du juge étayent ce résultat.

[89] Une fausse déclaration du défendeur constitue le premier élément de la fraude civile. La Cour d'appel partageait l'avis du juge que [TRADUCTION] « [s]ans aucun doute, le Groupe Mauldin a été amené à investir avec Hryniak en raison des propos adressés par M. Hryniak à Fred Mauldin » lors de la réunion du 19 juin 2001 (par. 158), ce que l'appelant ne conteste pas dans son mémoire.

[90] Le juge saisi de la requête a conclu à l'existence de la connaissance ou de l'insouciance requise quant à la fausseté de la déclaration, en l'occurrence le deuxième élément de la fraude civile, en raison de l'absence de démarches de la part de M. Hryniak pour s'assurer que les fonds seraient adéquatement investis et de son omission de vérifier que le destinataire éventuel des fonds, la New Savings Bank, était un établissement sûr. Le juge a également rejeté la thèse invoquée en défense selon laquelle les fonds avaient été dérobés, soulignant les démarches limitées prises par M. Hryniak pour recouvrer les fonds, celui-ci ayant attendu quelque 15 mois avant de signaler le vol apparent de 10,2 millions de dollars américains.

[91] Le juge saisi de la requête a conclu également à l'intention de M. Hryniak que ses fausses déclarations incitent le Groupe Mauldin à agir, ce qui constitue le troisième élément de la fraude civile. M. Hryniak a contracté un prêt de 76 000 dollars américains pour le compte de Fred Mauldin et a [TRADUCTION] « simulé une transaction », des gestes qui, selon le juge, ont été « posés [. . .] dans le but de dissuader le Groupe Mauldin d'exiger le remboursement de son placement » (par. 113). De plus, le juge a exposé en détail le rôle capital joué par M. Hryniak dans la multitude de tromperies qui ont amené le Groupe Mauldin à investir ses fonds et qui l'ont dissuadé de demander leur remboursement pendant quelque temps après que les fonds eurent été dérobés.

[92] Le dernier élément de la fraude civile, la perte, est manifestement présent. Le Groupe

US$1.2 million and, but for a small return of US$9,600 in February 2002, lost its investment.

[93] The motion judge found no credible evidence to support Hryniak's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment.

(3) Did the Interest of Justice Preclude the Motion Judge From Using His Powers Under Rule 20.04?

[94] The motion judge did not err in exercising his fact-finding powers under Rule 20.04(2.1). He was prepared to sift through the detailed record, and was of the view that sufficient evidence had been presented on all relevant points to allow him to draw the inferences necessary to make dispositive findings under Rule 20. Further, while the amount involved is significant, the issues raised by Hryniak's defence were fairly straightforward. As the Court of Appeal noted, at root, the question turned on whether Hryniak had a legitimate trading program that went awry when the funds were stolen, or whether his program was a sham from the outset (para. 159). The plaintiffs are a group of elderly American investors and, at the return date of the motion, had been deprived of their funds for nearly a decade. The record was sufficient to make a fair and just determination and a timely resolution of the matter was called for. While the motion was complex and expensive, going to trial would have cost even more and taken even longer.

[95] Despite the fact that the Mauldin Group's claims against Peebles and Cassels Brock had to

Mauldin a investi 1,2 million de dollars américains et, à part un rendement pour la modique somme de 9 600 dollars américains reçue en février 2002, il a perdu son placement.

[93] Le juge saisi de la requête a conclu qu'il n'existait pas d'élément de preuve crédible à l'appui de la prétention de M. Hryniak selon laquelle ce dernier était un courtier légitime et l'issue était donc claire. Le juge a par conséquent conclu qu'il n'y avait pas de question litigieuse nécessitant la tenue d'un procès. Il n'a pas commis d'erreur manifeste et dominante en rendant un jugement sommaire.

(3) L'intérêt de la justice empêchait-il le juge saisi de la requête d'exercer les pouvoirs que lui confère la règle 20.04?

[94] Le juge saisi de la requête n'a pas commis d'erreur en exerçant les pouvoirs en matière de recherche des faits que lui confère le par. 20.04(2.1) des Règles. Il était disposé à examiner minutieusement le dossier détaillé et était d'avis que les éléments de preuve présentés sur tous les points pertinents suffisaient pour lui permettre de tirer les inférences nécessaires à la formulation de conclusions décisives en vertu de la règle 20. En outre, malgré l'importance de la somme en cause, les moyens invoqués par M. Hryniak dans sa défense étaient relativement simples. Comme l'a indiqué la Cour d'appel, il s'agissait fondamentalement de savoir si M. Hryniak avait mis en place un programme légitime de transaction de titres qui a mal tourné lorsque les fonds ont été dérobés, ou si son programme était factice depuis le début (par. 159). Les demandeurs forment un groupe d'investisseurs américains âgés qui, à la date de l'audition de la requête, avaient été privés de leurs fonds depuis près de 10 ans. Le dossier était suffisant pour permettre de rendre une décision juste et équitable et il fallait trancher l'affaire de façon expéditive. Bien que la requête se soit révélée complexe et onéreuse, la tenue d'un procès aurait été encore plus coûteuse et aurait duré encore plus longtemps.

[95] Même si les actions intentées par le Groupe Mauldin contre M. Peebles et le cabinet Cassels

proceed to trial, there is little reason to believe that granting summary judgment against Hryniak would have a prejudicial impact on the trial of the remaining issues. While the extent of the other defendants' involvement in the fraud requires a trial, that matter is not predetermined by the conclusion that Hryniak clearly was *a* perpetrator of the fraud. The motion judge's findings speak specifically to Hryniak's involvement and neither rely upon, nor are inconsistent with, the liability of others. His findings were clearly supported by the evidence. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

Brock devaient être instruites, il n'y a pas vraiment lieu de croire qu'un jugement sommaire rendu contre M. Hryniak aurait nui à l'instruction des autres questions litigieuses. Bien que l'étendue de la participation des autres défendeurs à la fraude nécessite la tenue d'un procès, la conclusion selon laquelle M. Hryniak était manifestement l'*un* des auteurs de la fraude ne résout pas d'avance cette question. Les conclusions du juge saisi de la requête traitent spécifiquement de la participation de M. Hryniak et ne reposent pas sur la responsabilité d'autres personnes, ni ne sont incompatibles avec leur responsabilité. Ses conclusions étaient clairement étayées par la preuve. L'exercice, par le juge, de ses pouvoirs en matière de recherche des faits n'allait pas à l'encontre de l'intérêt de la justice, et sa décision discrétionnaire d'exercer ces pouvoirs n'était pas non plus entachée d'erreur.

V. Conclusion

[96] Accordingly, I would dismiss the appeal, with costs to the respondents.

V. Conclusion

[96] Par conséquent, je suis d'avis de rejeter le pourvoi avec dépens en faveur des intimés.

APPENDIX

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 20 SUMMARY JUDGMENT

20.01 [Where Available] (1) [To Plaintiff] A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) [To Defendant] A defendant may, after deliering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

ANNEXE

Règles de procédure civile, R.R.O. 1990, Règl. 194

RÈGLE 20 JUGEMENT SOMMAIRE

20.01 [Applicabilité] (1) [Au demandeur] Le demandeur peut, après que le défendeur a remis une défense ou signifié un avis de motion, demander, par voie de motion, appuyée d'un affidavit ou d'autres éléments de preuve, un jugement sommaire sur la totalité ou une partie de la demande formulée dans la déclaration.

(2) Le demandeur peut demander, par voie de motion présentée sans préavis, l'autorisation de signifier avec la déclaration un avis de motion en vue d'obtenir un jugement sommaire. L'autorisation peut être accordée en cas d'urgence extraordinaire, sous réserve de directives justes.

(3) [Au défendeur] Le défendeur peut, après avoir remis une défense, demander, par voie de motion appuyée d'un affidavit ou d'autres éléments de preuve, un jugement sommaire rejetant en totalité ou en partie la demande formulée dans la déclaration.

20.02 [Evidence on Motion] (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

20.03 [Factums Required] (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked.

20.04 [Disposition of Motion] (1) [General] Revoked.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the

20.02 [Preuves à l'appui d'une motion] (1) Dans un affidavit à l'appui d'une motion visant à obtenir un jugement sommaire, une partie peut faire état des éléments qu'elle tient pour véridiques sur la foi de renseignements, comme le prévoit le paragraphe 39.01(4). Toutefois, dans le cas où la partie ne fournit pas le témoignage de toute personne ayant une connaissance directe des faits contestés, le tribunal peut en tirer des conclusions défavorables, s'il y a lieu, lors de l'audition de la motion.

(2) Lorsqu'une motion en vue d'obtenir un jugement sommaire est appuyée d'un affidavit ou d'autres éléments de preuve, la partie intimée ne peut pas se contenter uniquement des allégations ou dénégations contenues dans ses actes de procédure. Elle doit préciser, au moyen d'un affidavit ou d'autres éléments de preuve, des faits spécifiques indiquant qu'il y a une véritable question litigieuse nécessitant la tenue d'une instruction.

20.03 [Mémoires requis] (1) Dans le cas d'une motion en vue d'obtenir un jugement sommaire, chaque partie signifie aux autres parties à la motion un mémoire comprenant une argumentation concise exposant les faits et les règles de droit qu'elle invoque.

(2) Le mémoire de l'auteur de la motion est signifié et déposé, avec la preuve de la signification, au greffe du tribunal où la motion doit être entendue, au moins sept jours avant l'audience.

(3) Le mémoire de la partie intimée est signifié et déposé, avec la preuve de la signification, au greffe du tribunal où la motion doit être entendue, au moins quatre jours avant l'audience.

(4) Abrogé.

20.04 [Décision sur la motion] (1) [Dispositions générales] Abrogé.

(2) Le tribunal rend un jugement sommaire si, selon le cas :

a) il est convaincu qu'une demande ou une défense ne soulève pas de véritable question litigieuse nécessitant la tenue d'une instruction;

b) il est convaincu qu'il est approprié de rendre un jugement sommaire et les parties sont d'accord pour que tout ou partie de la demande soit décidé par jugement sommaire.

(2.1) [Pouvoirs] Lorsqu'il décide, aux termes de l'alinéa (2)a), s'il existe une véritable question litigieuse

court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) [Only Genuine Issue Is Amount] Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) [Only Genuine Issue Is Question Of Law] Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) [Only Claim Is For An Accounting] Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

20.05 [Where Trial Is Necessary] (1) [Powers of Court] Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) [Directions And Terms] If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

nécessitant la tenue d'une instruction, le tribunal tient compte des éléments de preuve présentés par les parties et, si la décision doit être rendue par un juge, ce dernier peut, à cette fin, exercer l'un ou l'autre des pouvoirs suivants, à moins qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès :

1. Apprécier la preuve.
2. Évaluer la crédibilité d'un déposant.
3. Tirer une conclusion raisonnable de la preuve.

(2.2) [Témoignage oral (mini-procès)] Un juge peut, dans le but d'exercer les pouvoirs prévus au paragraphe (2.1), ordonner que des témoignages oraux soient présentés par une ou plusieurs parties, avec ou sans limite de temps pour leur présentation.

(3) [Si la seule question litigieuse est le montant de la demande] Le tribunal, s'il est convaincu que la seule véritable question litigieuse porte sur le montant auquel l'auteur de la motion a droit, peut ordonner l'instruction de la question ou rendre un jugement et ordonner un renvoi afin de fixer le montant.

(4) [Si la seule question litigieuse est une question de droit] Le tribunal, s'il est convaincu que la seule véritable question litigieuse porte sur une question de droit, peut trancher cette question et rendre un jugement en conséquence. Toutefois, si la motion est présentée à un protonotaire, elle est déférée à un juge pour audition.

(5) [Demande de reddition de comptes seulement] Si le demandeur est l'auteur de la motion et qu'il demande une reddition de comptes, le tribunal peut rendre jugement sur la demande et ordonner un renvoi pour la reddition des comptes, à moins que le défendeur ne convainque le tribunal qu'une question préliminaire doit être instruite.

20.05 [Nécessité d'une instruction] (1) [Pouvoirs du tribunal] Si le jugement sommaire est refusé ou n'est accordé qu'en partie, le tribunal peut rendre une ordonnance dans laquelle il précise les faits pertinents qui ne sont pas en litige et les questions qui doivent être instruites. Il peut également ordonner que l'action soit instruite de façon expéditive.

(2) [Directives et conditions] Le tribunal qui ordonne l'instruction d'une action en vertu du paragraphe (1) peut donner les directives ou imposer les conditions qu'il estime justes, et ordonner notamment :

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the

a) la remise par chaque partie, dans un délai déterminé, d'un affidavit de documents conformément aux directives du tribunal;

b) la présentation des motions dans un délai déterminé;

c) le dépôt, dans un délai déterminé, d'un exposé des faits pertinents qui ne sont pas en litige;

d) le déroulement des interrogatoires préalables conformément à un plan d'enquête préalable établi par le tribunal, dans lequel un calendrier des interrogatoires peut être fixé et des limites au droit à l'interrogatoire préalable qui sont justes peuvent être imposées, y compris la limitation de l'enquête préalable à des questions qui n'ont pas été traitées dans les affidavits ou les autres éléments de preuve présentés à l'appui de la motion et dans les contre-interrogatoires sur ceux-ci;

e) la modification d'un plan d'enquête préalable convenu par les parties en application de la Règle 29.1 (plan d'enquête préalable);

f) l'utilisation, à l'instruction, des affidavits ou des autres éléments de preuve présentés à l'appui de la motion et des contre-interrogatoires sur ceux-ci comme s'il s'agissait d'interrogatoires préalables;

g) la limitation de la durée de tout interrogatoire d'une personne prévu à la Règle 36 (obtention de dépositions avant l'instruction);

h) la remise par une partie, dans un délai déterminé, d'un résumé écrit de la déposition prévue d'un témoin;

i) la limitation de la durée de tout interrogatoire oral d'un témoin à l'instruction;

j) la présentation par affidavit de tout ou partie de la déposition d'un témoin;

k) la rencontre, sous toutes réserves, des experts engagés par les parties ou en leur nom relativement à l'action pour déterminer les questions en litige sur lesquelles ils s'entendent et celles sur lesquelles ils ne s'entendent pas, pour tenter de clarifier et régler toute question en litige qui fait l'objet d'un désaccord et pour rédiger une déclaration conjointe exposant les sujets d'entente et de désaccord ainsi que les motifs de ceux-ci, s'il estime que les économies de temps ou d'argent ou les autres avantages qui peuvent

meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

(3) [Specified Facts] At the trial, any facts specified under subrule (1) or clause (2)(c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

(4) [Order re Affidavit Evidence] In deciding whether to make an order under clause (2)(j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

(5) [Order re Experts, Costs] If an order is made under clause (2)(k), each party shall bear his or her own costs.

(6) [Failure To Comply With Order] Where a party fails to comply with an order under clause (2)(o) for payment into court or under clause (2)(p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

en découler sont proportionnels aux sommes en jeu ou à l'importance des questions en litige dans la cause et que, selon le cas :

(i) il y a des perspectives raisonnables d'en arriver à un accord sur une partie ou l'ensemble des questions en litige,

(ii) le fondement des opinions d'experts contraires est inconnu et qu'une clarification des questions faisant l'objet d'un désaccord aiderait les parties ou le tribunal;

l) la remise par chacune des parties d'un résumé concis de sa déclaration préliminaire;

m) la comparution des parties devant le tribunal au plus tard à une date déterminée, comparution au cours de laquelle le tribunal peut rendre toute ordonnance qu'autorise le présent paragraphe;

n) l'inscription de l'action pour instruction à une date donnée ou son inscription à un rôle donné, sous réserve des directives du juge principal régional;

o) la consignation de la totalité ou d'une partie de la somme demandée;

p) le versement d'un cautionnement pour dépens.

(3) [Faits précisés] Lors de l'instruction, les faits précisés conformément au paragraphe (1) ou à l'alinéa (2)c) sont réputés établis, à moins que le juge du procès n'ordonne autrement afin d'éviter une injustice.

(4) [Ordonnance : déposition par affidavit] Lorsqu'il est décidé si une ordonnance doit être rendue en vertu de l'alinéa (2)j), le fait qu'une partie opposée peut être fondée à exiger la présence du déposant à l'instruction pour le contre-interroger constitue un facteur pertinent.

(5) [Ordonnance : experts, dépens] Si une ordonnance est rendue en vertu de l'alinéa (2)k), chaque partie paie ses propres dépens.

(6) [Défaut de se conformer à l'ordonnance] Si une partie ne se conforme pas à une ordonnance de consignation prévue à l'alinéa (2)o) ou à une ordonnance de cautionnement pour dépens prévue à l'alinéa (2)p), le tribunal peut, sur motion de la partie adverse, rejeter l'action, radier la défense ou rendre une autre ordonnance juste.

(7) Si la défense est radiée sur motion présentée en application du paragraphe (6), le défendeur est réputé constaté en défaut.

20.06 [Costs Sanctions For Improper Use Of Rule] The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) he party acted in bad faith for the purpose of delay.

20.07 [Effect of Summary Judgment] A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

20.08 [Stay of Execution] Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

20.09 [Application to Counterclaims, Crossclaims And Third Party Claims] Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

20.06 [Condamnation aux dépens pour usage abusif de la règle] Le tribunal peut fixer les dépens d'une motion visant à obtenir un jugement sommaire sur une base d'indemnisation substantielle et en ordonner le paiement par une partie si, selon le cas :

a) la partie a agi déraisonnablement en présentant la motion ou en y répondant;

b) la partie a agi de mauvaise foi dans l'intention de causer des retards.

20.07 [Effet du jugement sommaire] Le demandeur qui obtient un jugement sommaire peut poursuivre le même défendeur pour d'autres mesures de redressement.

20.08 [Sursis d'exécution] Le tribunal, s'il constate qu'il devrait être sursis à l'exécution d'un jugement sommaire en attendant le règlement d'une autre question en litige dans l'action, d'une demande reconventionnelle, d'une demande entre défendeurs ou d'une mise en cause, peut ordonner le sursis à des conditions justes.

20.09 [Application aux demandes reconventionnelles, aux demandes entre défendeurs et aux mises en cause] Les règles 20.01 à 20.08 s'appliquent, avec les modifications nécessaires, aux demandes reconventionnelles, aux demandes entre défendeurs et aux mises en cause.

Appeal dismissed with costs.

Solicitors for the appellant: McCarthy Tétrault, Toronto.

Solicitors for the respondents: Heydary Hamilton, Toronto.

Solicitors for the intervener the Ontario Trial Lawyers Association: Allan Rouben, Toronto; SBMB Law, Richmond Hill, Ontario.

Solicitors for the intervener the Canadian Bar Association: Evans Sweeny Bordin, Hamilton; Sotos, Toronto.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : McCarthy Tétrault, Toronto.

Procureurs des intimés : Heydary Hamilton, Toronto.

Procureurs de l'intervenante Ontario Trial Lawyers Association : Allan Rouben, Toronto; SBMB Law, Richmond Hill, Ontario.

Procureurs de l'intervenante l'Association du Barreau canadien : Evans Sweeny Bordin, Hamilton; Sotos, Toronto.

Krause v. Canada (C.A.), [1999] 2 F.C. 476

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Stone, Linden and Sexton JJ.A.

Heard: Ottawa, January 19, 1999.

Judgment: February 8, 1999.

Court File No. A-135-98

[1999] 2 F.C. 476 | *[1999] F.C.J. No. 179*

William Krause and Pierre Després in their Personal Capacities and in their Capacities as Members of the Executive of the Social Science Employees' Association, Edward Halayko and Helen Rapp in their Personal Capacities and their Capacities as Members of the Executive of the Armed Forces Pensioners'/Annuitants' Association of Canada, Luc Pomerleau et Line Niquet en leur nom personnel et en leur qualité de membres de l'Éxecutif du Syndicat canadien des employés professionnels et techniques, and Wayne C. Foy and in his Personal Capacity and in his Capacity as a Member of the Executive of the Aircraft Operations Group Association (Appellants) (Applicants) v. Her Majesty the Queen in Right of Canada (Respondent) (Respondent)

Case Summary

Practice — Limitation of actions — Appeal from order striking out November 1997 originating notice of motion for mandamus, prohibition, declaration regarding crediting of amounts to pension plans as required by statute — Appellants alleging ongoing improper amortization of surpluses in each fiscal year since 1993-1994 breach of Minister's duties under Public Service, Canadian Forces Superannuation Acts — Motions Judge holding accounting procedures implemented in 1993-1994 having genesis in respondent's decision in 1989-1990 — Holding originating motion filed beyond 30-day time limit prescribed in Federal Court Act, s. 18.1(2) for application for judicial review in respect of decision or order of federal tribunal — Time limit imposed by s. 18.1(2) not barring appellants from seeking mandamus, prohibition, declaration — S. 18.1(1) permitting anyone directly affected by matter in respect of which relief sought to bring application for judicial review — "Matter" including any matter in respect of which remedy available under s. 18 — S. 18.1(3)(a), (b) contemplating mandamus, declaratory relief, prohibition — Exercise of s. 18 jurisdiction not depending on existence of "decision or order" — Acts of responsible Ministers in implementing decision attacked — Decision to proceed in accordance with 1988 recommendations not resulting in breach of statutory duties.

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Practice — Parties — Originating notice of motion alleging ongoing improper amortization of portion of surpluses in Public Service, Canadian Forces pension accounts since 1993-1994, breach of Minister's duties under Public Service, Canadian Forces Superannuation Acts — President of Treasury Board, Minister of Finance should have been named as respondents, rather than Her Majesty — Originating document not otherwise so defective could not be cured by simple amendment — Style of cause so amended.

Practice — Rules — Dispensing with compliance — Originating notice of motion alleging ongoing improper

amortization of portion of surpluses in Public Service, Canadian Forces pension accounts, breach of Minister's duties under Public Service, Canadian Forces Superannuation Acts — If breach of statutory duties, occurring because of acts of responsible Ministers in implementing 1988 recommendation as to accounting procedures, not because of decision to implement those procedures — When originating document filed, Federal Court Rules, R. 1602(4) required motion to be in respect of single decision, order, other matter — Former R. 6 giving Court authority in special circumstances to dispense with compliance with any Rule where necessary in interest of justice — That power continued in new r. 55 — Appropriate in circumstances to dispense with requirement by permitting "matters" to be brought in same proceeding.

Federal Court jurisdiction — Trial Division — Appeal from order striking out originating notice of motion for mandamus, prohibition, declaration as outside time limit prescribed in s. 18.1(2) to bring application for judicial review of federal tribunal's decision or order — Appellants alleging ongoing improper amortization of portions of Public Service, Canadian Forces surpluses since 1993-1994, breach of Minister's duties under Public Service, Canadian Forces Superannuation Acts — Appeal allowed — S. 18.1(1) [page478] permitting anyone directly affected by matter in respect of which relief sought to bring application for judicial review — "Matter" including any matter in respect of which remedy available under s. 18 — S. 18.1(3)(a),(b) contemplating mandamus, declaratory relief, prohibition — Exercise of s. 18 jurisdiction not depending on existence of "decision or order".

Administrative law — Judicial review — Mandamus — Appeal from order striking out originating notice of motion as filed beyond time limit prescribed in Federal Court Act, s. 18.1(2) — Appellants seeking mandamus, prohibition, declaration concerning allegation ongoing improper amortization of portions of surpluses in Public Service, Canadian Forces pension accounts since 1993-1994 fiscal year — Initial "decision" to adopt accounting procedure taken in 1989-1990 — Time limit imposed by s. 18.1(2) not barring appellants from seeking mandamus, prohibition, declaration — S. 18.1(1) permitting anyone directly affected by matter in respect of which relief sought to bring application for judicial review of federal tribunal's decision, order — "Matter" including any matter in respect of which remedy available under s. 18 — S. 18.1(3)(a), (b) contemplating mandamus, declaratory relief, prohibition — Exercise of s. 18 jurisdiction not depending on existence of "decision or order" — Acts of responsible Ministers in implementing decision attacked — Statutory duty arising in each fiscal year.

This was an appeal from a Trial Division order striking out the originating notice of motion filed in November 1997 for mandamus, prohibition and declaration, and dismissing a cross-motion for an extension of time. The principal complaint was that in each fiscal year beginning with the 1993-1994 fiscal year, the responsible Ministers have failed to credit the Public Service and Canadian Forces superannuation accounts with the full amounts required to be credited pursuant to Public Service Superannuation Act, subsection 44(1) and Canadian Forces Superannuation Act, subsection [page479] 55(1). The appellants asserted that in each of those years a portion of the surpluses in those accounts has been improperly amortized, and that these actions are ongoing and are in violation of the Ministers' duties imposed by those subsections. A surplus occurs when the balances of the accounts exceed the liability for future pension benefits determined through actuarial calculations. The Motions Judge noted that the accounting procedures which were implemented by the respondent in the 1993-1994 fiscal year were recommended in 1988 by the Canadian Institute of Chartered Accountants and had their genesis in the respondent's decision in the 1989-1990 fiscal year to put those recommendations into effect. Her Ladyship held that the originating motion had been filed beyond the 30-day time limit prescribed in Federal Court Act, subsection 18.1(2) for an application for judicial review in respect of a decision or order of a federal tribunal in that the initial "decision" to amortize the surpluses was taken in the 1989-1990 fiscal year. Even if the practice of amortizing surpluses in each fiscal year constituted a "decision", such practice commenced in the 1993-1994 fiscal year and any subsequent amortization of portions of the surpluses flowed from that decision.

The appellants submitted that the 30-day time limit specified in subsection 18.1(2) applies only where an application for judicial review is "in respect of a decision or order". They submitted that the actions sought to be reached by mandamus, prohibition and declaration were not "decisions" within subsection 18.1(2).

The respondent submitted that the originating document was defective because it improperly named Her Majesty as the respondent, and failed to set out the date and details of the single decision in respect of which judicial review was sought.

Held, the appeal should be allowed; and the style of cause should be amended by substituting "President of the Treasury Board" and "Minister of Finance" for "Her Majesty the Queen in Right of Canada".

The time limit imposed by subsection 18.1(2) did not bar the appellants from seeking relief by way of mandamus, prohibition and declaration. Subsection 18.1(1) permits "anyone directly affected by the matter in respect of which relief is sought" to bring an application for judicial review. "Matter" embraces not only a "decision or order", but any matter in respect of which a remedy may be available under Federal Court Act, section 18. Paragraph 18.1(3)(a), whereby a federal tribunal may be ordered to do any act or thing it has unlawfully failed or refused to do, appears to [page480] contemplate an order in the nature of mandamus. Paragraph 18.1(3)(b) appears to contemplate declaratory relief or prohibition when it provides "whenever a decision, order, act or proceeding" of a federal tribunal is found to be "invalid or unlawful". The language used in subsection 18.1 was designed to accommodate an application for both a section 18 remedy per se, in addition to a "setting aside" or a referral back of a "decision or order". While a decision was made to adopt the 1988 recommendations, it was not that decision, but the acts of the responsible Ministers in implementing that decision that were claimed to be invalid or unlawful. The duty to act in accordance with PSSA, subsection 44(1) and CFSA, subsection 55(1) arose "in each fiscal year".

The exercise of the jurisdiction under section 18 does not depend on the existence of a "decision or order". The decision to adopt the 1988 recommendations did not render the subsection 18.1(2) time limit applicable. That decision itself did not result in a breach of any statutory duties. If such a breach occurred, it was because of the actions taken by the responsible Minister in contravention of the relevant statutory provisions.

The "President of the Treasury Board" and the "Minister of Finance" ought to have been named as respondents rather than "Her Majesty". But the originating document was not otherwise so defective that it could not be cured by simple amendment. When it was filed, Federal Court Rules subsection 1602(4) required a notice of motion to be "in respect of a single decision, order or other matter", a requirement that has since been modified by new rule 302. Former Rule 6 vested in the Court authority, in special circumstances, to "dispense with compliance with any Rule where it is necessary in the interest of justice", a power that is largely continued in new rule 55. It was appropriate in the circumstances to dispense with the requirement by permitting the "matters" to be brought in the same proceeding. The appellants have set out sufficient details of those matters in their originating notice.

Statutes and Regulations Judicially Considered

Canadian Forces Superannuation Act, R.S.C., 1985, c. C-17, s. 55(1) (as am. by S.C. 1992, c. 46, s. 50).
Federal Court Act, R.S.C., 1985, c. F-7, ss. 18 (as am. by S.C. 1990, c. 8, s. 4), 18.1 (as enacted idem, s. 5), 18.4 (as enacted idem).
Federal Court Rules, C.R.C., c. 663, RR. 6 (as enacted by SOR/90-846, s. 1), 1602 (as enacted by SOR/92-43, s. 19; 94-41, s. 14). [page481]
Federal Court Rules, 1998, *SOR/98-106*, rr. 55, 302.
Financial Administration Act, R.S.C., 1985, c. F-11, s. 64(2)(d).
Public Service Superannuation Act, R.S.C., 1985, c. P-36, s. 44(1) (as am. by S.C. 1992, c. 46, s. 23).

Cases Judicially Considered

Applied:

Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans) *(1997), 26 C.E.L.R. (N.S.) 238*; *146 F.T.R. 19* (F.C.T.D.);
Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans), *[1999] 1 F.C. 483* (C.A.).

Considered:

Rex v. Barker (1762), 3 Burr. 1265; 97 E.R. 823;
Rochester (Mayor of) v. Reg. (1858), El.Bl. & El. 1024; 113 R.R. 978;
Reg. v. Inland Revenue Comrs., Ex parte National Federation of Self-Employed and Small Businesses Ltd., [1982] A.C. 617 (H.L.);
Reg. v. Greater London Council, Ex parte Blackburn, [1976] 1 W.L.R. 550.

Referred to:

Broughton v. Commissioner of Stamp Duties, [1899] A.C. 251 (P.C.);
McCaffrey v. Canada, *[1993] 1 C.T.C. 15*; *(1993), 93 DTC 5009*; *59 F.T.R. 12* (F.C.T.D.);
LeBlanc v. National Bank of Canada, *[1994] 1 F.C. 81* (T.D.);
Atlantic Oil Workers Union v. Canada (Director of Investigation and Research, Bureau of Competition Policy), *[1996] 3 F.C. 539*; *(1996), 68 C.P.R. (3d) 344*; *114 F.T.R. 161* (T.D.).

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MacKinnon, B. J. "Prohibition, Certiorari and Quo Warranto" in Special Lectures of the Law Society of Upper Canada, Toronto: Richard De Boo Ltd, 1961, 290.
Wade, William and Christopher Forsyth. Administrative Law, 7th ed. Oxford: Clarendon Press, 1994.

APPEAL from a Trial Division order (*(1998), 143 F.T.R. 143*) striking out an originating notice of [page482] motion for mandamus, prohibition and declaration with respect to the crediting of amounts to certain pension plans as filed beyond the 30-day time limit prescribed in Federal Court Act, subsection 18.1(2). Appeal allowed.

Appearances

Peter C. Englemann for appellants (applicants). Edward R. Sojonky, Q.C. and Jan E. Brongers for respondent (respondent).

Solicitors

Caroline Englemann Gottheil, Ottawa, for appellants (applicants). Deputy Attorney General of Canada for respondent (respondent).

The following are the reasons for judgment rendered in English by

STONE J.A.

1 This appeal is from an order of the Trial Division of February 25, 1998 [*(1998), 143 F.T.R. 143*] granting the respondent's motion to strike the appellants' originating notice of motion and dismissing the appellants' cross-motion for an extension of time.

2 The originating notice of motion, filed pursuant to sections 18 [as am. by S.C. 1990, c. 8, s. 4] and 18.1 [as enacted idem, s. 5] of the Federal Court Act [R.S.C., 1985, c. F-7] on November 13, 1997, requested relief in the nature of mandamus, prohibition and declaration. Its objectives are threefold. First, to compel the respondent to credit the Public Service Superannuation Account and the Canadian Forces Superannuation Account as continued by the Public Service Superannuation Act[1] (the PSSA) and the Canadian Forces Superannuation Act[2] (the CFSA), respectively, "with any and all amounts required to be credited" to these accounts and to maintain such amounts to the credits of these accounts pursuant to subsection 44(1) [as am. by S.C. 1992, c. 46, s. 23] of the PSSA and subsection 55(1) [as am. idem, s. 50] of [page483] the CFSA. Secondly, to prohibit the respondent from debiting these accounts, applying any portion of the amounts credited or required to be credited to other budgetary expenditures or to the national debt or otherwise reducing the amounts credited or required to be credited to both of these accounts. Thirdly, to have declared as contrary to subsection 44(1) of the PSSA and subsection 55(1) of the CFSA the use by the respondent of the "Allowance for Pension Adjustment Account" to debit or reduce the amounts which have been credited or required to be credited to both accounts or to apply any portion of the amount credited or required to be credited to other budgetary expenditures or to the national debt.

3 Subsections 44(1) of the PSSA and 55(1) of the CFSA read:

> 44. (1) There shall be credited to the Superannuation Account in each fiscal year
>
> (a) in respect of every month, an amount equal to the total of
>
> (i) an amount matching the total amount estimated by the Minister to have been paid into the Account during the month by way of contributions in respect of current service other than current service with any Public Service corporation or other corporation as defined in section 37, and
>
> (ii) such additional amount as is determined by the Minister to be required to provide for the cost of the benefits that have accrued in respect of that month in relation to current service and that will become chargeable against the Account;
>
> (b) in respect of every month, such amount in relation to the total amount paid into the Account during the preceding month by way of contributions in respect of past service as is determined by the Minister; and
>
> (c) an amount representing interest on the balance from time to time to the credit of the Account, calculated in such manner and at such rates and credited at such times as the regulations provide, but the rate for any quarter in a fiscal year shall be at least equal to the rate that would be determined for that quarter using the method set out in section 46 of the Public Service Superannuation Regulations, as that section read on March 31, 1991.

[page484]

. . .

55. (1) There shall be credited to the Superannuation Account in each fiscal year

(a) in respect of every month, an amount equal to the amount estimated by the President of the Treasury Board to be required to provide for the cost of the benefits that have accrued in respect of that month and that will become chargeable against the Account; and

(b) an amount representing interest on the balance from time to time to the credit of the Account, calculated in such manner and at such rates and credited at such times as the regulations provide, but the rate for any quarter in a fiscal year shall be at least equal to the rate that would be determined for that quarter using the method set out in section 36 of the Canadian Forces Superannuation Regulations, as that section read on March 31, 1991.

4 The individual appellants and members of the appellant associations are either contributors to or beneficiaries of the pension plans created and maintained pursuant to the PSSA and the CFSA.

5 The grounds on which the application for judicial review is based are as follows:[3]

1. section 44(1) and other sections of the PSSA impose a mandatory duty on the Respondent to credit certain amounts to the PS Superannuation Account and to maintain those amounts to the credit of the PS Superannuation Account;
2. the Respondent has failed or refused to credit those amounts, has failed or refused to maintain those amounts to the credit of the PS Superannuation Account, has applied (a) portion(s) of the amount credited or required to be credited to the PS Superannuation Account to other budgetary expenditures or to the national debt and/or has debited or reduced the PS Superannuation Account in a manner not authorized by law;
3. this has been accomplished primarily through the use of the "Allowance for Pension Adjustment Account" or other similarly named accounts to debit or to reduce the PS Superannuation Account or to apply a portion of the amount credited or required to be credited to the PS Superannuation Account to other budgetary expenditures or to the national debt;
4. section 55(1) and other sections of the Canadian Forces Superannuation [page485] Act impose a mandatory duty on the Respondent to credit certain amounts to the CF Superannuation Account and to maintain those accounts to the credit of the CF Superannuation Account;
5. the Respondent has failed or refused to credit those amounts, has failed or refused to maintain those amounts to the credit of the CF Superannuation Account, has applied (a) portion(s) of the amount credited or required to be credited to the CF Superannuation Account to other budgetary expenditures or to the national debt and/or has debited the CF Account in a manner not authorized by law;
6. this has been accomplished primarily through the use of the "Allowance for Pension Adjustment Account" or other similarly named accounts to debit or to reduce the CF Superannuation Account or to apply a portion of the amount credited or required to be credited to the CF Superannuation Account to other budgetary expenditures or to the national debt.

6 The principal complaint in issue is that in each fiscal year beginning with the 1993-1994 fiscal year, the responsible Ministers have failed to credit each of the pension accounts with the full amounts required to be credited pursuant to subsections 44(1) of the PSSA and 55(1) of the CFSA, respectively. The appellants assert that in each of those years a portion of the surpluses standing in the accounts has been improperly amortized over a

period of several years through the use of the Allowance for Pension Adjustment Account and that these actions are ongoing and are in violation of the Ministers' duties imposed by those subsections.

7 The learned Motions Judge noted, at page 148 of her reasons, that a "surplus occurs when the balances of the accounts are in excess of the obligation or liability for future employee pension benefits determined through actuarial calculations." She further noted that the accounting procedures which were implemented by the respondent in the 1993-1994 [page486] fiscal year were recommended by the Canadian Institute of Chartered Accountants in 1988 and had their genesis in the respondent's decision in the 1989-1990 fiscal year to put that body's recommendations into effect and to establish the adjustment account pursuant to paragraph 64(2)(d) of the Financial Administration Act.[4] It is not disputed that portions of the surpluses in the two pension accounts were for the first time amortized in the manner recommended in the 1993-1994 fiscal year.

8 Concern with this accounting treatment of the amounts required to be credited in the 1993-1994 fiscal year was conveyed to the responsible Minister in 1995 by way of an exchange of correspondence between the appellant Krause and the President of the Treasury Board. In the Minister's letter to Mr. Krause of May 18, 1995, he stated at pages 1-2:[5]

> There are two particular items in the accounting recommendations of which you should be aware. First, for defined benefit pension plans, there is a requirement to use the "government's best estimate" for the economic and demographic assumptions employed to establish pension liabilities and therefore the financial position of its pension plans, i.e. the difference between the pension plan assets and liabilities. Second, any year to year change in the financial position of a government's pension plans must be amortized over the expected average remaining service life of employees (EARSL). An improvement in a plan's financial position is amortized as an expenditure reduction for the government, while a worsening of the financial position of a plan is amortized as an increase in the government's expenditures.
>
> It should be noted that these amortizations do not affect the actual amounts recorded in a pension fund. Rather, the intent of the accounting standards is to report the realistic liabilities for a pension plan based on its existing terms and conditions and to smooth out the effect of annual fluctuations in the financial position of a pension plan on the government's financial statements, i.e., the effect on the expenditures of a government. In addition, the recorded pension liability in a government's financial statements is intended to be gradually brought in line with the estimated actuarial pension liability.

9 The respondent's motion to strike of December 23, 1997, was based primarily on the ground that the originating notice of motion was filed beyond the 30-day time limit specified in subsection 18.1(2) of the Federal Court Act. Other procedural defects were also alleged including a failure to set out the date and details of the decision, order or other matter in controversy as required by former Rule 1602 [Federal Court Rules, C.R.C., c. 663 (as enacted by SOR/92-43, s. 19; 94-41, s. 14) and to join the proper persons as respondents. Faced with that motion, the appellants proceeded to file the cross-motion seeking, inter alia, [page487] permission to bring the application for judicial review outside of the time period specified in subsection 18.1(2), to have the judicial review application treated and proceeded with as an action pursuant to subsection 18.4(2) [as enacted by S.C. 1990, c. 8, s. 5] and to amend the style of cause by substituting the President of the Treasury Board and the Minister of Finance as respondents.

10 The Motions Judge rejected the appellants' argument that the originating notice of motion was filed within time. She determined that the initial "decision" to amortize the surpluses was taken in the 1989-1990 fiscal year, and that even if the practice of amortizing surpluses in each fiscal year constituted a "decision" such practice commenced in the 1993-1994 fiscal year and any subsequent amortization of portions of the surpluses flowed from that decision. On this analysis she concluded that the originating notice of motion was filed well beyond the 30-day time limit in subsection 18.1(2). The appellants submit that the Motions Judge erred in so concluding.

11 The appellants submit that the actions sought to be reached by way of mandamus, prohibition and declaration are not "decisions" within the meaning of subsection 18.1(2). They further contend that if the subsection applies

there was not here a single decision but rather a series of annual decisions reflective of the ongoing policy or practice of the respondent over time. Finally, they urge in any event that the decisions to amortize portions of the surpluses in the 1996-1997 fiscal year were attacked within time.

12 I shall deal with these various arguments together.

13 If, of course, the appellants are correct that the actions sought to be challenged in the originating notice of motion are not "decisions," then clearly that notice of motion was not filed out of time. This argument calls for some examination of section 18 and [page488] subsections 18.1(1) to (3) of the Federal Court Act which read:

> 18. (1) Subject to section 28, the Trial Division has exclusive original jurisdiction
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> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> (2) The Trial Division 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.
>
> (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.
>
> 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.
>
> (2) An application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within such further time as a judge of the Trial Division may, either before or after the expiration of those thirty days, fix or allow.
>
> (3) On an application for judicial review, the Trial Division 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.

14 I shall begin by examining the appellants' submission that given the relief they seek to obtain in the originating document, the time bar laid down in subsection 18.1(2) has no application despite the fact [page489] that the Ministers in question may have decided as early as the 1989-1990 fiscal year to account for any future surpluses in the two pension accounts in the manner that was recommended by the Canadian Institute of Chartered Accountants in 1988.

15 Before taking up the appellants' argument that the time bar in subsection 18.1(2) does not apply in the present case, I wish to offer a few observations on the historical roles served by the extraordinary remedies that are made available under section 18 of the Federal Court Act.

16 The common law courts developed the ancient writs of mandamus, certiorari, and prohibition to restrain the abuse or misuse of power. As early as 1762, Lord Mansfield was of the view that mandamus ought to be "used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."[6] Almost one hundred years later Baron Martin saw it as the duty of the courts "to be vigilant" to

apply the remedy of mandamus "in every case to which, by any reasonable construction, it can be made applicable."[7] Nowadays the remedy is commonly used to enforce the performance of public duties by public authorities of all kind.[8] Very recently, in Reg. v. Inland Revenue Comrs., Ex parte National Federation of Self-Employed and Small Businesses Ltd., Lord Diplock, commenting upon the decision of Lord Denning M.R. in Reg. v. Greater London Council, Ex parte Blackburn [[1976] 1 W.L.R. 550, at page 559], stated:[9]

> I agree in substance with what Lord Denning M.R. said, at p. 559, though in language more eloquent than it would be my normal style to use:
>
> > "I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate." (The italics in this quotation are my own.)
>
> [page490]
>
> The reference here is to flagrant and serious breaches of the law by persons and authorities exercising governmental functions which are continuing unchecked.

17 The design of prohibition, on the other hand, is preventative rather than corrective.[10] It affords a measure of judicial supervision not only of inferior tribunals but of administrative authorities generally. Specifically it is available "to prohibit administrative authorities from exceeding their powers or misusing them."[11] Indeed, prohibition has been granted to supervise the exercise of statutory power by such authorities including an act as distinct from a legal decision or determination, and a preliminary decision leading to a decision that affects rights even though the preliminary decision does not immediately do so.[12]

18 Declaratory relief is available, inter alia, to determine whether a statute applies in a particular case. It has been stated that:[13]

> In administrative law the great merit of the declaration is that it is an efficient remedy against ultra vires action by governmental authorities of all kinds, including ministers and servants of the Crown, and, in its latest development, the Crown itself. If the Court will declare that some action, either taken or proposed, is unauthorised by law, that concludes the point as between the plaintiff and the authority. If then his property is taken, he has his ordinary legal remedies; if an order is made against him, he can ignore it with impunity; if he has been dismissed from an office, he can insist that he still holds it. All these results flow from the mere fact that the rights of the parties have been declared. This is a particularly suitable way to settle disputes with government authorities, since it involves no immediate threat of compulsion, yet is none the less effective.

19 All of these remedies are, of course, discretionary. They will be denied, for example, where there has been unreasonable delay.[14] Moreover, an applicant must possess a sufficient interest in the subject-matter of the dispute as not to be seen as a mere busybody.

20 I now turn to the appellants' primary argument. It is that although by subsection 18(3) of the Federal [page491] Court Act a person seeking any of the extraordinary remedies available under subsections 18(1) and (2) may do so "only on an application for judicial review made under section 18.1," the appellants are not prevented from doing so beyond the 30-day time limit specified in subsection 18.1(2) for the simple reason that this time limit applies only where an application for judicial review is "in respect of a decision or order." The appellants submit that nowhere in the originating document do they seek to attack any "decision" of the respective Ministers but, rather, to compel performance of public duties, prevent continued failure to perform such duties and declare the use of the Allowance

for Pension Adjustment Account by the Ministers to be contrary to subsections 44(1) of the PSSA and 55(1) of the CFSA.

21 The appellants point out that the drafters of section 18.1 employed language elsewhere in its text which, in their submission, is designed to accommodate an application for both a section 18 remedy per se and such other remedy as is provided for in subsection 18.1(3). Thus in subsection 18.1(1), the words "anyone directly affected by the matter in respect of which relief is sought" appear. The Motions Judge [at page 150] was of the view that the word "matter" as repeated in former Rule 1602 is "reflective . . . of the necessity to find a word to cover a variety of administrative actions." I respectfully agree. Further support for that view was expressed after Bill C-38 which proposed this change was adopted, but before it came into force.[15] Indeed, it seems to me that the word "matter" does embrace not only a "decision or order" but any matter in respect of which a remedy may be available under section 18 of the Federal Court Act.

22 The appellants also point to language employed in subsection 18.1(3) as again indicating that this subsection was drafted with a view to permitting the award of section 18 relief per se in addition to a "setting aside" or a referral back of a "decision or order." An order in the nature of mandamus would appear to be contemplated by paragraph 18.1(3)(a) whereby a federal tribunal may be ordered to "do any act or thing it has unlawfully failed or refused to do." [page492] A remedy by way of declaratory relief or prohibition would appear to be among those provided for in paragraph 18.1(3)(b) whenever "a decision, order, act or proceeding" [underlining added] of a federal tribunal is found to be "invalid or unlawful."[16]

23 I agree with these submissions. In my view, the time limit imposed by subsection 18.1(2) does not bar the appellants from seeking relief by way of mandamus, prohibition and declaration. It is true that at some point in time an internal departmental decision was taken to adopt the 1988 recommendations of the Canadian Institute of Chartered Accountants and to implement those recommendations in each fiscal year thereafter. It is not, however, this general decision that is sought to be reached by the appellants here. It is the acts of the responsible Ministers in implementing that decision that are now claimed to be invalid or unlawful. The duty to act in accordance with subsections 44(1) of the PSSA and 55(1) of the CFSA arose "in each fiscal year." The charge is that by acting as they have in the 1993-1994 and subsequent fiscal years the Ministers have contravened the relevant provisions of the two statutes thereby failing to perform their duties, and that this conduct will continue unless the Court intervenes with a view to vindicating the rule of law. The merit of this contention can only be determined after the judicial review application is heard in the Trial Division.

24 I am satisfied that the exercise of the jurisdiction under section 18 does not depend on the existence of a "decision or order." In Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans),[17] Hugessen J. was of the view that a remedy envisaged by that section "does not require that there be a decision or order actually in existence as a prerequisite to its exercise." In the present case, the existence of the general decision to proceed in accordance with the recommendations of the Canadian Institute of Chartered Accountants does not, in my view, render the subsection 18.1(2) time limit applicable so as to bar the appellants from seeking relief by way of [page493] mandamus, prohibition and declaration. Otherwise, a person in the position of the appellants would be barred from the possibility of ever obtaining relief under section 18 solely because the alleged invalid or unlawful act stemmed from a decision to take the alleged unlawful step. That decision did not of itself result in a breach of any statutory duties. If such a breach occurred it is because of the actions taken by the responsible Minister in contravention of the relevant statutory provisions.

25 In view of the above conclusion, it is unnecessary to consider the appellants' alternative arguments including that if subsection 18.1(2) applied, the application for judicial review was nevertheless brought within time, that the Motions Judge erred in refusing to extend the time or to allow the application to be treated and proceeded with as an action.

26 It is necessary, however, to consider the grounds put forward by the respondent, in her motion to strike, that the originating document was defective because it failed to identify the federal tribunal in respect of which it is made,

that it improperly named Her Majesty as the respondent and that it failed to set out the date and details of the single decision, order or matter in respect of which judicial review is sought.

27 By their cross-motion, the appellants seek leave to amend the originating document by deleting the name of Her Majesty and substituting the "President of the Treasury Board" and the "Minister of Finance".

28 I agree with the respondent that the style of cause does contain a misnomer. The "President of the Treasury Board" and the "Minister of Finance" ought to have been named as respondents rather than "Her Majesty."[18]

29 I am not persuaded that the originating document is otherwise so defective that it cannot be cured by simple amendment. At the time this document was filed, former subsection 1602(4) of the Rules required that it be "in respect of a single decision, order or [page494] other matter," a requirement that has since been modified by new rule 302 [Federal Court Rules, 1998, *SOR/98-106*]. Former Rule 6 [as enacted by SOR/90-846, s. 2] invested the Court in special circumstances with authority by order to "dispense with compliance with any Rule where it is necessary in the interest of justice," a power that is largely continued in new rule 55. It seems to me appropriate in the circumstances to dispense with the requirement by permitting the "matters" to be brought in the same proceeding. I am also of the view that the appellants have set out sufficient details of those matters in their originating notice.

30 I would allow the appeal with costs, set aside the order of the Trial Division and dismiss the motion to strike. I would also amend the style of cause by substituting "President of the Treasury Board" and "Minister of Finance" as parties respondent in the place of "Her Majesty the Queen in Right of Canada."

Linden J.A.: I agree.

Sexton J.A.: I agree.

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1 R.S.C., 1985, c. P-36.

2 R.S.C., 1985, c. C-17.

3 Appeal Book, Vol. 1, at pp. 34-35.

4 R.S.C., 1985, c. F-11.

5 Appeal Book, Vol. 1, at pp. 264-265.

6 Rex v. Barker (1762), 3 Burr. 1265, at p. 1267; 97 E.R. 823, at p. 825.

7 Mayor of Rochester v. Reg. (1858), El. Bl. & El. 1024, at p. 1033; 113 R.R. 978, at p. 983.

8 W. Wade & C. Forsyth, Administrative Law, 7th ed. (Oxford: Clarendon Press, 1994), at p. 643.

9 [1982] A.C. 617 (H.L.), at p. 641.

10 B. J. MacKinnon, "Prohibition, Certiorari and Quo Warranto," in Law Society of Upper Canada Special Lectures, Toronto: Richard De Boo Ltd., 1961, at p. 290.

11 W. Wade & C. Forsyth, supra, note 8, at p. 626.

12 Id., at pp. 633-634.

13 Id., at p. 593.

14 See e.g. Broughton v. Commissioner of Stamp Duties, [1899] A.C. 251 (P.C.).

15 I. G. Whitehall and J. H. Smellie, "Judicial Review and Administrative Appeals--A Substantive and Procedural Overview," Canadian Bar Association Seminar on Bill C-38, Toronto, January 25, 1991 and Vancouver, February 1, 1991, at p. 14. The amending statute (S.C. 1990, c. 8) was assented to on March 29, 1990 and came into effect on February 1, 1992.

16 See Brown, D. and Evans, J. M. Judicial Review of Administrative Action in Canada (Toronto: Canvasback Publishing, 1998), at p. 2:4410 for a discussion of s. 18.1(3).

17 *(1997), 26 C.E.L.R. (N.S.) 238* (F.C.T.D.), at pp. 241-242; revd on other grounds; Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans), *[1999] 1 F.C. 483* (C.A.).

18 McCaffrey v. Canada, *[1993] 1 C.T.C. 15* (F.C.T.D.). See also LeBlanc v. National Bank of Canada, *[1994] 1 F.C. 81* (T.D.); Atlantic Oil Workers Union v. Canada (Director of Investigation and Research, Bureau of Competition Policy), *[1996] 3 F.C. 539* (T.D.).

End of Document

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160909

Docket: A-39-16

Citation: 2016 FCA 227

CORAM: **WEBB J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 9, 2016.

REASONS FOR ORDER BY: GLEASON J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

Federal Court of Appeal | Cour d'appel fédérale

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Respondent

REASONS FOR ORDER

GLEASON J.A.

[1] The Court has before it a motion to strike this application for mootness. For the reasons that follow, I would grant this motion, without costs.

[2] This application was launched in January of 2016. It seeks declarations regarding the lack of authority of the respondent to make a decision or order that has the effect of excluding or exempting Indirect Air Service Providers (ISPs) from the requirement of holding a licence under

the *Canadian Transportation Act*, S.C. 1996, c. 10 (the *CTA*). In addition to declaratory relief, the applicant also seeks in this application an order of prohibition, enjoining the respondent from making a decision or order that purports to exclude or exempt ISPs from the requirement of holding a licence under the *CTA*. The applicant brought this application after the respondent announced that it intended to undertake public consultations as to whether it should modify its approach to the licencing of domestic ISPs or resellers under the *CTA*.

[3] Following the conclusion of those consultations, and while this application was still pending, the respondent issued Decision No. 100-A-2016 on March 29, 2016. In that decision the respondent determined that:

1. Resellers do not operate air services and are not required to hold an air licence under the *CTA*, as long as they do not hold themselves out to the public as an air carrier operating an air service; and

2. New Leaf Travel Company Inc., which is an ISP or reseller, would not be required to hold an air licence under the *CTA* if it proceeded with its proposed business model.

[4] It is common ground between the parties that the terms “ISP” and “reseller” are interchangeable and refer to companies who sell air transportation services but contract with a third party carrier to actually provide those services. Thus, the decision that the applicant sought to prohibit in this application was made by the respondent on March 29, 2016.

[5] By order dated June 9, 2016, this Court granted the applicant leave to appeal the respondent's March 29, 2016 decision and that appeal is currently pending before the Court.

[6] There is a high threshold for striking an application for judicial review on a preliminary basis in that such orders should only be made where the application is so flawed as to be bereft of any chance of success: *Canada (National Revenue) v. JP Morgan Asset Management (Canadian) Inc.*, 2013 FCA 250 at paras. 47-48, [2014] 2 F.C.R. 557. Where an application has been rendered moot, this high threshold may be met especially where, as here, the issues in the moot proceeding are fully engaged in another matter that is pending before the Court.

[7] A matter is moot when there is no longer a live controversy between the parties and an order will therefore have no practical effect: *Borowski v. Canada*, [1989] 1 S.C.R. 342 at para. 16, 57 D.L.R. (4th) 231 and *Lavoie v. Canada (Minister of the Environment)*, 2002 FCA 268 at para. 6, 291 N.R. 282. Even where a matter is moot, the Court may still decide to hear a case if the circumstances warrant it.

[8] Here, the issues raised by this application are fully engaged by the pending appeal brought in respect of the respondent's March 29, 2016 decision. A remedy identical to the requested declaratory relief will necessarily be considered by the Court in deciding the appeal. As for the requested remedy of prohibition, there is no longer anything to prohibit as the respondent has made the decision that the applicant sought to prohibit in this application. I therefore conclude that this application is moot and can have no practical effect. Moreover, there is no reason why it should be pursued – or even stayed – as all the issues raised in the application

are now before the Court in the pending appeal of the respondent's March 29, 2016 decision. Thus, the only impact of this application would be the incurring of unnecessary costs by the parties and the expenditure of unnecessary time by the Court.

[9] I would accordingly grant this motion and strike this application, without costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-39-16
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GLEASON J.A.
CONCURRED IN BY:	WEBB J.A. RENNIE J.A.
DATED:	SEPTEMBER 9, 2016

APPEARANCES:

Dr. Gábor Lukács	FOR THE APPLICANT (ON HIS OWN BEHALF)
Allan Matte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140319

Docket: A-279-13

Citation: 2014 FCA 76

CORAM: **DAWSON J.A.**
WEBB J.A.
BLANCHARD J.A. (*ex officio*)

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Heard at Halifax, Nova Scotia, on January 29, 2014.

Judgment delivered at Ottawa, Ontario, on March 19, 2014.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: WEBB J.A.
BLANCHARD J.A. (*ex officio)*

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140319

Docket: A-279-13

Citation: 2014 FCA 76

CORAM: **DAWSON J.A.**
WEBB J.A.
BLANCHARD J.A. (*ex officio*)

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

Introduction

[1] This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states 'In all proceedings before the Agency, one member constitutes a quorum".

The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

[2] The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made with the approval of the Governor in Council.

[3] The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

[4] The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

[5] Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

[6] The Act contains a quorum provision that is expressly subjected to the Agency's rules:

16. (1) Subject to the Agency's rules, two members constitute a quorum.	16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

[7] The Agency's rule-making power is as follows:

17. The Agency may make rules respecting	17. L'Office peut établir des règles concernant :
(*a*) the sittings of the Agency and the carrying on of its work;	*a*) ses séances et l'exécution de ses travaux;
(*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	*b*) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;
(*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.]	*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.	36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.
(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.	(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

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	15. (2) Les dispositions définitoires ou interprétatives d'un texte :
[…]	. . .
(*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.	*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,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"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	« règlement » Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires,

issued, made or established	lettres patentes, commission, mandat, résolution ou autre acte pris :
(*a*) in the execution of a power conferred by or under the authority of an Act, or	*a*) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;
(*b*) by or under the authority of the Governor in Council. [Emphasis added.]	*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,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"regulation" means a statutory instrument	« règlement » Texte réglementaire :
(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or	*a*) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;
(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,	*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.
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.]	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	22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:
(*a*) the sittings of the Agency and the carrying on of its work;	*a*) ses séances et l'exécution de ses travaux;
(*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	*b*) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;
(*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.	*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) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum. [Emphasis added.]	(2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres. [Le souligné est de moi.]

[48] In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

[49] Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

[50] The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

[51] First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

[52] Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

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

[54] The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

[55] In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

[56] Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

[57] There remains to consider the appellant's final argument.

What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?

[58] As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

[59] In my view, there are two answers to this argument.

[60] First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005 stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors 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.

"Eleanor R. Dawson"

J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Edmond P. Blanchard J.A. (*ex officio*)"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-279-13
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JANUARY 29, 2014
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	WEBB J.A. BLANCHARD J.A. (*ex officio*)
DATED:	MARCH 19, 2014

APPEARANCES:

Dr. Gábor Lukács	FOR THE APPELLANT (on his own behalf)
Simon-Pierre Lessard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Counsel Legal Services Branch Canadian Transportation Agency	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150605

Docket: A-218-14

Citation: 2015 FCA 140

CORAM: **RYER J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY ET AL.

Respondents

and

THE PRIVACY COMMISSIONER OF CANADA

Intervener

and

THE ATTORNEY GENERAL OF CANADA

Intervener

Heard at Halifax, Nova Scotia, on March 17, 2015.

Judgment delivered at Ottawa, Ontario, on June 5, 2015.

REASONS FOR JUDGMENT BY: RYER J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] Dr. Gábor Lukács 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. Lukács' 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. Lukács, 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. Lukács' 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. Lukács 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. Lukács 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. Lukács 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. Lukács 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. Lukács 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. Lukács 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. Lukács and, without specifically so stating, refused (the "Refusal") to accede to Dr. Lukács' request for unredacted copies of the materials (the "Unredacted Materials") in the Cancun Matter.

[18] On April 22, 2014, Dr. Lukács 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. Lukács 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. Lukács filed a Notice of Constitutional Question in which he challenged the constitutional validity of certain provisions of the *Privacy Act*. Dr. Lukács 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. Lukács 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. Lukács' 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. Lukács (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. Lukács' 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	*Object*
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.	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:	**7.** À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci:
(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or	*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*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).	*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	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*) for the purpose for which the	*a*) communication aux fins auxquelles

information was obtained or compiled by the institution or for a use consistent with that purpose;	ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
(*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;	*b*) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;
…	...
(*m*) for any purpose where, in the opinion of the head of the institution,	*m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure,	(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 *Lukács 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. Lukács 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-rules>), 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	*Demande de traitement confidentiel*
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.	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	*Dépôt*
7. (1) Any document filed under these Rules must be filed with the Secretary of the Agency.	7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.
Agency's public record	*Archives publiques de l'Office*
(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.	(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. Lukács 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. Lukács 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. Lukács 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. Lukács' Submission – "Publicly Available"

[63] Dr. Lukács 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. Lukács 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. Lukács 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. Lukács 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. Lukács. In view of the complexities of the issues that were raised in this application and the considerable time that was spent by Dr. Lukács I would award Dr. Lukács a moderate allowance in the amount of $750.00 plus reasonable disbursements, such amounts to be payable by the Agency.

"C. Michael Ryer"
J.A.

"I agree
D.G. Near, J.A."

"I agree
Richard Boivin, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-218-14
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY ET AL. and PRIVACY COMMISSIONER OF CANADA and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	MARCH 17, 2015
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	NEAR J.A. BOIVIN J.A.
DATED:	JUNE 5, 2015

APPEARANCES:

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Jennifer Seligy Steven J. Welchner	FOR THE INTERVENER
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Federal Court of Appeal | Cour d'appel fédérale

Date: 20130625

Docket: A-460-12

Citation: 2013 FCA 169

CORAM: **SHARLOW J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and PORTER AIRLINES INC.

Respondents

Heard at Halifax, Nova Scotia, on June 25, 2013.

Judgment delivered from the Bench at Halifax, Nova Scotia, on June 25, 2013.

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Halifax, Nova Scotia, on June 25, 2013)

DAWSON J.A.

[1] The appellant, Mr. Lukács, appeals from an interlocutory decision of the Canada Transportation Agency. This Court granted leave to appeal the issue of whether the Agency erred in law by rendering an interlocutory decision without a quorum of at least two members of the Agency.

[2] A preliminary issue was raised by the respondent Porter Airlines Inc.: is the appeal moot and, if so, should this Court exercise its discretion to hear the appeal?

[3] The mootness issue arises on the following facts. The appellant filed a complaint with the Agency in respect of Porter's International Tariff Rule 18, which relates to its liability for damages and expenses caused due to flight delays or cancellations. In response, Porter sought a 60 day extension in which to file its answer. The appellant opposed Porter's request for an extension and sought an order staying the impugned tariff pending adjudication of his complaint. A single member of the Agency granted a 30 day extension to Porter and refused the appellant's request for a stay (LET-C-A-92-2012).

[4] The appellant then filed a motion asking that at least two members of the Agency review the legal status of LET-C-A-92-2012 (on the ground that it was decided by a single member of the Agency) and order that Chairman Hare, who made the impugned order, recuse or disqualify himself. In LET-C-A-126-2012 Chairman Hare dismissed the motion. This is the decision under appeal.

[5] After this Court granted leave to appeal the interlocutory decision, the Agency issued its final decision in respect of the appellant's complaint. A portion of Porter's International Tariff Rule 18 was disallowed by the Agency. This decision was made by two members of the Agency, including Chairman Hare. No application was made for leave to appeal this decision.

[6] The appellant argues that the present appeal is not moot because the result of the appeal will affect the validity of both the final decision and also another proceeding before the Agency.

[7] We disagree. The Agency has rendered its final decision and there was no application for leave to appeal that decision. The order under appeal in large part considered the propriety of the previous order that granted an extension to Porter to file its answer and refused to stay the impugned tariff while the complaint was adjudicated. After the issuance of the final decision no practical purpose would be served by considering the validity of the extension and stay refusal.

[8] Chairman Hare's refusal in the decision under appeal to recuse himself is not relevant to the validity of the final decision. That decision was never challenged by the appellant and an appeal from the Chairman's interlocutory refusal to recuse himself cannot be used to collaterally attack the Agency's final decision.

[9] The fact that the issue of the validity of decisions made by one member may remain live in other cases before the Agency does not prevent that issue from being moot between these parties.

[10] Having found the appeal to be moot, it is necessary to consider whether we should exercise our discretion to hear this appeal, notwithstanding its mootness. The relevant factors to be considered are:

1. Is there a continued adversarial relationship?
2. Do concerns over judicial economy trump the potential impact of the decision under appeal?
3. Will the exercise of discretion be seen as an intrusion into the legislative branch?

[11] We agree that there is a continued adversarial relationship between the parties. Written memoranda have been filed and the parties are ready to argue the underlying appeal if it is not dismissed for mootness. In our view, however, the determinative factor is concern over judicial economy.

[12] The Agency's internal policy under which the decision in issue was made by a single member has been rescinded. An amendment to the Canada Transportation Agency General Rules which provides for a single member quorum is pending. These factors militate against considering the moot question of the validity of the interlocutory decision under appeal.

[13] The appellant argues that the pending amendments to the General Rules are invalid. In our view this raises a new legal issue that could raise new legal arguments by the respondents that are outside the scope of the issue on which leave was granted. The Agency seeks to uphold the internal policy as a valid exercise of the Chairman's authority under section 13 of the *Canada Transportation Act*, S.C.1996, c.10 (Act). The validity of the proposed rules would appear to depend upon whether the rules are instruments that fall within subsection 36(1) of the Act, which requires regulations made by the Agency to be approved by the Governor-in-Council. This is an issue that does not arise on the facts of this case. Therefore, we express no opinion upon the issue.

[14] Accordingly, in the exercise of our discretion we decline to consider the appeal.

[15] The Agency filed its own motion to dismiss the appeal on the ground of mootness. It is unnecessary for us to address either the merits or the appropriateness of the decision-maker bringing such a motion.

[16] Accordingly, despite the very articulate submissions of the appellant, the appeal will be dismissed without costs.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-460-12
(APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY DATED AUGUST 9, 2012)	
STYLE OF CAUSE:	Gábor Lukács v. Canadian Transportation Agency and Porter Airlines Inc.
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	June 25, 2013
REASONS FOR JUDGMENT OF THE COURT BY:	SHARLOW, DAWSON AND STRATAS JJ.A.
DELIVERED FROM THE BENCH BY:	DAWSON J.A.

APPEARANCES:

Gábor Lukács	ON HIS OWN BEHALF
Odette Lalumière	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Martha A. Healey	FOR THE RESPONDENT PORTER AIRLINES INC.

SOLICITORS OF RECORD:

Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Norton Rose Canada LLP Ottawa, Ontario	FOR THE RESPONDENT PORTER AIRLINES INC.

Date: 20110825
Docket: CI 10-01-68359
(Winnipeg Centre)
Indexed as: Lukács v. Doering et al.
Cited as: 2011 MBQB 203

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

	)	Counsel:
	)	
	)	
DR. GÁBOR LUKÁCS,	)	R. L. Tapper, Q.C.
	)	for the applicant
applicant,	)	
	)	
- and -	)	J. A. Kagan
	)	for the respondents,
	)	Dr. John (Jay) Doering and
DR. JOHN (JAY) DOERING and THE	)	The University of Manitoba,
UNIVERSITY OF MANITOBA, through its	)	through its Academic Body,
Academic Body, THE SENATE OF THE	)	The Senate of the University
UNIVERSITY OF MANITOBA and A.Z.,	)	of Manitoba
	)	
respondents.	)	
	)	D. I. Marr
	)	for the respondent, A.Z.
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	August 25, 2011

McCAWLEY, J.

[1] The respondents, Dr. John (Jay) Doering and the University of Manitoba, through its Academic Body, the Senate of the University of Manitoba, bring a motion for an order that a notice of application filed by Dr. Gábor Lukács be struck on the grounds that Dr. Lukács does not have standing to seek the relief

claimed and therefore the application fails to disclose a reasonable cause of action.

BACKGROUND

[2] Dr. Lukács is an Assistant Professor of Mathematics at the University of Manitoba (the "University") and has held that position since 2006. Dr. Doering is Dean of the Faculty of Graduate Studies at the University and A.Z. was a graduate student in the PhD Program in Mathematics at the relevant time. The University made certain accommodations pursuant to its disability policies to allow A.Z. to complete his doctorate as a result of which he was awarded a PhD Degree in Mathematics. Dr. Lukács takes exception to the awarding of the degree and the process followed. He seeks various declarations and orders including an order that A.Z. has not fulfilled the requirements of a PhD Degree in Mathematics. It is his position that the extent to which the respondents went to accommodate A.Z pursuant to its disability policies undermines the academic integrity and standards of the PhD Program in Mathematics and the University as a whole.

[3] The motion of Dr. Doering and the University to strike the application is supported by A.Z. At the outset of the hearing, counsel for all parties indicated they were agreeable to having the narrow issue of standing determined first and, depending on the outcome, the remaining matters would be argued later.

[4] It should be noted that although A.Z. was a student in the PhD Program in Mathematics at the University, at no time was Dr. Lukács his teacher, supervisor

or adviser. There was some disagreement as to whether Dr. Lukács was a member of the Mathematics Graduate Studies Committee (the "Committee") at the relevant time. The evidence is that Dr. Doering met with the Committee on September 29, 2009, at which time Dr. Lukács was not a member. It was then that the decision was taken – the applicant says the decision was "announced" by Dr. Doering whereas the respondents say Dr. Doering's view was "accepted" by the Committee, although not without controversy – to waive certain academic requirements for A.Z. Dr. Lukács was elected to the Committee the following day as a result of the resignation of one of the Committee members. The decision of the Committee was communicated by Dr. Doering to A.Z. one month later, by letter dated October 30, 2009.

[5] I raise this disagreement over how the decision came to be by way of example of the kinds of disagreements as to facts Dr. Lukács raised in his brief. Whereas they were characterized as prejudicial misstatements or omissions of crucial facts on the part of the respondents, in my view, they are more properly described as a question of interpretation rather than difference and lack the somewhat ominous nature implied.

[6] In or around March 2009, A.Z. failed his second Candidacy Examination in the PhD Program of Mathematics and was subsequently required to withdraw from the program pursuant to the applicable University policies and regulations.

[7] On June 26, 2009, A.Z. appealed the decision to the Dean of Graduate Studies on the ground that he suffered from a disability. The regulations

governing academic appeals by graduate students permit the Dean of the Faculty to mediate between a student and the student's department to resolve the appeal, failing which the matter is remitted to an Appeal Panel for hearing. The Appeal Panel has the authority to hear and determine the appeal on behalf of the Faculty Council of Graduate Studies.

[8] The Dean decided to reinstate A.Z., without the necessity of A.Z. sitting for another examination, pursuant to the University's Accessibility for Students with Disabilities By-law.

[9] Section 2.1.2 states:

> **2.0 Policy Statement**
>
> **2.1 General**
>
> . . . . .
>
> 2.1.2. The University will use reasonable efforts to offer reasonable in the delivery of academic programs and services to students with disabilities.

[10] Section 2.2 designates the Disability Services ("DS") office as the centralized service for the University to provide focus and expertise regarding disability related accommodations. Among other things, it evaluates medical documentation from students requesting DS assistance and is responsible for ensuring the University's criteria for academic excellence is not compromised in providing accommodations.

[11] On August 11, 2009, in response to a request from Dr. Doering, the Committee and DS made a joint recommendation to Dr. Doering as to what

accommodation might be afforded to A.Z. Dr. Doering did not accept this recommendation, preferring to propose an alternative accommodation which was first rejected and then accepted by the Committee. As noted earlier, it was not without dissension.

[12] On October 30, 2009, A.Z was advised by letter of the accommodation made. It was not until some ten months later that it came to light A.Z. was short a doctoral course. The Committee proposed a solution to the problem to which Dr. Doering responded again with an alternative which was unacceptable to the Committee. Nevertheless, Dr. Doering implemented his alternative exercising his authority as Dean which decision was later confirmed by counsel to the University as being within his jurisdiction to make.

[13] Dr. Lukács took exception to the Dean's decision and made numerous efforts to challenge it. These included requests for meetings some of which were refused, others of which did take place, and ultimately an appeal was filed by Dr. Lukács to the University Senate. After some procedural difficulties, the Senate Committee on Appeals declined to hear the appeal on September 17, 2010, taking the position it lacked the jurisdiction. For the purpose of deciding the threshold question of standing, it is not necessary to go into further detail as to what steps were taken and various other issues that were raised throughout other than to say Dr. Lukács' attempts were unsuccessful and, ultimately, he turned to the courts.

ANALYSIS

[14] The respondents' motion is brought pursuant to Manitoba ***Court of Queen's Bench Rule 25.11(d)*** which gives the court discretion to strike out a pleading on the ground that it does not disclose a reasonable cause of action.

[15] It is well settled that the threshold is low and a claim is only to be struck where it is "plain and obvious" or "beyond doubt" that no reasonable cause of action has been set out. ***Basaraba v. Manitoba Court of Queen's Bench***, 2006 MBCA 27, 201 Man.R. (2d) 302.

[16] Standing, which is the ability of a party to invoke the jurisdiction of the court, can be established by showing either private interest standing or public interest standing. The difference is the difference between standing as a matter of right arising from a direct relationship between the person and the state, and standing granted by a court in the exercise of its discretion where a direct relationship does not exist. ***Downtown Eastside Sex Workers United Against Violence Society et al. v. Canada (Attorney General)***, 2010 BCCA 439, 324 D.L.R. (4th) 1.

Private Interest Standing

[17] In ***Re Greenpeace Foundation of British Columbia et al. and Minister of the Environment*** (1981), 122 D.L.R. (3d) 179 at 184 (B.C.S.C.) [***Re Greenpeace*** cited to D.L.R.], Callaghan J., citing Buckley J. in ***Boyce v. Paddington Borough Council***, [1903] 1 Ch. 109, explained the test for private interest standing as either a situation where interference with a public right also

interferes with the private right of a private citizen, or where no private right of a citizen is interfered with, but in respect of his public right a private citizen suffers special damage peculiar to himself from the interference with a public right.

[18] Of particular applicability to the present case is the decision of the Supreme Court of Canada in ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607, which cited with approval ***Australian Conservation Foundation Inc. v. Commonwealth of Australia*** (1980), 28 A.L.R. 257 at 270, to the effect that the applicant must have a personal stake in the outcome of the litigation ([***Finlay*** cited to S.C.R.] at p. 623):

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[19] The court in ***Finlay*** also cautioned against the expansion of public interest standing out of a concern for the allocation of scarce judicial resources and emphasized the need to "screen out the mere busybody" (at p. 631).

[20] Further concerns were expressed in ***Cassells v. University of Victoria***, 2010 BCSC 1213, 323 D.L.R. (4th) 180, where the court stated that private interest or special damage giving rise to standing must flow from the impact of an asserted public wrong independently of the political or social activism which the petitioner in that case undertook (at para. 64). The court went on to say that a fear of flood of unnecessary litigation that could result from affording broad rights of standing and a concern over the politicization of the judicial

process were two factors that should constrain the courts from affording standing to an individual seeking a remedy with respect to a matter of general public interest.

[21] Counsel for the respondents argued that Dr. Lukács has no individual rights in law or in equity that are at stake in the matter before the court. Furthermore, it was submitted that he does not have a direct or personal interest in the alleged improper acts of the Dean or the University, nor has he suffered or is likely to suffer special damages peculiar to himself, as a result of the accommodation afforded to A.Z. by the University or any of the decisions made by the University as a result of the accommodation made. It is the position of the respondents that the only advantage Dr. Lukács would gain is the satisfaction of righting an alleged wrong and, further, if he were not granted the relief, he would not suffer any disadvantage other than a sense of grievance or debt for costs which ***Finlay*** would not allow.

[22] The position of the applicant with respect to private interest standing is summarized in paragraph 100 of his motion brief:

> The substance of the Applicant's pleading is that Dr. Doering interfered, without authority and unreasonably, with the academic requirements in the case of student A.Z.. Furthermore, the interference was to the benefit of A.Z., and to the detriment of the University's academic integrity and credibility, and the ability of the Applicant to perform his duties credibly insofar as PhD candidates are concerned.

[23] Furthermore, Dr. Lukács says that if the decisions of Dr. Doering are allowed to stand, the University will rightfully be labelled a "diploma mill," its

graduates and faculty will be suspect, their integrity will be questioned, and the future of post-secondary education in the province will be threatened.

[24] Without belabouring the point, I fail to see any direct, legitimate personal or private interest as defined by the authorities which would grant Dr. Lukács private interest standing. He did not teach the student in question, he was only laterally a member of the Committee, he himself does not hold a degree from the University of Manitoba nor does he represent in any official capacity anyone but himself. Neither has he demonstrated any damages other than unsubstantiated statements as to what he thinks will occur if he does not succeed in his mission. His interest, as he himself acknowledges, is one of "conscience" which, as counsel for the respondents observed, does not in itself necessarily ground a legal proceeding.

Public Interest Standing

[25] In its 1992 decision in ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration)***, [1992] 1 S.C.R. 236, the Supreme Court of Canada set out the test for public interest standing as follows:

(1) Is there a serious issue raised as to the invalidity of the legislation in question?

(2) Has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity?

(3) Is there another reasonable and effective way to bring the issue before the court?

[26] While recognizing the purpose of granting public interest status is to prevent the immunization of legislation or public acts, the court indicated that the granting of status is not "required" when, on a balance of probabilities, it can be shown that the impugned measure will be the subject of attack by a private litigant. In very clear language, the court stated that the decision whether to grant status is a discretionary one and in that case there was no need to expand the principles enunciated by the Supreme Court to grant it.

[27] In ***Downtown Eastside Sex Workers United Against Violence Society***, the British Columbia Court of Appeal found that although the forgoing test is to be applied generously, each of the three conditions must be met before public standing is granted.

[28] The respondents submit that the three part test has not been met by Dr. Lukács as Dr. Lukács has not raised an issue regarding the invalidity of ***The University of Manitoba Act***, C.C.S.M., c. U60, or any other legislation. I agree and, on this basis alone, he has failed to establish a public interest standing on the first ground.

[29] Even had I not so found, Dr. Lukács has not shown that he is directly affected by any impugned legislation or that he has a genuine interest is its validity. The matter of the validity or invalidity of legislation is not the issue. Accordingly, Dr. Lukács would also have failed on the second ground.

[30] With respect to the third question, it is also not necessary to decide it, but as the following indicates, if the matter is not one which should come before the courts it matters not whether there is a reasonable and effective way for it to do so.

[31] Although prior to the ***Canadian Council of Churches*** decision, but in keeping with it in the Saskatchewan Court of Queen's Bench in ***Shiell v. Amok Ltd. and Saskatchewan Mining Development Corp. et al.*** (1987), 58 Sask.R. 141, Barclay J. held that public interest standing will not be granted to individuals for the purpose of conducting an action against another private party. The court found in that case that the purpose of public interest standing is not to pursue a claim against a private individual or group, but rather to ensure that private individuals have the avenue by which to challenge the unlawful use of government authority.

[32] I accept the respondents' argument that the University is a private entity and decisions made on its behalf are private decisions affecting the governance of the University and its academic programs. I also agree that this is a dispute between Dr. Lukács, as a private individual, and the University, as a private entity, which is not analogous to a governmental authority. Accordingly, the court should not extend public interest standing to Dr. Lukács, an individual, for the purpose of conducting an action against the University, a private party with respect to this matter. It is well known that Dr. Lukács has availed himself of other avenues available to him to resolve some related matters.

[33] Counsel for Dr. Lukács argues that the University is a public body, created by statute, dependent in large measure on the public purse and that given the value society places on higher education there is a public interest quality which should be subject to some measure of judicial control.

[34] Although there is no doubt that universities are not immune from the purview of the courts as seen in such decisions referred to by the applicant as ***Al-Bakkal v. University of Manitoba et al.***, 2003 MBQB 198, 176 Man.R. (2d) 127; ***Ghaniabadi v. University of Regina et al.*** (1997), 161 Sask.R. 129 (Q.B.); ***Paine v. University of Toronto*** (1981), 34 O.R. (2d) 770 (C.A.), the cases are clear the conferring of academic degrees is private in nature and generally the courts should exercise restraint.

[35] In ***King v. University of Saskatchewan***, [1969] S.C.R. 678 at 689, the Supreme Court of Canada rejected the argument that the respective duties of faculty council and the senate were in the nature of public duties rather than domestic. The court held that as they especially affected the rights of the appellant student, an order of *mandamus* should be granted. However, the court also found that the senate of the University of Saskatchewan, as elsewhere, is the sole body to determine to whom the degrees of the university may be conferred.

[36] In ***Re Polten and Governing Council of University of Toronto*** (1976), 8 O.R. (2d) 749 (H.C.J., Div. Ct.), although the court opined that

prerogative writs may be available to a student who has been denied natural justice in respect of his examinations, the court clearly stated (at p. 758):

> ... the standards for a degree, and the assessment of a student's work, are so clearly vested in the university that the Courts have no power to intervene merely because it is thought that the standards are too high, or that the student's work was inaccurately assessed. There must be other grounds.

[37] A similar hands off approach is seen in the decision of the Manitoba Court of Appeal in ***Warraich v. University of Manitoba***, 2003 MBCA 58, 173 Man.R. (2d) 202. There, the central issue was whether the applicant's dispute with the University was in its essential character an academic matter to be resolved by the University's own dispute resolution process or a breach of the applicant's contractual rights and therefore the proper subject of proceedings in the courts.

[38] The court found that the dispute was an internal disagreement relating to academic matters which, by their very nature, are better resolved by the University's own procedures "so long as they are fair, comprehensive and effective" (citing ***King v. University of Saskatchewan*** at para. 14).

[39] Here the decisions taken with respect to A.Z. were, in their "essential character," related to academic matters with which the University is uniquely positioned to deal. It should also be noted that here there also exists a multi-faceted appeal process to ensure procedural fairness to students which, not insignificantly, Dr. Lukács is not.

[40] Counsel for Dr. Lukács also submitted that he is entitled to a statutory appeal to the Senate under the "others" category found in s. 34(1) of ***The***

University of Manitoba Act, suggesting that the existing appeal process insofar as Dr. Lukács is concerned is not "fair, comprehensive, and effective." No authorities were provided in support of this position which in my view is an attempt to gain standing before the court without first meeting the rigours of the legal test laid down in ***Canadian Council of Churches***. While the inclusion of the word "others" is unclear it could conceivably be meant to cover some out of the ordinary situation where a student is unable to represent himself or herself and some other person – perhaps a guardian or personal representative – must. Certainly the interpretation urged by counsel for the applicant is difficult to accept in light of the authorities, and could lead to the unhappy conclusion that a third party can challenge the degree of someone with whom they have no viable, direct and substantial connection. To the extent the courts have warned against the floodgate of litigation that could result by expanding standing, for similar reasons this argument is unpersuasive.

[41] Interestingly, at the outset of his submissions, counsel for the applicant admitted that Dr. Lukács has no connection to A.Z. Rather, it is his connection to the process on which he relies. While that may be so, it is insufficient to ground his application in law. In the result, I find that Dr. Lukács lacks the necessary public standing to invoke the jurisdiction of the court.

JUDICIAL REVIEW

[42] In their brief, counsel for the applicant argued that the court should exercise its discretion to not strike the application without first hearing the

matter on its merits. In support of this position, it was submitted that the process followed involves a complex factual matrix, significant disagreement as to the facts, and therefore warrants judicial review. Furthermore, whether to grant public interest standing is discretionary.

[43] Reference was made to ***Finlay*** and ***Sierra Club of Canada v. Canada (Minister of Finance) et al.*** (1998), 157 F.T.R. 123 (T.D.), which establishes that whether standing should be granted is a question of judicial discretion and depends on the nature of the issues and whether the court has sufficient materials before it for a proper understanding, at that stage, of the nature of the interest asserted.

[44] I have no hesitation in saying that in light of the quantity and quality of the material before me, I have a clear understanding of what is at stake. Additionally, and in accordance with the rationale laid down in ***Soldier v. Canada (Attorney General)***, 2009 MBCA 12, 236 Man.R. (2d) 107 at para. 46, I am satisfied that the clear application of the law leads me to the conclusion that the motion to strike should be granted. To exercise my discretion in favour of the applicant and accede to the applicant's request on this ground would effectively grant him standing when he has not demonstrated he is entitled to it.

CONCLUSION

[45] As is apparent, I have not referred to all the cases cited by counsel although all have been read and considered. Similarly, I have not responded to all of the matters raised, some of which went beyond the issue before me.

[46] For the foregoing reasons, I find Dr. Lukács lacks both public and private interest standing in these proceedings and, accordingly, his application is struck.

[47] Counsel may speak to the issue of costs if they cannot be agreed.

McCawley, J.

Federal Court Cour fédérale

Date: 20150303

Docket: T-2133-14

Citation: 2015 FC 267

Vancouver, British Columbia, March 3, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

PRESIDENT OF THE NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] After Gábor Lukács' request for access to information held by the Natural Sciences and Engineering Research Council (NSERC) was refused, he filed a complaint with the Office of the Information Commissioner of Canada (OIC). NSERC ultimately provided three separate responses to Dr. Lukács' access request, each citing different sections of the *Access to Information Act* to justify its refusal to disclose the information in issue.

[2] Following receipt of a report from the OIC, Dr. Lukács commenced this application for judicial review with respect to NSERC's refusal of his access request. NSERC has now brought a motion to strike Dr. Lukács' application, arguing that to the extent that the application relates to NSERC's refusal to disclose the documents under subsection 10(2) of the *Access to Information Act*, the application is moot as NSERC had withdrawn its reliance on that statutory provision prior to the release of the OIC's report.

[3] To the extent that Dr. Lukács seeks to challenge NSERC's reliance on other sections of the *Access to Information Act* to deny him access to the information he is seeking, NSERC asserts that the application is premature, as the OIC has neither investigated nor considered whether NSERC's reliance on these exemptions is proper.

[4] I agree with NSERC that Dr. Lukács' application is bereft of any chance of success. As a consequence, the motion to strike will be granted.

I. Background

[5] In order to understand the issues raised by NSERC's motion, it is necessary to understand the chronology of events relating to Dr. Lukács' access to information request.

[6] On April 24, 2012, Dr. Lukács requested access to documents held by NSERC. NSERC is a federal government agency that funds research in the natural sciences and engineering. The documents sought by Dr. Lukács included:

> 1. Copies of any reports or correspondence regarding the nature and outcomes of investigations regarding research misconduct, as reported to NSERC by McGill University between January 2010 and April 2012, with nominative

> information concerning individuals excised as required by the Act.
>
> 2. Copies of any decisions or correspondence related to actions subsequently taken by NSERC in response to the reports or communications from item (1), immediately above, with nominative information concerning individuals excised as required by the Act.

[7] On May 8, 2012, NSERC informed Dr. Lukács that it could "neither confirm nor deny the existence of such records in accordance with section 10(2) of the *Access to Information Act*" (the first refusal). Subsection 10(2) of the Act allows the head of a government institution to refuse to indicate the existence of a record in exceptional circumstances, where doing so would itself disclose information to a requester: Michel W. Drapeau & Marc-Aurèle Racicot, *Federal Access to Information and Privacy Legislation Annotated 2015* (Toronto: Thomson Reuters, 2014) at 1-154.6. The full text of the relevant statutory provisions is attached as an appendix to these reasons.

[8] Dr. Lukács filed a complaint with the OIC concerning NSERC's first refusal, submitting that NSERC had failed to comply with paragraph 10(1)(b) of the *Access to Information Act*, R.S.C. 1985, c. A-1. This provision states that where the head of a government institution refuses to grant access to information, notice should be provided as to "the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed".

[9] On November 5, 2012, NSERC sent Dr. Lukács a further response to his access request, reiterating its position that, in accordance with subsection 10(2) of the Act, it could neither

confirm nor deny the existence of the information sought. However, this response added that if such a record existed "it can reasonably be expected that it would have been withheld pursuant to subsection 19(1) of the Act for personal information" (the second refusal).

[10] Dr. Lukács provided the OIC with further submissions regarding the second refusal, and in July of 2014, he received a third response from NSERC with respect to his access request (the third refusal). This time NSERC stated that "…further to your complaint with the [OIC] … and discussions we had with the investigator, the ATIP office has reviewed the application of subsection 10(2) *and replaced it with 19(1)* …" [my emphasis]. The letter went on to state that "[t]he documents will now be withheld, in their entirety, under section 19(1) of the *Act*". Subsection 19(1) of the Act directs that records containing personal information about an identifiable individual not be disclosed, absent certain circumstances that do not apply here.

[11] NSERC also stated in the third refusal that some of the requested documents should also be withheld under section 23 of the Act, which protects documents that are subject to solicitor-client privilege, and under paragraph 21(1)(b) of the Act, which protects accounts of deliberations and consultations involving the directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister.

[12] On July 30, 2014, Dr. Lukács provided the OIC with submissions in relation to the third refusal.

II. The OIC's Report

[13] The OIC outlined the results of its investigation into Dr. Lukács' complaint in a report dated September 2, 2014. The report noted that the OIC had disagreed with NSERC's reliance on

subsection 10(2) of the Act in its first and second responses, and that the OIC had asked NSERC to reconsider its position in this regard. According to the report, it was after further discussions between the OIC and NSERC that NSERC issued "a final response" to Dr. Lukács' access request in July of 2014, "replacing" its reliance on subsection 10(2) of the Act with exemptions claimed under sections 19(1), 21(1)(b) and 23 of the Act.

[14] The OIC recognized in its report that Dr. Lukács was dissatisfied with the investigation, but stated that its investigation had been "limited to the applicability of section 10(2) of the Act to the responsive documents". The report further indicated that the OIC would consider Dr. Lukács' letter of July 30, 2014 "as a new complaint concerning the exemptions applied by NSERC on the responsive documents". According to the OIC, a new file number concerning these exemptions had been assigned to the complaint, and an investigator had been assigned to inquire into the matter.

[15] The OIC completed its analysis by stating that "[t]herefore, we will conclude this complaint concerning the applicability of section 10(2) of the Act as well founded resolved".

[16] Finally, the report notified Dr. Lukács of his right to apply to this Court for a review of NSERC's decision pursuant to section 41 of the Act.

III. Dr. Lukács' Application for Judicial Review

[17] On October 17, 2014, Dr. Lukács filed his application for judicial review with respect to NSERC's continuing refusal to grant him access to the requested documents. The application seeks an order requiring the President of NSERC to disclose the requested documents to Dr. Lukács, together with his costs of the application.

IV. NSERC's Motion to Strike

[18] NSERC responded to Dr. Lukács' application with its motion to strike. NSERC observed that as of the date of Dr. Lukács' application, the OIC had only investigated and reported on NSERC's reliance on subsection 10(2) of the Act. To the extent that Dr. Lukács' application seeks to challenge NSERC's reliance on subsection 10(2) of the Act, NSERC says that the application is moot, as it was no longer relying on subsection 10(2) of the Act to justify its refusal to grant access to the requested documents when the report was issued.

[19] NSERC also submits that the OIC has yet to consider the exemptions that it now asserts under sections 19(1), 21(1)(b) and 23 of the Act. Absent a report from the OIC addressing NSERC's reliance on these provisions, NSERC says that Dr. Lukács' application for judicial review is premature.

V. The Test on Motions to Strike Applications for Judicial Review

[20] Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add to the cost and time required to deal with such matters. Moreover, as the Federal Court of Appeal observed in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, 176 N.R. 48, the striking out process is more feasible in actions than in applications for judicial review. This is because there are numerous rules governing actions which require precise pleadings as to the nature of the claim or defence, as well as the facts upon which the claim is based. There are no comparable rules governing Notices of Application for Judicial Review.

[21] As a consequence, the Federal Court of Appeal has determined that an application for judicial review should not be struck out prior to a hearing on the merits, unless the application is "so clearly improper as to be bereft of any possibility of success". The Court further observed that "[s]uch cases must be very exceptional and cannot include cases … where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, above at para. 15.

[22] Unless a moving party can meet this very stringent standard, the "direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself": *David Bull*, above at para. 10; see also *Addison & Leyen Ltd. v. Canada*, 2006 FCA 107 at para. 5, [2006] 4 F.C.R. 532, rev'd on other grounds 2007 SCC 33, [2007] 2 S.C.R. 793.

VI. Is the Application Moot Insofar as it Relates to Subsection 10(2) of the Act?

[23] As the Supreme Court of Canada noted in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at para. 15, 57 D.L.R. (4th) 231, mootness is a policy or practice that allows a court to decline to decide cases that do not involve a live controversy between the parties, but raise only hypothetical or abstract questions.

[24] The jurisdiction to strike a proceeding for mootness stems from the Court's inherent jurisdiction to control its own process, and not by reference to the power conferred on the Court by Rule 221 of the *Federal Courts Rules*, S.O.R./98-106: *Aktiebolaget Hassle v. Apotex Inc.*, 2008 FCA 88 at paras. 13-14, 375 N.R. 342.

[25] I do not understand there to be any dispute that this application is properly before the Court, to the extent that it relates to NSERC's original subsection 10(2) claim for exemption. NSERC claimed this exemption in its first response to Dr. Lukács' access request, and it was investigated by and reported on by the OIC prior to the commencement of Dr. Lukács' application. As a consequence, the procedural requirements of section 41 of the Act have been satisfied.

[26] That said, by the time that the OIC delivered its report, NSERC was no longer relying on subsection 10(2) to refuse Dr. Lukács access to the requested documentation. There is thus no live controversy between the parties as to whether this exemption was properly claimed by NSERC, and Dr. Lukács cannot derive any benefit from a judicial decision in this regard. To this extent, Dr. Lukács' application is clearly moot.

[27] While the Court has discretion to decide a case that has become moot, Dr. Lukács has not identified any principled basis that would justify the expenditure of scarce judicial resources to decide the propriety of an exemption that NSERC is no longer claiming. The availability of a claimed exemption is largely a fact-specific exercise, and does not involve an issue of public importance that would transcend the interests of these parties. Nor is the availability of the subsection 10(2) exemption in this case an issue that is capable of repetition, but otherwise elusive of review. Consequently, I decline to exercise my discretion to allow this aspect of the application to proceed notwithstanding the fact that it is moot.

[28] The next question is whether the application should be struck on the basis that it is premature, insofar as it relates to the exemptions that are actually bring relied upon by NSERC.

To answer this question, it is necessary to start by having regard to the procedural requirements of the *Access to Information Act*.

VII. The Requirements of Section 41 of the *Access to Information Act*

[29] Subsection 41 of the Act provides that anyone denied access to a record requested under the legislation may "if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) …".

[30] Subsection 37(2) of the Act provides that after investigating a complaint, the OIC shall report to the complainant and the government institution the results of the investigation.

[31] In *Statham v. Canadian Broadcasting Corp.*, 2010 FCA 315 at para. 64, [2012] 2 F.C.R. 421, the Federal Court of Appeal identified three prerequisites that an individual seeking access to information must satisfy before applying to the Federal Court under section 41 of the Act. These are:

1. The applicant must have been "refused access" to a requested record;

2. The applicant must have complained to the OIC about the refusal; and

3. The applicant must have received a report of the OIC under subsection 37(2) of the Act.

[32] As Justice Stratas observed in *Whitty v. Canada (Minister of the Environment)*, 2014 FCA 30, at para. 8, 460 N.R. 372, section 41 of the Act "is a statutory expression of the common

law doctrine that, absent exceptional circumstances, all adequate and alternative remedies must be pursued before resorting to an application for judicial review".

[33] The parties agree that the first two *Statham* criteria have been met in this case. Where they disagree is in relation to the third criterion.

[34] As noted earlier, NSERC asserts that the OIC has yet to report on the availability of exemptions under sections 19(1), 21(1)(b) and 23 of the Act, and that Dr. Lukács' application for judicial review is premature in the absence of such a report.

[35] Dr. Lukács submits that the third *Statham* criterion only requires that an applicant receive "a report" from the OIC. He submits that he has received "a report", together with notice from the OIC of his right to seek judicial review with respect to NSERC's refusal to provide him with access to the requested documents.

[36] According to Dr. Lukács, section 41 of the Act does not specify what an OIC report must address. Dr. Lukács also submits that the OIC cannot bifurcate its investigations and reports, as it appears to have done in this case. According to Dr. Lukács, once the OIC has delivered "a report" in relation to an access complaint, it is *functus officio* and loses jurisdiction over the matter.

[37] It is plain and obvious that Dr. Lukács' submissions on this point cannot succeed.

[38] Section 34 of the Act makes it clear that the OIC is master of its own procedure insofar as the conduct of investigations is concerned. I see nothing in the legislative structure that would preclude the OIC from investigating and reporting on a complaint in stages as it is doing here.

[39] We must, moreover, keep in mind that this case involves a challenge to NSERC's refusal to grant access to Dr. Lukács, and not an application to judicially review the way that the OIC had decided to investigate Dr. Lukács' complaint.

[40] I also cannot accept Dr. Lukács' argument that once the OIC has delivered a report, even if that report only deals with a portion of an access complaint, it is *functus officio* and loses jurisdiction over a matter.

[41] The doctrine of *functus officio* provides that once a decision-maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or other minor errors. The policy rationale underlying this doctrine is the need for finality in proceedings: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at paras. 20-21, [1989] S.C.J. No. 102.

[42] In order to engage the principle of *functus officio*, the decision in issue must be final. In the context of judicial decision-making, a decision may be described as final when "... it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain ...": G. Spencer Bower & A.K. Turner, *The Doctrine of Res Judicata*, 2d. ed. (London: Butterworths, 1969) at 132, cited in Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Thomson Reuters, 2014), vol. 3 at 12:6222.

[43] *Functus officio* can apply in the context of administrative decision-making: *Chandler*, at paras. 20-21. To apply, however, it still requires that there be a final decision. The OIC's report was not a final one, as it clearly deferred consideration of the substantive grounds for the refusal

of access to a future investigation. It was, moreover, arguably not even a decision as it did not finally determine any rights. In contrast to investigative bodies such as the Canadian Human Rights Commission, the OIC does not make binding decisions, and only has the power to issue recommendations. I am thus not persuaded that the doctrine of *functus officio* has any application in a non-adjudicative, investigative process such as that in issue in this case.

VIII. The Power of a Government Institution to Amend its Grounds for Refusing Access

[44] Dr. Lukács also asserts that he has only made one access request, which was refused by NSERC. According to Dr. Lukács, the fact that NSERC repeatedly amended its grounds for refusing access does not create multiple decisions, each of which must be subject to separate applications for judicial review. If this were so, Dr. Lukács contends that a government institution could avoid its responsibilities under the Act by repeatedly amending its grounds of review every time the OIC is about to complete its investigation.

[45] Although he did not raise this argument before the OIC, Dr. Lukács submits that a government institution cannot amend its grounds for refusing access to documents once a complaint has been filed with the OIC. In support of this claim, Dr. Lukács cites the Federal Court of Appeal's decision in *Davidson v. Canada (Solicitor General)* 1989] 2 F.C. 341, 61 D.L.R. (4th) 342. That decision is, however, readily distinguishable from the present case, as the amended grounds relied upon in *Davidson* were only asserted by the government institution *after* the delivery of the Privacy Commissioner's report, and not before.

[46] The jurisprudence has, moreover, established that a government institution can indeed amend the grounds asserted for denying access if it does so *before* the OIC has reported in

relation to an access complaint: see, for example, *Tolmie v. Canada (Attorney General)*, [1997] 3 F.C. 893, 137 F.T.R. 309.

[47] *Tolmie* involved a request for access to a computer-readable version of the Revised Statutes of Canada. Access was initially denied to protect the economic interests of the government, as it was in the process of making the statutes available for sale in an electronic format.

[48] Mr. Tolmie filed a complaint with the OIC regarding the refusal to provide access to the requested documents. However, before the OIC could complete its investigation, the requested information became publicly available. Accordingly, the government institution amended its initial response to claim that the information was published material available for purchase by the public.

[49] The OIC found that the government institution's first ground for not disclosing the requested information was justified at the time of the complaint. The OIC further found that the amended ground asserted by the government institution justified non-disclosure at the date of the report, as the information was available on the internet by that time.

[50] Justice McGillis dismissed Mr. Tolmie's application, noting that the OIC had "expressly considered the question of whether the respondent could rely on an additional ground of exemption raised during the course of the investigation". She found that the OIC had properly determined that, on the facts of that case, the government institution was entitled to raise an additional ground of exemption during the course of the OIC's investigation: *Tolmie*, above, at para. 13.

[51] It is thus clear that there is no blanket prohibition on the ability of government institutions to amend the grounds relied upon to justify the refusal of access to documents once a complaint has been filed with the OIC, and that they can amend the grounds of exemption during the OIC investigative process.

[52] Dr. Lukács argued that little weight should be given to Justice McGillis' decision in *Tolmie*, because the Federal Court of Appeal subsequently overturned a decision referred to in her reasons: *Rubin v. Canada (Minister of Transport* (1995), 105 F.T.R. 81 [1995] F.C.J. No. 1731, rev'd [1998] 2 F.C. 430, 154 D.L.R. (4th) 414.

[53] While this is true, the Federal Court of Appeal did not appear be concerned about the fact that the government institution had amended its grounds for exemption in *Rubin* while the matter was still before the OIC. Indeed the entire Federal Court of Appeal decision relates to the amended ground.

[54] Insofar as this Court's decision in *Matol Botanical International Inc. v. Canada (Minister of National Health and Welfare)*, (1998), 84 F.T.R. 168, [1994] F.C.J. No. 860, is concerned, the facts of that case are readily distinguishable from the present case. In *Matol*, a third party brought an application under section 44 of the Act, objecting to the proposed disclosure by a government institution. The case thus did not involve a complaint to the OIC, nor was an OIC investigation or report involved, with the result that the section 41 prerequisites for commencing a Federal Court application did not apply. The Court's comments at paragraph 34 of *Matol* must be read in that context.

IX. Is the Application Premature to the Extent that it Relates to NSERC's Other Asserted Exemptions?

[55] The OIC has yet to investigate or report on the availability of the exemptions claimed by NSERC under sections 19(1), 21(1)(b) and 23 of the Act. Dr. Lukács' application for judicial review is thus premature: *Whitty*, above at para. 8. The application should therefore be struck on this basis.

X. Conclusion

[56] Much of Dr. Lukács' dissatisfaction stems from the OIC's decision to respond to his complaint by dividing its investigative and reporting functions into two phases. I agree with the parties that it is puzzling why the OIC would choose to report on a ground (subsection 10(2) of the Act) that was no longer in issue as of the date of the report, while at the same time opting not to investigate a ground (subsection 19(1) of the Act - personal information) that NSERC had asserted some two years earlier. However, as was noted earlier, the OIC is master of its own procedure, and this application does not relate to the way that the OIC has performed its statutory duties.

[57] To the extent that Dr. Lukács' application relates to NSERC's refusal to grant him access to the requested information under subsection 10(2) of the Act, the application is moot, as NSERC is no longer claiming an exemption under that provision.

[58] To the extent that Dr. Lukács' application relates to NSERC's refusal to grant him access to the requested information under sections 19(1), 21(1)(b) and 23 of the Act, the application is premature. The OIC has neither investigated nor reported on this aspect of Dr. Lukács'

complaint, with the result that the statutory preconditions for the commencement of an application for judicial review have not been met in this regard.

[59] In these circumstances, Dr. Lukács' application is clearly bereft of any chance of success, and NSERC's motion is granted. It will, of course, be open to Dr. Lukács to file a further application for judicial review in the future if he is not satisfied with the results of the OIC's investigation into the outstanding aspects of his access complaint.

[60] NSERC has not sought its costs of this application, and Dr. Lukács has not persuaded me that this case raises an important new principle regarding the *Access to Information Act* such that he should be entitled to his costs, notwithstanding the result. Consequently, no order will be made as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. NSERC's motion is granted, and this application for judicial review is struck out.

"Anne L. Mactavish"
Judge

APPENDIX

***Access to Information Act*, R.S.C. 1985, c. A-1**

10. (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)	10. (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :
(a) that the record does not exist, or	a) soit le fait que le document n'existe pas;
(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,	b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.
and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal	
(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.	(2) Le paragraphe (1) n'oblige pas le responsable de l'institution fédérale à faire état de l'existence du document demandé.
[…]	[…]
19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.	19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la Loi sur la protection des renseignements personnels.
[…]	[…]
21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains	21. (1) Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :

[…]	[…]
(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,	b) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel;
[…]	[…]
if the record came into existence less than twenty years prior to the request.	
23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.	23. Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.
34. Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.	34. Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information peut établir la procédure à suivre dans l'exercice de ses pouvoirs et fonctions.
37. (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the record with a report containing	37. (1) Dans les cas où il conclut au bien-fondé d'une plainte portant sur un document, le Commissaire à l'information adresse au responsable de l'institution fédérale de qui relève le document un rapport où :
(a) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and	a) il présente les conclusions de son enquête ainsi que les recommandations qu'il juge indiquées;
(b) where appropriate, a request that, within a time specified in the report, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.	b) il demande, s'il le juge à propos, au responsable de lui donner avis, dans un délai déterminé, soit des mesures prises ou envisagées pour la mise en oeuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite.

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(b) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

(2) Le Commissaire à l'information rend compte des conclusions de son enquête au plaignant et aux tiers qui pouvaient, en vertu du paragraphe 35(2), lui présenter des observations et qui les ont présentées; toutefois, dans les cas prévus à l'alinéa (1)b), le Commissaire à l'information ne peut faire son compte rendu qu'après l'expiration du délai imparti au responsable de l'institution fédérale

(3) Where a notice has been requested under paragraph (1)(b) but no such notice is received by the Commissioner within the time specified therefor or the action described in the notice is, in the opinion of the Commissioner, inadequate or inappropriate or will not be taken in a reasonable time, the Commissioner shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

(3) Le Commissaire à l'information mentionne également dans son compte rendu au plaignant, s'il y a lieu, le fait que, dans les cas prévus à l'alinéa (1)b), il n'a pas reçu d'avis dans le délai imparti ou que les mesures indiquées dans l'avis sont, selon lui, insuffisantes, inadaptées ou non susceptibles d'être prises en temps utile. Il peut en outre y inclure tous commentaires qu'il estime utiles.

(4) Where, pursuant to a request under paragraph (1)(b), the head of a government institution gives notice to the Information Commissioner that access to a record or a part thereof will be given to a complainant, the head of the institution shall give the complainant access to the record or part thereof

(4) Dans les cas où il fait suite à la demande formulée par le Commissaire à l'information en vertu de l'alinéa (1)b) en avisant le Commissaire qu'il donnera communication totale ou partielle d'un document, le responsable d'une institution fédérale est tenu de donner cette communication au plaignant :

(a) forthwith on giving the notice if no notice is given to a third party under paragraph 29(1)(b) in the matter; or

a) immédiatement, dans les cas où il n'y a pas de tiers à qui donner l'avis prévu à l'alinéa 29(1)b);

(b) forthwith on completion of twenty days after notice is given to a third party under paragraph 29(1)(b), if that notice is given, unless a review of the matter is requested under section 441.

b) dès l'expiration des vingt jours suivant l'avis prévu à l'alinéa 29(1)b), dans les autres cas, sauf si un recours en révision a été exercé en vertu de l'article 44.

(5) Where, following the investigation of a complaint relating to a refusal to give access to a record requested under this Act or a part thereof, the head of a government institution does not give notice to the Information Commissioner that access to the record will be given, the Information Commissioner shall inform the complainant that the complainant has the right to apply to the Court for a review of the matter investigated.

(5) Dans les cas où, l'enquête terminée, le responsable de l'institution fédérale concernée n'avise pas le Commissaire à l'information que communication du document ou de la partie en cause sera donnée au plaignant, le Commissaire à l'information informe celui-ci de l'existence d'un droit de recours en révision devant la Cour.

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2133-14
STYLE OF CAUSE:	DR. GABOR LUKACS v PRESIDENT OF THE NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	FEBRUARY 10, 2015
JUDGMENT AND REASONS:	MACTAVISH J.
DATED:	MARCH 3, 2015

APPEARANCES:

Dr. Gábor Lukács	FOR THE APPLICANT (ON HIS OWN BEHALF)
Melissa Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dr. Gábor Lukács Halifax, Nova Scotia	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20180830

**Dockets: A-78-17 (lead file); A-217-16; A-218-16;
A-223-16; A-224-16; A-225-16; A-232-16;
A-68-17; A-74-17; A-75-17;
A-76-17; A-77-17; A-84-17; A-86-17**

Citation: 2018 FCA 153

CORAM: **DAWSON J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY

Applicants

and

**ATTORNEY GENERAL OF CANADA,
NATIONAL ENERGY BOARD and
TRANS MOUNTAIN PIPELINE ULC**

Respondents

and

ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF BRITISH COLUMBIA

Interveners

Heard at Vancouver, British Columbia, on October 2-5, 10, 12-13, 2017.

Judgment delivered at Ottawa, Ontario, on August 30, 2018.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

DAWSON J.A.

Para.

Para.

Para.

I. Introduction

[1] On May 19, 2016, the National Energy Board issued its report concerning the proposed expansion of the Trans Mountain pipeline system. The Board's report recommended that the Governor in Council approve the expansion. The Board's recommendation was based on the Board's findings that the expansion is in Canada's public interest, and that if certain environmental protection procedures and mitigation measures are implemented, and if the conditions the Board recommended are implemented, the expansion is not likely to cause significant adverse environmental effects.

[2] On November 29, 2016, the Governor in Council accepted the Board's recommendation and issued Order in Council P.C. 2016-1069. The Order in Council recited the Governor in Council's acceptance of the Board's recommendation, and directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the expansion project, subject to the conditions recommended by the Board.

[3] A number of applications for judicial review of the Board's report and the Order in Council were filed in this Court. These applications were consolidated. These are the Court's reasons for judgment in respect of the consolidated proceeding. Pursuant to the order consolidating the applications, a copy of these reasons shall be placed in each file.

A. Summary of Conclusions

[4] While a number of applicants challenge the report of the National Energy Board, as explained below, the Order in Council is legally the only decision under review. Its validity is challenged on two principal grounds: first, the Board's process and findings were so flawed that the Governor in Council could not reasonably rely on the Board's report; second, Canada failed to fulfil the duty to consult owed to Indigenous peoples.

[5] Applying largely uncontested legal principles established by the Supreme Court of Canada to the factual record, a factual record that is also largely not contested, I conclude that most of the flaws asserted against the Board's process and findings are without merit. However, the Board made one critical error. The Board unjustifiably defined the scope of the Project under review not to include Project-related tanker traffic. The unjustified exclusion of marine shipping from the scope of the Project led to successive, unacceptable deficiencies in the Board's report and recommendations. As a result, the Governor in Council could not rely on the Board's report and recommendations when assessing the Project's environmental effects and the overall public interest.

[6] Applying the largely uncontested legal principles that underpin the duty to consult Indigenous peoples and First Nations set out by the Supreme Court, I also conclude that Canada acted in good faith and selected an appropriate consultation framework. However, at the last stage of the consultation process prior to the decision of the Governor in Council, a stage called Phase III, Canada's efforts fell well short of the mark set by the Supreme Court of Canada. Canada failed in Phase III to engage, dialogue meaningfully and grapple with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns. The duty to consult was not adequately discharged.

[7] Accordingly, for the following reasons, I would quash the Order in Council and remit the matter back to the Governor in Council for appropriate action, if it sees fit, to address these flaws and, later, proper redetermination.

[8] These reasons begin by describing: (i) the expansion project; (ii) the applicants who challenge the Board's report and the Order in Council; (iii) the pending applications for judicial review; (iv) the legislative regime; (v) the report of the Board; and, (vi) the decision of the Governor in Council. The reasons then set out the factual background relevant to the challenges before the Court before turning to the issues raised in these applications and the consideration of those issues.

II. The Project

[9] No company may operate an interprovincial or international pipeline in Canada unless the National Energy Board has issued a certificate of public convenience and necessity, and given

leave to the company to open the pipeline (subsection 30(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7).

[10] Trans Mountain Pipeline ULC is the general partner of Trans Mountain Pipeline L.P. (together referred to as Trans Mountain). Trans Mountain owns and holds operating certificates issued by the National Energy Board for the existing Trans Mountain pipeline system. This system includes a pipeline approximately 1,147 kilometres long that moves crude oil, and refined and semi-refined petroleum products from Edmonton, Alberta to marketing terminals and refineries in the central region and lower mainland area of British Columbia, as well as to the Puget Sound area in Washington State.

[11] On December 16, 2013, Trans Mountain submitted an application to the National Energy Board for a certificate of public convenience and necessity (and certain amended certificates) for the Trans Mountain Expansion Project (Project).

[12] The application described the Project to consist of a number of components, including: (i) twinning the existing pipeline system with approximately 987 kilometres of new pipeline segments, including new proposed pipeline corridors and rights-of-way, for the purpose of transporting diluted bitumen from Edmonton, Alberta to Burnaby, British Columbia; (ii) new and modified facilities, including pump stations and tanks (in particular, an expanded petroleum tank farm in Burnaby which would be expanded from 13 to 26 storage tanks); (iii) a new and expanded dock facility, including three new berths, at the Westridge Marine Terminal in

Burnaby; and, (iv) two new pipelines running from the Burnaby storage facility to the Westridge Marine Terminal.

[13] The Project would increase the number of tankers loaded at the Westridge Marine Terminal from approximately five Panamax and Aframax class tankers per month to approximately 34 Aframax class tankers per month. Aframax tankers are larger and carry more product than Panamax tankers. The Project would increase the overall capacity of Trans Mountain's existing pipeline system from 300,000 barrels per day to 890,000 barrels per day.

[14] Trans Mountain's application stated that the primary purpose of the Project is to provide additional capacity to transport crude oil from Alberta to markets in the Pacific Rim, including Asia. If built, the system would continue to transport crude oil—primarily diluted bitumen.

III. The Applicants

[15] A number of First Nations and two large cities are significantly concerned about the Project and its impact upon them, and challenge its approval. Two non-governmental agencies also challenge the Project. These applicants are described below.

A. Tsleil-Waututh Nation

[16] The applicant Tsleil-Waututh Nation is a Coast Salish Nation. It is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 and its members are Aboriginal peoples within the

meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

[17] In the traditional dialect of Halkomelem, the name Tsleil-Waututh means "People of the Inlet". Tsleil-Waututh's asserted traditional territory extends approximately from the vicinity of Mount Garibaldi to the north to the 49th parallel and beyond to the south. The traditional territory extends west to Gibsons and east to Coquitlam Lake. The traditional territory includes areas across British Columbia's Lower Mainland, including sections of the Lower Fraser River, Howe Sound, Burrard Inlet and Indian Arm.

[18] Tsleil-Waututh's traditional territory encompasses the proposed Westridge Marine Terminal and fuel storage facility expansion, and approximately 18 kilometres of pipeline right-of-way. Approximately 45 kilometres of marine shipping route will pass within Tsleil-Waututh's asserted traditional territory.

[19] Much of Tsleil-Waututh's population of 500 people live in its primary community of Tsleil-Waututh, which is located on the north shore of Burrard Inlet, approximately 3 kilometres across the Inlet from the Westridge Marine Terminal.

[20] Tsleil-Waututh asserts Aboriginal title to the land, water, air, marine foreshore and resources in Eastern Burrard Inlet. It also asserts freestanding stewardship, harvesting and cultural rights in this area. The Crown states that it assessed its duty to consult with Tsleil-Waututh on the deeper end of the consultation spectrum.

B. City of Vancouver

[21] The City of Vancouver is the third most densely populated city in North America, after New York City and San Francisco. It has 69.8 kilometres of waterfront along Burrard Inlet, English Bay, False Creek and the Fraser River, with 18 kilometres of beaches and a 22-kilometre long seawall.

[22] Approximately 25,000 residents of Vancouver live within 300 metres of the Burrard Inlet and English Bay shorelines.

C. City of Burnaby

[23] The City of Burnaby is the third largest city in British Columbia, with a population of over 223,000 people.

[24] A number of elements of the Project infrastructure will be located in Burnaby: (i) the new Westridge Marine Terminal; (ii) the Burnaby Terminal, including thirteen new storage tanks and one replacement storage tank; (iii) two new delivery lines following a new route connecting the Burnaby Terminal to the Westridge Marine Terminal through a new tunnel to be drilled under the Burnaby Mountain Conservation Area; and, (iv) a portion of the main pipeline along a new route to the Burnaby Terminal.

D. The Squamish Nation

[25] The applicant Squamish Nation is a Coast Salish Nation. It is a band within the meaning of the *Indian Act* and its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. There are currently just over 4,000 registered members of the Squamish Nation.

[26] The Squamish assert that since a time before contact with Europeans, Squamish have used and occupied lands and waters on the southwest coast of what is now British Columbia, extending from the Lower Mainland north to Whistler. This territory includes Burrard Inlet, English Bay, Howe Sound and the Squamish Valley. The boundaries of asserted Squamish territory thus encompass all of Burrard Inlet, English Bay and Howe Sound, as well as the rivers and creeks that flow into these bodies of water.

[27] Squamish has three reserves located in and at the entrance to Burrard Inlet:

i. Seymour Creek Reserve No. 2 (ch'ích'elxwi7kw) on the North shore close to the Westridge Marine Terminal;
ii. Mission Reserve No. 1 (eslhá7an); and,
iii. Capilano Reserve No. 5 (xwmelchstn).

Also located in the area are Kitsilano Reserve No. 6 (senákw) near the entrance to False Creek, and three other waterfront reserves in Howe Sound.

[28] Project infrastructure, including portions of the main pipeline, the Westridge Marine Terminal, the Burnaby Terminal, two new delivery lines connecting the terminals, and sections of the tanker routes for the Project will be located in Squamish's asserted traditional territory and close to its reserves across the Burrard Inlet. The shipping route for the Project will also travel past three Squamish reserves through to the Salish Sea.

[29] Squamish asserts Aboriginal rights, including title and self-government, within its traditional territory. Squamish also asserts Aboriginal rights to fish in the Fraser River and its tributaries. The Crown assessed its duty to consult Squamish at the deeper end of the consultation spectrum.

E. Coldwater Indian Band

[30] The applicant Coldwater is a band within the meaning of section 2 of the *Indian Act*. Its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. Coldwater, together with 14 other bands, comprise the Nlaka'pamux Nation.

[31] The Nlaka'pamux Nation's asserted traditional territory encompasses part of south-central British Columbia extending from the northern United States to north of Kamloops. This territory includes the Lower Thompson River area, the Fraser Canyon, the Nicola and Coldwater Valleys and the Coquihalla area.

[32] Coldwater's registered population is approximately 850 members. Approximately 330 members live on Coldwater's reserve lands. Coldwater holds three reserves: (i) Coldwater Indian Reserve No. 1 (Coldwater Reserve) approximately 10 kilometres southwest of Merritt, British Columbia; (ii) Paul's Basin Indian Reserve No. 2 located to the southwest of the Coldwater Reserve, upstream on the Coldwater River; and, (iii) Gwen Lake Indian Reserve No. 3 located on Gwen Lake.

[33] Approximately 226 kilometres of the proposed pipeline right-of-way and four pipeline facilities (the Kamloops Terminal, the Stump Station, the Kingsvale Station and the Hope Station) will be located within the Nlaka'pamux Nation's asserted traditional territory. The Kingsvale Station is located in the Coldwater Valley. The approved pipeline right-of-way skirts the eastern edges of the Coldwater Reserve. The existing Trans Mountain pipeline system transects both the Coldwater Reserve and the Coldwater Valley.

[34] Coldwater asserts Aboriginal rights and title in, and the ongoing use of, the Coldwater and Nicola Valleys and the Nlaka'pamux territory more generally. The Crown assessed its duty to consult Coldwater at the deeper end of the consultation spectrum.

F. The Stó:lō Collective

[35] One translation of the term "Stó:lō" is "People of the River", referencing the Fraser River. The Stó:lō are a Halkomelem-speaking Coast Salish people. Traditionally, they have been tribally organized.

[36] The "Stó:lō Collective" was formed for the sole purpose of coordinating and representing the interests of its membership before the National Energy Board and in Crown consultations about the Project. The Stó:lō Collective represents the following applicants:

(a) Aitchelitz, Skowkale, Tzeachten, Squiala First Nation, Yakweakwioose, Shxwa:y Village and Soowahlie, each of which are villages and also bands within the meaning of section 2 of the *Indian Act* (the Ts'elxweyeqw Villages). The Ts'elxweyeqw Villages collectively comprise the Ts'elxweyeqw Tribe. Members of the Ts'elxweyeqw Villages are Stó:lō people and Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*; and,

(b) Skwah and Kwaw-Kwaw-Apilt, each of whom are villages and also bands within the meaning of section 2 of the *Indian Act* (the Pil'Alt Villages). The Pil'Alt Villages are members of the Pil'Alt Tribe. Members of the Pil'Alt Villages are Stó:lō people and Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. The Pil'Alt Villages are represented by the Ts'elxweyeqw Tribe in matters relating to the Project. (On March 6, 2018, Kwaw-Kwaw-Apilt filed a notice of discontinuance.)

[37] The Stó:lō's asserted traditional territory, known as S'olh Temexw, includes the lower Fraser River watershed.

[38] The Stó:lō live in many villages, all of which are located in the lower Fraser River watershed.

[39] The existing Trans Mountain pipeline crosses, and the Project's proposed new pipeline route would cross, approximately 170 kilometres of the Stó:lō Collective applicants' asserted

traditional territory, beginning from an eastern point of entry near the Coquihalla Highway and continuing to the Burrard Inlet.

[40] The Stó:lō possess established Aboriginal fishing rights on the Fraser River (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289). The Crown assessed its duty to consult Stó:lō at the deeper end of the consultation spectrum.

G. Upper Nicola Band

[41] The applicant Upper Nicola is a member community of the Syilx (Okanagan) Nation and a band within the meaning of section 2 of the *Indian Act*. Upper Nicola and Syilx are an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*.

[42] The Syilx Nation's asserted traditional territory extends from the north past Revelstoke around Kinbasket to the south to the vicinity of Wilbur, Washington. It extends from the east near Kootenay Lake to the west to the Nicola Valley. Upper Nicola currently has eight Indian Reserves within Upper Nicola's/Syilx's asserted territory. The primary residential communities are Spaxomin, located on Upper Nicola Indian Reserve No. 3 on the western shore of Douglas Lake, and Quilchena, located on Upper Nicola Indian Reserve No. 1 on the eastern shore of Nicola Lake.

[43] Approximately 130 kilometres of the Project's proposed new pipeline will cross through Upper Nicola's area of responsibility within Syilx territory. The Stump Station and the Kingsvale Station are also located within Syilx/Upper Nicola's asserted territory.

[44] Upper Nicola asserts responsibility to protect and preserve the claimed Aboriginal title and harvesting and other rights held collectively by the Syilx, particularly within its area of responsibility in the asserted Syilx territory. The Crown assessed its duty to consult Upper Nicola at the deeper end of the consultation spectrum.

H. Stk'emlupsemc te Secwepemc of the Secwepemc Nation

[45] The Secwepemc are an Aboriginal people living in the area around the confluence of the Fraser and Thompson Rivers. The Secwepemc Nation is comprised of seven large territorial groupings referred to as "Divisions". The Stk'emlupsemc te Secwepemc Division (SSN) is comprised of the Skeetchestn Indian Band and the Kamloops (or Tk'emlups) Indian Band. Both are bands within the meaning of section 2 of the *Indian Act*. SSN's members are also Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*.

[46] The Skeetchestn Indian Band is located along the northern bank of the Thompson River, approximately 50 kilometres west of Kamloops and has four reserves. Its total registered population is 533. The Tk'emlups Indian Band is located in the Kamloops area and has six reserves. Its total registered population is 1,322. Secwepemc Territory is asserted to be a

substantial landmass which encompasses many areas, including the area in the vicinity of Kamloops Lake.

[47] The existing and proposed pipeline right-of-way crosses through SSN's asserted traditional territory for approximately 350 kilometres. Approximately 80 kilometres of the proposed pipeline right-of-way and two pipeline facilities, the Black Pines Station and the Kamloops Terminal, will be located within SSN's asserted traditional territory.

[48] The SSN claim Aboriginal title over its traditional territory. The Crown assessed its duty to consult SSN at the deeper end of the consultation spectrum.

I. Raincoast Conservation Foundation and Living Oceans Society

[49] These applicants are not-for-profit organizations. Their involvement in the National Energy Board review process focused primarily on the effects of Project-related marine shipping.

IV. The applications challenging the report of the National Energy Board and the Order in Council

[50] As will be discussed in more detail below, two matters are challenged in this consolidated proceeding: first, the report of the National Energy Board which recommended that the Governor in Council approve the Project and direct the Board to issue the necessary certificate of public convenience and necessity; and, second, the decision of the Governor in Council to accept the recommendation of the Board and issue the Order in Council directing the Board to issue the certificate.

[51] The following applicants applied for judicial review of the report of the National Energy Board:

- Tsleil-Waututh Nation (Court File A-232-16)
- City of Vancouver (Court File A-225-16)
- City of Burnaby (Court File A-224-16)
- The Squamish Nation and Xálek/Sekyú Siý am, Chief Ian Campbell on his own behalf and on behalf of all members of Squamish (Court File A-217-16)
- Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of Coldwater on behalf of all members of Coldwater (Court File A-223-16)
- Raincoast Conservation Foundation and Living Oceans Society (Court File A-218-16).

[52] The following applicants applied, with leave, for judicial review of the decision of the Governor in Council:

- Tsleil-Waututh Nation (Court File A-78-17)
- City of Burnaby (Court File A-75-17)
- The Squamish Nation and Xálek/Sekyú Siý am, Chief Ian Campbell on his own behalf and on behalf of all members of Squamish (Court File A-77-17)
- Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of Coldwater on behalf of all members of Coldwater (Court File A-76-17)
- The Stó:lō Collective applicants (Court File A-86-17)
- Upper Nicola Band (Court File A-74-17)
- Chief Ron Ignace and Chief Fred Seymour, on their own behalf and on behalf of all other members of Stk'emlupsemc te Secwepemc of the Secwepemc Nation (Court File A-68-17)
- Raincoast Conservation Foundation and Living Oceans Society (Court File A-84-17).

V. The legislative regime

[53] For ease of reference the legislative provisions referred to in this section of the reasons are set out in the Appendix to these reasons.

A. The requirements of the *National Energy Board Act*

[54] As explained above, no company may operate an interprovincial or international pipeline in Canada unless the National Energy Board has issued a certificate of public convenience and necessity, and, after the pipeline is built, has given leave to the company to open the pipeline.

[55] Trans Mountain's completed application for a certificate of public convenience and necessity for the Project triggered the National Energy Board's obligation to assess the Project pursuant to section 52 of the *National Energy Board Act*. Subsection 52(1) of that Act requires the Board to prepare and submit to the Minister of Natural Resources, for transmission to the Governor in Council, a report which sets out the Board's recommendation as to whether the certificate should be granted, together with all of the terms and conditions that the Board considers the certificate should be subject to if issued. The Board is to provide its reasons for its recommendation. When considering whether to recommend issuance of a certificate the Board is required to take into account "whether the pipeline is and will be required by the present and future public convenience and necessity".

[56] The Board's recommendation is, pursuant to subsection 52(2) of the *National Energy Board Act*, to be based on "all considerations that appear to it to be directly related to the

pipeline and to be relevant" and the Board may have regard to five specifically enumerated factors which include "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application."

[57] If an application relates to a "designated" project, as defined in section 2 of the *Canadian Environmental Assessment Act, 2012*, the Board's report must also set out the Board's environmental assessment of the project. This assessment is to be prepared under the *Canadian Environmental Assessment Act, 2012* (subsection 52(3) of the *National Energy Board Act*). A designated project is defined in section 2 of the *Canadian Environmental Assessment Act, 2012*:

designated project means one or more physical activities that	projet désigné Une ou plusieurs activités concrètes :
(*a*) are carried out in Canada or on federal lands;	*a*) exercées au Canada ou sur un territoire domanial;
(*b*) are designated by regulations made under paragraph 84(*a*) or designated in an order made by the Minister under subsection 14(2); and	*b*) désignées soit par règlement pris en vertu de l'alinéa 84*a*), soit par arrêté pris par le ministre en vertu du paragraphe 14(2);
(*c*) are linked to the same federal authority as specified in those regulations or that order.	*c*) liées à la même autorité fédérale selon ce qui est précisé dans ce règlement ou cet arrêté.
It includes any physical activity that is incidental to those physical activities.	Sont comprises les activités concrètes qui leur sont accessoires.

[58] The remaining subsections in section 52 deal with the timeframe in which the Board must complete its report. Generally, a report must be submitted to the Minister within the time limit specified by the Chair of the Board. The specified time limit must not be longer than 15 months after the completed application has been submitted to the Board.

B. The requirements of the *Canadian Environmental Assessment Act, 2012*

[59] Pursuant to subsection 4(3) of the *Regulations Designating Physical Activities*, SOR/2012-147, and section 46 of the Schedule thereto, because the Project includes a new onshore pipeline longer than 40 kilometres, the Project is a designated project as defined in part (*b*) of the definition of "designated project" set out in paragraph 57 above. In consequence, the Board was required to conduct an environmental assessment under the *Canadian Environmental Assessment Act, 2012*. For this purpose, subsection 15(*b*) of the *Canadian Environmental Assessment Act, 2012* designated the National Energy Board to be the sole responsible authority for the environmental assessment.

[60] As the responsible authority, the Board was required to take into account the environmental effects enumerated in subsection 5(1) of the *Canadian Environmental Assessment Act, 2012*. These effects include changes caused to the land, water or air and to the life forms that inhabit these elements of the environment. The effects to be considered are to include the effects upon Aboriginal peoples' health and socio-economic conditions, their physical and cultural heritage, their current use of lands and resources for traditional purposes, and any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

[61] Subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* required the Board to take into account a number of enumerated factors when conducting the environmental assessment, including:

- the environmental effects of the designated project (including the environmental effects of malfunctions or accidents that may occur in connection with the

designated project) and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

- mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;
- alternative means of carrying out the designated project that are technically and economically feasible, and the environmental effects of any such alternative means; and
- any other matter relevant to the environmental assessment that the responsible authority, here the Board, requires to be taken into account.

[62] The Board was also required under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* to make recommendations to the Governor in Council with respect to the decision to be made by the Governor in Council under paragraph 31(1)(*a*) of that Act—a decision about the existence of significant adverse environmental effects and whether those effects can be justified in the circumstances.

C. Consideration by the Governor in Council

[63] Once in receipt of the report prepared in accordance with the requirements of the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*, the Governor in Council may make its decision concerning the proponent's application for a certificate.

[64] Three decisions are available to the Governor in Council. It may, by order:

i. "direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report" (paragraph 54(1)(*a*) of the *National Energy Board Act*); or

ii. "direct the Board to dismiss the application for a certificate" (paragraph 54(1)(*b*) of the *National Energy Board Act*); or

iii. "refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration" and specify a time limit for the reconsideration (subsections 53(1) and (2) of the *National Energy Board Act*).

[65] Subsection 54(2) of the *National Energy Board Act* requires that the Governor in Council's order "must set out the reasons for making the order."

[66] Subsection 54(3) of the *National Energy Board Act* requires the Governor in Council to issue its order within three months after the Board's report is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, extend this time limit.

[67] Additionally, once the National Energy Board as the responsible authority for the designated project has submitted its report with respect to the environmental assessment, pursuant to subsection 31(1) of the *Canadian Environmental Assessment Act, 2012*, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*, "decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment … that the designated project":

(i) is not likely to cause significant adverse environmental effects,	(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,
(ii) is likely to cause significant adverse environmental effects that can	(ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans

be justified in the circumstances, or	les circonstances,
(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances;	(iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

VI. The report of the National Energy Board

[68] On May 19, 2016, the Board issued its report which recommended approval of the Project. The recommendation was based on a number of findings, including:

- With the implementation of Trans Mountain's environmental protection procedures and mitigation measures, and the Board's recommended conditions, the Project is not likely to cause significant adverse environmental effects.
- However, effects from the operation of Project-related marine vessels would contribute to the total cumulative effects on the Southern resident killer whales, and would further impede the recovery of that species. Southern resident killer whales are an endangered species that reside in the Salish Sea. Project-related marine shipping follows a route through the Salish Sea to the open ocean that travels through the whales' critical habitat as identified in the Recovery Strategy for the Northern and Southern resident killer whales. The Board's finding was that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, and that it is likely to result in significant adverse effects on Aboriginal cultural uses associated with these marine mammals."
- The likelihood of a spill from the Project or from a Project-related tanker would be very low in light of the mitigation and safety measures to be implemented. However, the consequences of large spills could be high.
- The Board's recommendation and decisions with respect to the Project were consistent with subsection 35(1) of the *Constitution Act, 1982*.

- The Project would be in the Canadian public interest and would be required by the present and future public convenience and necessity.
- If approved, the Board would attach 157 conditions to the certificate of public convenience and necessity. The conditions dealt with a broad range of matters, including the safety and integrity of the pipeline, emergency preparedness and response and ongoing consultation with affected entities, including Indigenous communities.

VII. The decision of the Governor in Council

[69] On November 29, 2016, the Governor in Council issued the Order in Council, accepting the Board's recommendation that the Project be approved and directing the Board to issue a certificate of public convenience and necessity to Trans Mountain.

[70] The Order in Council contained a number of recitals, two of which are relevant to these applications. First, the Governor in Council stated its satisfaction "that the consultation process undertaken is consistent with the honour of the Crown and the [Aboriginal] concerns and interests have been appropriately accommodated". Second, the Governor in Council accepted the Board's recommendation that the Project is required by present and future public convenience and necessity and that it will not likely cause significant adverse environmental effects.

[71] The Order in Council was followed by a 20-page explanatory note which was stated not to form part of the Order in Council. The Explanatory Note described the Project and its objectives and the review process before the National Energy Board, and summarized the issues raised before the Board. The Explanatory Note also dealt with matters that post-dated the Board's report and set out the government's "response to what was heard".

VIII. Factual background

A. Canada's consultation process

[72] The first step in the consultation process was determining the Indigenous groups whose rights and interests might be adversely impacted by the Project. In order to do this, a number of federal departments and the National Energy Board coordinated research and analysis on the proximity of Indigenous groups' traditional territories to elements of the Project, including the proposed pipeline right-of-way, the marine terminal expansion, and the designated shipping lanes. Approximately 130 Indigenous groups were identified, including all of the Indigenous applicants.

[73] On August 12, 2013, the National Energy Board wrote to the identified Indigenous groups to advise that Trans Mountain had filed a Project description on May 23, 2013, and to provide preliminary information about the upcoming review process. This letter also attached a letter from the Major Projects Management Office of Natural Resources Canada. The Major Projects Management Office's letter advised that Canada would rely on the National Energy Board's public hearing process:

> to the extent possible, to fulfil any Crown duty to consult Aboriginal groups for the proposed Project. Through the [National Energy Board] process, the [Board] will consider issues and concerns raised by Aboriginal groups. The Crown will utilise the [National Energy Board] process to identify, consider and address the potential adverse impacts of the proposed Project on established or potential Aboriginal and treaty rights.

[74] In subsequent letters sent to Indigenous groups between August 2013 and February 19, 2016, the Major Projects Management Office directed Indigenous groups that could be impacted

by the Project to participate in and communicate their concerns through the National Energy Board public hearings. Additionally, Indigenous groups were advised that Canada viewed the consultation process to be as follows:

i. Canada would rely, to the extent possible, on the Board's process to fulfil its duty to consult Indigenous peoples about the Project;

ii. There would be four phases of Crown consultation:

   a. "Phase I": early engagement, from the submission of the Project description to the start of the National Energy Board hearing;

   b. "Phase II": the National Energy Board hearing, commencing with the start of the Board hearing and continuing until the close of the hearing record;

   c. "Phase III": consideration by the Governor in Council, commencing with the close of the hearing record and continuing until the Governor in Council rendered its decision in relation to the Project; and

   d. "Phase IV": regulatory authorization should the Project be approved, commencing with the decision of the Governor in Council and continuing until the issuance of department regulatory approvals, if required.

iii. Natural Resources Canada's Major Projects Management Office would serve as the Crown Consultation Coordinator for the Project.

iv. Following Phase III consultations, an adequacy of consultation assessment would be prepared by the Crown. The assessment would be based upon the depth of consultation owed to each Indigenous group. The depth of consultation owed would in turn be based upon the Project's potential impact on each group and the strength of the group's claim to potential or established Aboriginal or treaty rights.

[75] On May 25, 2015, towards the end of Phase II, the Major Projects Management Office wrote to Indigenous groups, including the applicants, to provide additional information on the scope and timing of Phase III Crown consultation. Indigenous groups were advised that:

i. Canada intended to submit summaries of the concerns and issues Indigenous groups had brought forward to date and to seek feedback on the completeness and accuracy of the summaries. The summaries would be issued in the form of Information Requests, a Board hearing process explained below. Canada would also seek Indigenous groups' views on adverse impacts not yet addressed by Trans Mountain's mitigation measures. The Crown would use the information provided by Indigenous groups to "refine our current understanding of the potential impacts of the project on asserted or established Aboriginal or treaty rights."

ii. Phase III consultation would focus on two questions:

   a. Are there outstanding concerns with respect to Project-related impacts to potential or established Aboriginal or treaty rights?

   b. Are there incremental accommodation measures that should be considered by the Crown to address any outstanding concerns?

iii. Information made available to the Crown throughout each phase of the consultation process would be consolidated into a "Crown Consultation Report". "This report will summarize both the procedural aspects of consultations undertaken and substantive issues raised by Aboriginal groups, as well as how these issues may be addressed in the process". The section of the Crown Consultation Report dealing with each Indigenous group would be provided to the group for review and comment before the report was placed before the Governor in Council.

iv. If Indigenous groups identified outstanding concerns there were a number of options which might "be considered and potentially acted upon." The options were described to be:

> The Governor in Council has the option of asking the [National Energy Board] to reconsider its recommendation and conditions. Federal and provincial governments could undertake additional consultations prior to issuing additional permits and/or authorizations. Finally, federal and provincial governments can also use existing or new policy and program measures to address outstanding concerns.

(underlining added)

B. Prehearing matters and the Project application

[76] To facilitate participation in the National Energy Board hearing process, the Board operates a participant funding program. On July 22, 2013, the Board announced that it was making funding available under this program to assist landowners, Indigenous groups and other interested parties to participate in the Board's consideration of the Project. To apply for funding, a party required standing as an intervener in the Board's process.

[77] On July 29, 2013, the Board released its "list of issues" which identified the topics the Board would consider in its review of the Project. The following issues of relevance to these applications were included:

- the need for the proposed Project.
- the potential environmental and socio-economic effects of the proposed Project, including any cumulative environmental effects that were likely to result from the Project, including those the Board's Filing Manual required to be considered.
- the potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that might occur.
- the terms and conditions to be included in any recommendation to approve the Project that the Board might issue.
- the potential impacts of the Project on Indigenous interests.
- contingency plans for spills, accidents or malfunctions, during construction and operation of the Project.

[78] On September 10, 2013, the Board issued "Filing Requirements Related to the Potential Environmental and Socio-Economic Effects of Increased Marine Shipping Activities." This was

a guidance document intended to assist the proponent. The document described requirements that supplemented those set out in the Board's Filing Manual.

[79] In particular, this guidance document required Trans Mountain's assessment of accidents and malfunctions to deal with a number of things, including measures to reduce the potential for accidents and malfunctions, credible worst case spill scenarios together with smaller spill scenarios and information on the fate and behaviour of any spilled hydrocarbons. For all mitigation measures Trans Mountain proposed, it was required to describe the roles, responsibilities and capabilities of each relevant organization in implementing mitigation measures, and the level of care and control Trans Mountain would have in overseeing or implementing the measures.

[80] On December 16, 2013, Trans Mountain formally filed its application, seeking approval to construct and operate the Project.

C. The scoping decision and the hearing order

[81] On April 2, 2014, the Board issued a number of decisions setting the parameters of the Project's environmental assessment and establishing the hearing process for the Project. Three of these decisions are of particular relevance to these applications.

[82] First, the Board issued a hearing order which set out timelines and a process for the hearing. The hearing order did not allow any right of oral cross-examination. Instead, the hearing order provided a process whereby interveners and the Board could submit written interrogatories,

referred to as Information Requests, to Trans Mountain. The hearing order also set out a process for interveners and the Board to compel adequate responses to their Information Requests, an opportunity for Indigenous groups to provide oral traditional evidence, and allowed both written arguments in chief and summary oral arguments.

[83] Next, in the decision referred to as the "scoping" decision, the Board defined the "designated project" to be assessed, and described the factors to be assessed under the *Canadian Environmental Assessment Act, 2012* (and the scope of each factor). In defining the "designated project", the Board did not include marine shipping activities as part of the "designated project". Rather, the Board stated that it would consider the effects of increased marine shipping under the *National Energy Board Act*. To the extent there was potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board would consider those effects under the cumulative effects portion of the *Canadian Environmental Assessment Act, 2012* environmental assessment.

[84] Finally, the Board ruled on participation rights in the hearing. The Board granted participation status to 400 interveners and 1,250 commentators. All of the applicants before the Court applied for, and were granted, intervener status. Additionally, a number of government departments were granted intervener status; both Health Canada and the Pacific Pilotage Authority were granted commentator status.

D. Challenges to the hearing order and the scoping decision

[85] Of relevance to issues raised in these applications are two challenges brought against the hearing order and the scoping decision.

[86] The first challenge requested that all evidence filed in the hearing be subject to oral cross-examination. The Board dismissed this request in Ruling No. 14. In Ruling No. 51, the Board dismissed motions seeking reconsideration of Ruling No. 14.

[87] The second challenge was brought by Tsleil-Waututh to aspects of both the hearing order and the scoping decision. Tsleil-Waututh asserted, among other things, that the Board erred in law by failing to include marine shipping activities in the Project description. This Court granted Tsleil-Waututh leave to appeal this and other issues. On September 6, 2016, this Court dismissed the appeal (2016 FCA 219). The dismissal of the appeal was expressly stated, at paragraph 21 of the Court's reasons, to be without prejudice to Tsleil-Waututh's right to raise the issue of the proper scope of the Project "in subsequent proceedings".

E. The TERMPOL review process

[88] In view of the Project's impact on marine shipping, it is useful to describe this process.

[89] Trans Mountain requested that the marine transportation components of the Project be assessed under the voluntary Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL). The review process was chaired by Transport Canada and the

review committee was composed of representatives of other federal agencies and Port Metro Vancouver.

[90] The purpose of the review process was to objectively appraise operational vessel safety, route safety and cargo transfer operations associated with the Project, with a focus on improving, where possible, elements of the Project.

[91] The review committee did not identify regulatory concerns for the tankers, tanker operations, the proposed route, navigability, other waterway users or the marine terminal operations associated with tankers supporting the Project. It found that Trans Mountain's commitments to the existing marine safety regime would provide for a higher level of safety for tanker operations appropriate to the increase in traffic.

[92] The review committee also proposed certain measures to provide for a high level of safety for tanker operations. Examples of such proposed measures were the extended use of tethered and untethered tug escorts and the extension of the pilot disembarkation zone. Trans Mountain agreed to adopt each of the recommended measures.

[93] The TERMPOL report formed part of Transport Canada's written evidence before the National Energy Board.

F. The applicants' participation in the hearing before the Board

[94] The applicants, as interveners before the Board, were entitled to:

- issue Information Requests to Trans Mountain and others;
- file motions, including motions to compel adequate responses to Information Requests;
- file written evidence;
- comment on draft conditions; and,
- present written and oral summary argument.

[95] All of the applicants issued Information Requests, filed or supported motions and filed written evidence. Interveners who filed evidence were required to respond in writing to written questions about their evidence from the Board, Trans Mountain or other interveners.

[96] All of the applicants filed written submissions commenting on draft conditions except for the City of Vancouver and SSN.

[97] All of the applicants filed written arguments and all of the applicants except SSN delivered oral summary arguments.

[98] Indigenous interveners could adduce traditional Indigenous evidence, either orally or in writing. Oral evidence could be questioned orally by other interveners, Trans Mountain or the Board. Tsleil-Waututh, Squamish, Coldwater, SSN, and Upper Nicola provided oral, Indigenous traditional evidence. The Stó:lō Collective formally objected to the Board's procedure for introducing Indigenous oral traditional evidence and did not provide such evidence.

G. Participant funding

[99] As previously mentioned, the Board operated a participant funding program. Additional funding was available through the Major Projects Management Office and Trans Mountain.

[100] It is fair to say that the participant funding provided to the applicants by the Board and the Major Projects Management Office was generally viewed to be inadequate by them (see for example the affidavit of Chief Ian Campbell of the Squamish Nation). Concerns were also expressed about delays in funding. Funds provided by the Board could only be applied to work conducted after the funding was approved and a funding agreement was executed.

[101] The following funds were paid or offered.

1. Tsleil-Waututh Nation

[102] Tsleil-Waututh requested $766,047 in participant funding. It was awarded $40,000, plus travel costs for two members to attend the hearing. Additionally, the Major Projects Management Office offered to pay $14,000 for consultation following the close of the hearing record and $12,000 following the release of the Board's report. These offers were not accepted.

2. The Squamish Nation

[103] Squamish applied for $293,350 in participant funding. It was awarded $44,720, plus travel costs for one person to attend the hearing. The Major Projects Management Office offered

$12,000 for consultations following the close of the Board's hearing record, and $14,000 to support participation in consultations following the release of the Board's report. These funds were paid.

3. Coldwater Indian Band

[104] Coldwater was awarded $48,490 in participant funding from the Board. Additionally, the Major Projects Management Office offered an additional $52,000 in participant funding.

4. The Stó:lō Collective

[105] The Stó:lō Collective was awarded $42,307 per First Nation band in participant funding from the Board. Additionally, the Major Projects Management Office offered $4,615.38 per First Nation band for consultation following the close of the Board's hearing record, and $5,384.61 per First Nation band following the release of the Board's report.

5. Upper Nicola Band

[106] Upper Nicola was awarded $40,000 plus travel costs for two members to attend the hearing and an additional $10,000 in special funding through the Board's participant funding program. Additionally, the Major Projects Management Office offered Upper Nicola Band and the Okanagan Nation Alliance $11,977 and $24,000 respectively in participant funding for consultations following the close of the Board's hearing record. The Okanagan Nation Alliance was offered an additional $26,000 following the release of the Board's report.

6. SSN

[107] SSN applied for participant funding in excess of $300,000 in order to participate in the Board's hearing. It was awarded $36,920 plus travel costs for two members to attend the hearing. Additionally, the Major Projects Management Office offered $18,000 in participation funding for consultations following the close of the Board's hearing record and $21,000 for consultations following the release of the Board's report.

7. Raincoast Conservation Foundation and Living Oceans Society

[108] Raincoast was awarded $111,100 plus travel costs for two people to attend the hearing from the Board's participant funding program. Living Oceans was awarded $89,100 plus travel costs for two persons to attend the hearing through the participant funding program.

H. Crown consultation efforts—a brief summary

1. Phase I (from 2013 to April 2014)

[109] In this initial engagement phase some correspondence was exchanged between the Crown and some of the Indigenous applicants. Canada does not suggest that any of this correspondence contained any discussion about any substantive matter.

2. Phase II (from April 2014 to February 2016)

[110] During the Board's hearing process and continuing until the close of its hearing record, Canada continued to exchange correspondence with some of the Indigenous applicants.

Additionally, some informational meetings were held; however, these meetings did not allow for any substantive discussion about any group's title, rights or interests, or the impact of the Project on the group's title, rights or interests.

[111] To illustrate, Crown representatives met with Squamish officials on September 11, 2015, and November 27, 2015. At these meetings Squamish raised a number of concerns, including its concerns that Squamish had not been involved in the design of the consultation process, that the consultation process was inadequate to assess impacts on Squamish rights and title and that inadequate funding was provided for participation in the Board's hearing. Squamish also expressed confusion about the respective roles of the Board and Trans Mountain in consultations with Squamish.

[112] Similarly, informational meetings were held with the Stó:lō Collective on July 18, 2014 and December 3, 2015. Again, no substantive discussion took place about Stó:lō's title, rights and interests or the impact of the Project thereon. The Stó:lō also expressed their concerns about the consultation process, including their concerns that the Board failed to compel Trans Mountain to respond adequately to Information Requests and the lack of specificity of the Board's draft terms and conditions.

[113] Informational hearings of this nature were also held with Upper Nicola and SSN in 2014.

[114] It is fair to say that in Phase II Canada continued to rely upon the National Energy Board process to fulfil the Crown's duty to consult. Canada's efforts in Phase II were largely directed to

using the Information Request process to solicit concerns and potential mitigation measures from First Nations. Canada prepared tables to record potential Project impacts and concerns and to record and monitor whether those potential impacts and concerns were addressed in Trans Mountain's commitments, the Board's draft terms and conditions or other mitigation measures.

3. Phase III (February to November 2016)

[115] Crown representatives met with all of the Indigenous applicants in Phase III. Generally, the Indigenous applicants expressed dissatisfaction with the National Energy Board process and the Crown's reliance on that process. Individual concerns raised by individual Indigenous applicants will be discussed in the context of consideration of the adequacy of Canada's consultation efforts.

[116] Towards the latter part of Phase III, on August 16, 2016, the Major Projects Management Office and the British Columbia Environmental Assessment Office jointly sent a letter to Indigenous groups confirming that they were responsible for conducting consultation efforts for the Project, and that they were coordinating by participating in joint consultation meetings, sharing information and by preparing the draft "Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project" (Crown Consultation Report).

[117] Canada summarized its consultation efforts in the Crown Consultation Report, which included appendices specific to individual Indigenous groups. Indigenous groups were generally provided with a first draft of the Crown Consultation Report, together with the appendix relevant

to that group, in August of 2016. Comments and corrections were to be provided in September 2016. A second draft of the Crown Consultation Report, together with relevant appendices, was provided to Indigenous groups in November of 2016, with comments due by mid-November.

I. Post National Energy Board report events

1. The Interim Measures for Pipeline Reviews

[118] On January 27, 2016, Canada introduced this initiative as part of a strategy to review Canada's environmental assessment processes. The Interim Measures set out five guiding principles to guide the approval of major pipeline projects:

i. No proponent would be required to return to the beginning of the approval process. That is, no proponent would be required to begin the approval process afresh.
ii. Decisions about pipeline approval would be based on science, traditional knowledge of Indigenous peoples and other relevant evidence.
iii. The views of the public and affected communities would be sought and considered.
iv. Indigenous peoples would be meaningfully consulted, and, where appropriate, accommodated.
v. The direct and upstream greenhouse gas emissions linked to a project under review would be assessed.

[119] Canada advised that it planned to apply the Interim Measures to the Project and that in order to do so it would: undertake deeper consultations with Indigenous peoples and provide funding to support participation in these deeper consultations; assess the upstream gas emissions associated with the Project and make this information public; and, appoint a ministerial

representative to engage local communities and Indigenous groups in order to obtain their views and report those views back to the responsible Minister.

[120] The Minister of Natural Resources sought and obtained a four-month extension of time to permit implementation of the Interim Measures. The deadline for the Governor in Council to make its decision on Project approval was, therefore, on or before December 19, 2016.

2. The Ministerial Panel

[121] On May 17, 2016, the Minister announced he was striking a three-member independent Ministerial Panel that would engage local communities and Indigenous groups as contemplated in Canada's implementation of the Interim Measures for the Project.

[122] The Ministerial Panel held a series of public meetings in Alberta and British Columbia, received emails and received responses to an online questionnaire. The Ministerial Panel submitted its report to the Minister on November 1, 2016, in which it identified six "high-level questions" that "remain unanswered" that it commended to Canada for serious consideration.

[123] The report of the Ministerial Panel expressly stated that the panel's work was "not intended as part of the federal government's concurrent commitment to direct consultation with First Nations" and that "full-scale consultation" was never the intent of the panel "especially in the case of First Nations, where the responsibility for consultation fell elsewhere". It follows that no further consideration of the Ministerial Panel is required in the context of consideration of the adequacy of Canada's consultation efforts.

3. Greenhouse gas assessment

[124] For completeness, I note that in November 2016, Environment Canada did publish an assessment estimating the upstream greenhouse gas emissions from the Project.

IX. The issues to be determined

[125] Broadly speaking, the applicants' submissions require the Court to address the following questions.

[126] First, is there merit in any of the preliminary issues raised by the parties?

[127] Second, under the applicable legislative scheme, can the report of the National Energy Board be judicially reviewed?

[128] Finally, should the decision of the Governor in Council be set aside? This in turn requires the Court to consider:

i. What is the standard of review to be applied to the decision of the Governor in Council?

ii. Did the Governor in Council err in determining whether the Board's process of assembling, analyzing, assessing and studying the evidence before it was so deficient that the report submitted by it to the Governor in Council did not qualify as a "report" within the meaning of the *National Energy Board Act*? This will require the Court to consider:

   a. was the process adopted by the Board procedurally fair?

   b. did the Board err by failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*?

c. did the Board err in its treatment of the *Species at Risk Act*, S.C. 2002, c. 29?

d. did the Board impermissibly fail to decide certain issues before it recommended approval of the Project?

e. did the Board impermissibly fail to consider alternatives to the Westridge Marine Terminal?

iii. Did the Governor in Council fail to comply with the statutory requirement to give reasons?

iv. Did the Governor in Council err by concluding that the Indigenous applicants were adequately consulted and, if necessary, accommodated?

X. Consideration of the issues

A. The preliminary issues

[129] Before turning to the substantive issues raised in this application it is necessary to deal with three preliminary issues raised by the parties. They may be broadly characterized as follows.

[130] First, as described above, a number of the applicants commenced applications challenging the report of the National Energy Board. Trans Mountain moves to strike on a preliminary basis the six applications for judicial review commenced in respect of the report of the National Energy Board on the ground that the report is not amenable to judicial review.

[131] Second, the applicants ask that the two affidavits sworn on behalf of Trans Mountain by Robert Love, or portions thereof, be struck or given no weight on a number of grounds, including that Mr. Love had no personal knowledge of the bulk of the matters sworn to in his affidavits.

[132] Finally, the applicants object to the "Consultation Chronologies" found in Canada's compendium.

1. Trans Mountain's motion to strike

[133] In *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, at paragraph 125, this Court concluded that applications for judicial review do not lie against reports made pursuant to section 52 of the *National Energy Board Act* recommending whether a certificate of public convenience and necessity should issue for all or any portion of a pipeline. Accordingly, Trans Mountain seeks orders striking the six notices of application (listed above at paragraph 51) that challenge the Board's report.

[134] A comparison of the parties enumerated in paragraph 51 with those parties who challenge the decision of the Governor in Council (enumerated in paragraph 52) shows that all but one of the applicants who challenge the report of the National Energy Board also challenge the decision of the Governor in Council. For reasons not apparent on the record, the City of Vancouver elected to challenge only the report of the Board.

[135] The City of Vancouver, supported by the City of Burnaby, Tsleil-Waututh, Raincoast and Living Oceans, responds to Trans Mountain by arguing that *Gitxaala* was wrongly decided on this point and that in any event, the applications should not be struck on a preliminary basis.

[136] Those applicants who challenge both decisions are able to argue, and do argue, that in *Gitxaala* this Court determined that the decision of the Governor in Council cannot be

considered in isolation from the Board's report; it is for the Governor in Council to determine whether the process followed by the Board in assembling, analyzing, assessing, and studying the evidence before it was so deficient that its report does not qualify as a "report" within the meaning of the *National Energy Board Act*.

[137] Put another way, a statutory pre-condition for a valid Order in Council is a report from the Board prepared in accordance with all legislative requirements. The Governor in Council is therefore required to be satisfied that the report was prepared in accordance with the governing legislation. This makes practical sense as well because the Board's report formed the factual basis for the decision of the Governor in Council.

[138] It is in the context of these arguments that I turn to consider whether the applications should be struck on a preliminary basis.

[139] The jurisprudence of this Court is uniformly to the effect that motions to strike applications for judicial review are to be resorted to sparingly: see, for example, *Odynsky v. League for Human Rights of B'Nai Brith Canada*, 2009 FCA 82, 387 N.R. 376, at paragraph 5, citing *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C.R. 588, (1994), 176 N.R. 48.

[140] The rationale for this approach is that judicial review proceedings are designed to proceed with celerity; motions to strike carry the potential to unduly and unnecessarily delay the

expeditious determination of an application. Therefore justice is better served by allowing the Court to deal at one time with all of the issues raised by an application.

[141] This rationale is particularly applicable in the present case where striking the applications would still leave intact the ability of all but one of the applicants to argue the asserted flaws in the Board's report in the context of the Court's review of the decision of the Governor in Council. Little utility would be achieved in deciding the motions when the arguments in support of them will be considered now, in the Court's determination of the merits of the applications.

[142] For this reason, in the exercise of my discretion I would dismiss Trans Mountain's motion to strike the applications brought challenging the report of the National Energy Board. I deal with the merits of the argument that the report is not amenable to judicial review below at paragraph 170 and following.

2. The applicants' motion asking that the two affidavits of Robert Love, or portions thereof, be struck or given no weight

[143] The applicants argue that the Love affidavits, or portions thereof, should be struck or given no weight on three grounds. First, the applicants argue that Mr. Love had no personal knowledge of the bulk of the matters sworn to in his affidavits so that his evidence should be disregarded as inadmissible hearsay. Second, the applicants argue that the affidavits contain irrelevant and impermissible evidence about Trans Mountain's engagement and consultations with the Indigenous applicants. Finally, the applicants argue that the second affidavit impermissibly augments the evidence that was before the Board and the Governor in Council.

(a) The hearsay objection

[144] In both impugned affidavits Mr. Love swore that "I have personal knowledge of the matters in this Affidavit, except where stated to be based on information and belief, in which case I believe the same to be true." Notwithstanding this statement, on cross-examination, Mr. Love admitted that his first affidavit was based almost entirely on facts of which he had no personal knowledge and that his affidavit failed to disclose that he relied on information and belief to assert those facts. He largely relied on Trans Mountain's lawyers to prepare the paragraphs of his affidavit of which he had no direct knowledge. The basis of his belief that his affidavit was truthful and accurate was his "trust in other people". He frequently admitted that there were other Trans Mountain employees who had direct knowledge of the matters set out in his affidavit (cross-examination of Robert Love, June 19, 2017, by counsel for the City of Burnaby, page 14, line 17 to page 50, line 8).

[145] Similarly, under cross-examination Mr. Love admitted that he had no personal knowledge of the contents of his second affidavit which dealt with Trans Mountain's consultation with Squamish (cross-examination Robert Love, June 22, 2017, by counsel for Squamish, page 2, line 7 to page 11, line 4). When cross-examined by counsel for Coldwater, Mr. Love admitted that he was "largely" not involved with Trans Mountain's engagement with Coldwater. Rather, "[i]t was the aboriginal engagement team who did the communications." (cross-examination of Robert Love, June 22, 2017, by counsel for Coldwater, page 2, line 9 to page 2, line 21).

[146] Mr. Love is the Manager, Land and Rights-of-Way for Kinder Morgan Canada Inc., a company related to Trans Mountain. During his cross-examination by counsel for Squamish he described his role to be responsible for securing "all of the private land interest for the Trans Mountain Expansion Project and to obtain all utility crossings". He was also responsible "for undertaking the land rights necessary to go through about 10 reserves that we have agreements with." Later, on his cross-examination, he explained that prior to swearing his affidavit he "sat down with Regan Schlecker and went through most of the First Nation's engagement and high-level [government] engagements that were happening here" because he had no direct involvement in those engagements. Regan Schlecker was Trans Mountain's Aboriginal affairs manager.

[147] On the basis of Mr. Love's many admissions the applicants argue that Mr. Love's evidence should be struck or given no weight.

[148] Trans Mountain argues in response that the City of Burnaby failed to object to the Love affidavits on a timely basis. It also argues that on judicial review the parties can provide background explanations and summaries regarding the administrative proceeding below and that no applicant points to any important statements in the affidavits that were shown to be based on hearsay.

[149] I begin by rejecting Trans Mountain's argument that the arguments raised by Burnaby were raised too late and so should not be considered. While Burnaby may well not have raised its hearsay objection on a timely basis (see the order of the case management Judge issued on July

25, 2017), both the City of Vancouver and Squamish did object to the Love affidavits on a timely basis. Squamish adopts Burnaby's objections (Squamish's memorandum of fact and law, paragraph 133) and the City of Vancouver relies upon the cross-examination of Mr. Love conducted by counsel for Burnaby (Vancouver's memorandum of fact and law, paragraph 109). On this basis, in my view, Burnaby's arguments are properly before the Court.

[150] With respect to Trans Mountain's argument on the merits, I begin by noting that to the extent background statements and summaries are admissible on an application for judicial review, this admissibility is for the sole and limited purpose of orienting the reviewing Court. In any event and more importantly, affidavits must always fully and candidly disclose if an affiant is relying on information and belief and what portions of the affidavit are based on information and belief. In that event, the affiant must disclose both the sources of the information relied upon and the bases for the affiant's belief in the truth of the information sworn to. This was not done in the present case.

[151] Notwithstanding this failure, I do not see the need to strike portions of the Love affidavits. The affidavits are relevant for the purpose of orienting the Court. However, it is unsafe to rely on the contents of the Love affidavits for the purpose of establishing the truth of their contents unless Mr. Love had personal knowledge of a particular fact or matter. Because Mr. Love did not demonstrate any material, personal knowledge of Trans Mountain's engagement with the Indigenous applicants, and because there is no explanation as to why an individual directly involved in that engagement could not have provided evidence, evidence of

Trans Mountain's engagement must come from other sources—such as the consultation logs Trans Mountain placed in evidence before the Board.

[152] As I have determined that it is unsafe except in limited circumstances to rely upon the contents of the Love affidavits to establish the truth of their contents, it is unnecessary for me to consider the applicants' objection to the second affidavit on the ground that it impermissibly supplemented the consultation logs in evidence before the Board.

(b) Relevance of evidence of Trans Mountain's engagement with the Indigenous applicants

[153] In answer to an Information Request issued by Squamish inquiring whether Canada delegated any procedural aspects of consultation to Trans Mountain, Canada responded:

> The Crown has not delegated the procedural aspects of its duty to consult to Trans Mountain. The Crown does rely on the [National Energy Board] review process to the extent possible to fulfill this duty, a process that requires the proponent to work with and potentially accommodate Aboriginal groups impacted by the project. The [National Energy Board] filing manual provides information to the proponent on the requirement to engage potentially affected Aboriginal groups. This does not constitute delegation of the duty to consult.
>
> (underlining added)

[154] Based on this response, the Indigenous applicants argue that evidence of Trans Mountain's engagement with them is irrelevant. It is necessary to consider this submission because it is an issue that transcends the Love affidavits—there is other evidence of Trans Mountain's engagement.

[155] I accept Trans Mountain's submission that proper evidence of its engagement with the Indigenous applicants is relevant. I reach this conclusion for the following reasons.

[156] First, the Indigenous applicants were informed by the Major Projects Management Office's letter of August 12, 2013, that Canada would rely on the Board's public hearing process "to the extent possible" to fulfil the Crown's duty to consult. As Canada noted in its response to the Information Request, the Board's hearing process required Trans Mountain to work with, and potentially accommodate, Indigenous groups impacted by the Project. Thus the Major Projects Management Office's August 12 letter encouraged Indigenous groups with Project-related concerns to discuss those concerns directly with Trans Mountain. Unresolved concerns were to be directed to the National Energy Board. It follows from this that the Indigenous applicants were informed before the commencement of the Board's hearing process that the Board and, in turn, Canada would rely in part on Trans Mountain's engagement with them.

[157] Thereafter, the Board required Trans Mountain "to make all reasonable efforts to consult with potentially affected Aboriginal groups and to provide information about those consultations to the Board." The Board expressly required this information to include "evidence on the nature of the interests potentially affected, the concerns that were raised and the manner and degree to which those concerns have been addressed. Trans Mountain was expected to report to the Board on all Aboriginal concerns that were expressed to it, even if it was unable or unwilling to address those concerns". (Report of the National Energy Board, page 46).

[158] Trans Mountain's consultation was guided by the Board's Filing Manual requirements and directions given by the Board during the Project Description phase.

[159] This demonstrates that Trans Mountain's consultation was central to the decision of the Board. Therefore, evidence of Trans Mountain's efforts is relevant.

[160] My second reason for finding proper evidence of Trans Mountain's engagement to be relevant is that, consistent with Canada's response to Squamish's Information Request, a review of the Crown Consultation Report shows that in Section 3 Canada summarized "the procedural elements and chronology of Aboriginal consultations and engagement activities undertaken by the proponent, the [Board] and the Crown." Elements of Trans Mountain's engagement were summarized in the Crown Consultation Report, and therefore put before the Governor in Council so it could assess the adequacy of consultation. Elements that were summarized include Trans Mountain's Aboriginal Engagement Program and the Mutual Benefit Agreements Trans Mountain entered into with Indigenous groups. Trans Mountain's Aboriginal Engagement Program was noted to have provided approximately $12 million in capacity funding to potentially affected groups. As well, Trans Mountain provided funding to conduct traditional land and resource use and traditional marine resource use studies. As for the Mutual Benefit Agreements, as of November 2016, Canada was aware that 33 potentially affected Indigenous groups had signed such agreements with Trans Mountain. These included a letter of support for the Project.

[161] Canada's reliance on Trans Mountain's engagement also makes evidence about that engagement relevant.

[162] Finally on this point, some Indigenous applicants assert that Trans Mountain's engagement efforts were inadequate. Evidence of Trans Mountain's engagement, including its provision of capacity funding, is relevant to this allegation and to the issue of the adequacy of available funding.

3. Canada's compendium—The Consultation Chronologies

[163] In its compendium, Canada included schedules in the form of charts (referred to as "Consultation Chronologies") which describe events said to have taken place. The Indigenous applicants assert that the schedules are interpretive, inaccurate, and incomplete and that they should not be received by the Court for two reasons.

[164] First, the Indigenous applicants argue that the Consultation Chronologies summarize the facts as perceived by the Crown. As such, the material should have appeared in Canada's affidavit and in its memorandum of fact and law. It is argued that Canada should not be permitted to circumvent page length restrictions on the length of its memorandum by creating additional resources in its compendium.

[165] Second, the Indigenous applicants argue that the Consultation Chronologies are not evidence. Instead, the summaries are newly created documents that were not before the Board or

the Governor in Council. Their admission is also argued to be prejudicial to the Indigenous applicants.

[166] Canada responds that, as the case management Judge noted in his direction of September 7, 2017, "parties often include material in their compendia as an aid to argument. As long as the aid to argument is brief and helpful and is not anything resembling a memorandum of fact and law and as long as the aid to argument presents or is based entirely upon facts and data from the evidentiary record without adding to it, hearing panels of this Court usually permit it. Of course, there is a limit to this."

[167] I agree with the Indigenous applicants that the Consultation Chronologies must be approached with caution. For example, the Consultation Chronology in respect of the Coldwater Indian Band recites that on May 3, 2016, Canada emailed Coldwater a letter dated November 3, 2015 sent in response to Coldwater's letter of August 20, 2015. The Consultation Chronology also recites that the letter contained an offer to meet with Coldwater to discuss the consultation process and Project-related issues. However, Coldwater points to the sworn evidence of its Chief Councillor to the effect that the November 3, 2015 letter did not actually address the concerns detailed in Coldwater's letter of August 20, 2015, and that the meeting was never arranged because the November 3, 2015 letter was not provided to Coldwater until May 3, 2016.

[168] Thus, I well understand the concern of the Indigenous applicants. This said, this Court's understanding of the evidence is not based upon a summary in chart form which briefly summarizes the consultation process. The Court will base its decision upon the evidentiary

record properly before it, which includes the record before the Board and the Governor in Council, the affidavits sworn in this proceeding, the cross-examinations thereon, the statement of agreed facts, and the contents of the agreed book of documents. The sole permissible use of the Consultation Chronologies is as a form of table of contents or finding aid that directs a reader to a particular document in the record. On the basis of this explanation of the limited permissible use of the Consultation Chronologies there is no need to strike them, a point conceded by counsel for Coldwater and Squamish in oral argument.

[169] For completeness, I note that Upper Nicola moved on a preliminary basis to strike portions of the second Love affidavit on the ground that the affidavit impermissibly recited confidential information. That motion is the subject of brief, confidential reasons issued contemporaneously with these reasons. After the parties to the motion have the opportunity to make submissions, a public version of the confidential reasons will issue.

B. Is the report of the National Energy Board amenable to judicial review?

[170] While I would dismiss Trans Mountain's motion to strike the application on a preliminary basis, because some applicants do challenge the report of the National Energy Board it is necessary to decide whether judicial review lies, notwithstanding this Court's conclusion to the contrary in *Gitxaala*.

[171] The applicants who argue that, contrary to *Gitxaala*, the Board's report is amenable to judicial review acknowledge the jurisprudence of this Court to the effect that the test applied for overruling a decision of another panel of this Court is whether the previous decision is

"manifestly wrong" in the narrow sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed: see, for example, *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149, at paragraph 10. The applicants argue that *Gitxaala* was manifestly wrong in deciding that the Board's report was not justiciable. The specific errors asserted are:

a. *Gitxaala* was manifestly wrong in holding that only "decisions about legal or practical interests are judicially reviewable". The Court did not address case law that has interpreted subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 more broadly.
b. The Court failed to deal with the prior decision of this Court in *Forestethics Advocacy v. Canada (Attorney General)*, 2014 FCA 71, 390 D.L.R. (4th) 376.
c. The Court failed to deal with prior jurisprudence of the Federal Court and this Court which did review environmental assessment reports prepared by a joint review panel.
d. The Court referred to provisions of the *Canadian Environmental Assessment Act, 2012* that were inapplicable.
e. The *Gitxaala* decision impermissibly thwarts the right to seek judicial review of the decision of the National Energy Board.

[172] I will deal with each argument in turn after first reviewing this Court's analysis in *Gitxaala*.

1. The decision of this Court in *Gitxaala*

[173] The Court's consideration of the justiciability of the report of the Joint Review Panel began with its detailed analysis of the legislative scheme (reasons, paragraphs 99 to 118). The Court then turned to consider the proper characterization of the legislative scheme, which the

Court described to be "a complete code for decision-making regarding certificate applications."

The Court then reasoned:

> [120] The legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council.
>
> [121] Before the Governor in Council decides, others assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. In this scheme, no one but the Governor in Council decides anything.
>
> [122] In particular, the environmental assessment under the *Canadian Environmental Assessment Act, 2012* plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.
>
> [123] This is a different role—a much attenuated role—from the role played by environmental assessments under other federal decision-making regimes. It is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written.
>
> [124] Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation:
>
> - In the case of the report or portion of the report setting out the environmental assessment, subsection 29(3) of the *Canadian Environmental Assessment Act, 2012* provides that it is "final and conclusive," but this is "[s]ubject to sections 30 and 31." Sections 30 and 31 provide for review of the report by the Governor in Council and, if the Governor in Council so directs, reconsideration and submission of a reconsideration report by the Governor in Council.
>
> - In the case of the report under section 52 of the *National Energy Board Act*, subsection 52(11) of the *National Energy Board Act* provides that it too is "final and conclusive," but this is "[s]ubject to sections 53 and 54." These sections empower the Governor in Council to consider the report and decide what to do with it.
>
> [125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative

> scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.
>
> [126] Under this legislative scheme, the National Energy Board also does not really decide anything, except in a formal sense. After the Governor in Council decides that a proposed project should be approved, it directs the National Energy Board to issue a certificate, with or without a decision statement. The National Energy Board does not have an independent discretion to exercise or an independent decision to make after the Governor in Council has decided the matter. It simply does what the Governor in Council has directed in its Order in Council.
>
> (underlining added)

[174] Having reviewed *Gitxaala*, I now turn to the asserted errors.

> 2. Was *Gitxaala* wrongly decided on this point?
>
> (a) Did the Court err by stating that only "decisions about legal or practical interests" are judicially reviewable?

[175] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by "anyone directly affected by the matter in respect of which relief is sought" (underlining added). In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, this Court considered the scope of subsection 18.1(1) as follows:

> [24] Subsection 18.1(1) of the *Federal Courts Act* provides that 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." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply

> to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> …
>
> [28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> [29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149.
>
> (underlining added)

[176] To similar effect, in *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15, 387 N.R. 365, the Court wrote, at paragraph 10, that when "administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review".

[177] On the basis of these authorities the City of Vancouver, supported by the City of Burnaby and Raincoast and Living Oceans, argues that this Court erred by writing in paragraph 125 in *Gitxaala* that only "decisions about legal or practical interests" are reviewable. The Court is said to have overlooked the established jurisprudence to the effect that "matter" as used in subsection 18.1(1) denotes a broader category than merely decisions.

[178] In my view, when the Court's analysis in *Gitxaala* is read in its entirety no such statement was made and no such error was made.

[179] In *Gitxaala*, the Court found that the only action to carry legal consequences was the decision of the Governor in Council. The environmental assessment conducted by the Joint Review Panel under the *Canadian Environmental Assessment Act, 2012* did not affect legal rights or carry legal consequences. Instead, the assessment played "no role other than assisting in the development of recommendations submitted to the Governor in Council" (reasons, paragraph 122). The same could be said of the balance of the report prepared pursuant to the requirements of the *National Energy Board Act*.

[180] Put another way, on the basis of the legislative scheme enacted by Parliament, the report of the Joint Review Panel constituted a set of recommendations to the Governor in Council that lacked any independent legal or practical effect. It followed that judicial review did not lie from it.

[181] Both the determination about the effect of the report of the Joint Review Panel and the conclusion that it was not justiciable were wholly consistent with *Air Canada* and *Democracy Watch*. It was therefore unnecessary for the Court to expressly deal with these decisions, or with subsection 18.1(1).

[182] To complete this analysis, I note that the City of Vancouver also argues that it was prejudiced because the report of the National Energy Board did not comply with section 19 of the *Canadian Environmental Assessment Act, 2012* and because the Board's process was unfair. However, any detrimental effects upon the City of Vancouver could have been remedied through a challenge to the decision of the Governor in Council; the City has not asserted that it suffered

any prejudice in the interval between the issuance of the Board's report and the issuance of the Order in Council by the Governor in Council.

(b) *Forestethics Advocacy v. Canada (Attorney General)*

[183] In this decision, a single Judge of this Court decided whether this Court or the Federal Court had jurisdiction to entertain applications for judicial review brought in respect of the Report of the Joint Review Panel for the Enbridge Northern Gateway Project. Justice Sharlow found jurisdiction to lie in this Court. The City of Vancouver argues that implicit in this decision is the conclusion the reports prepared by joint review panels under the *Canadian Environmental Assessment Act, 2012* are judicially reviewable.

[184] I respectfully disagree. At issue in *Forestethics* was the proper interpretation of section 28 of the *Federal Courts Act*. The Court made no finding about whether the report is amenable to judicial review—its only finding was that the propriety of the report (which would include whether it was amenable to judicial review) was a matter for this Court, not the Federal Court.

(c) The jurisprudence which reviewed environmental assessment reports

[185] The City of Vancouver also points to jurisprudence in which environmental assessment reports prepared by joint review panels were judicially reviewed, and argues that this Court erred by failing to deal with this jurisprudence. The authorities relied upon by Vancouver are: *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, 15 Admin. L.R. (3d) 25, (F.C.); *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000]

2 F.C.R. 263, (1999), 169 F.T.R. 298 (C.A.); *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, 80 Admin. L.R. (4th) 74; *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520, 422 F.T.R. 299; and, *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463, 455 F.T.R. 1, rev'd on appeal, 2015 FCA 186, 475 N.R. 247.

[186] All of these authorities predate *Gitxaala*. They do not deal with the "complete code" of legislation that was before the Court in *Gitxaala*. But, more importantly, in none of these decisions was the availability of judicial review put in issue—this availability was assumed. In *Gitxaala* the Court reviewed the legislative scheme and explained why the report of the Joint Review Panel was not justiciable. The Court did not err by failing to refer to case law that had not considered this issue.

(d) The reference to inapplicable provisions of the *Canadian Environmental Assessment Act, 2012*

[187] The City of Vancouver also argues that *Gitxaala* is distinguishable because it dealt with section 38 of the *Canadian Environmental Assessment Act, 2012*, a provision that has no application to the process at issue here. The City also notes that *Gitxaala*, at paragraph 124, referred to sections 30 and 31 of the *Canadian Environmental Assessment Act, 2012*. These sections are said not to apply to the Joint Review Panel at issue in *Gitxaala*.

[188] I accept that pursuant to subsection 126(1) of the *Canadian Environmental Assessment Act, 2012* the environmental assessment of the Northern Gateway project (at issue in *Gitxaala*)

was continued under the process established under the *Canadian Environmental Assessment Act, 2012*. Subsection 126(1) specified that such continuation was to be as if the assessment had been referred to a review panel under section 38 of the *Canadian Environmental Assessment Act, 2012*, and that the Joint Review Panel which continued the environmental assessment was considered to have been established under section 40 of the *Canadian Environmental Assessment Act, 2012*.

[189] It followed that sections 29 through 31 of the *Canadian Environmental Assessment Act, 2012* did not apply to the Northern Gateway project, and ought not to have been referenced by the Court in *Gitxaala* in its analysis of the legislative scheme.

[190] This said, the question that arises is whether these references were material to the Court's analysis. To assess the materiality, if any, of this error I begin by reviewing the content of the provisions said to be erroneously referred to in *Gitxaala*.

[191] Section 29 of the *Canadian Environmental Assessment Act, 2012*, discussed above at paragraph 62, requires a responsible authority to ensure that its environmental assessment report sets out its recommendation to the Governor in Council concerning the decision the Governor in Council must make under paragraph 31(1)(*a*) of the *Canadian Environmental Assessment Act, 2012*. Section 30 allows the Governor in Council to refer any recommendation made by a responsible authority back to the responsible authority for reconsideration. Section 31 sets out the options available to the Governor in Council after it receives a report from a responsible authority. Paragraph 31(1)(*a*), discussed at paragraph 67 above, sets out the three choices

available to the Governor in Council with respect to its assessment of the likelihood that a project will cause significant adverse environmental effects and, if so, whether such effects can be justified.

[192] These provisions, without doubt, do apply to the Project at issue in these proceedings. Therefore, the Project is to be assessed under the legislative scheme analyzed in *Gitxaala*. It follows that *Gitxaala* cannot be meaningfully distinguished.

[193] As to the effect, if any, of the erroneous references in *Gitxaala*, the statutory framework applicable to the Northern Gateway project originated in three sources: the *National Energy Board Act*; the *Canadian Environmental Assessment Act, 2012*; and, transitional provisions found in section 104 of the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c.19 (Jobs Act).

[194] Provisions relevant to the present analysis are:

- subsection 104(3) of the Jobs Act which required the Joint Review Panel to set out in its report an environmental assessment prepared under the *Canadian Environmental Assessment Act, 2012*;
- subsection 126(1) of the *Canadian Environmental Assessment Act, 2012* which continued the environmental assessment under the process established under that Act; and,
- paragraph 104(4)(*a*) of the Jobs Act which made the Governor in Council the decision-maker under section 52 of the *Canadian Environmental Assessment Act, 2012* (thus, it was for the Governor in Council to determine if the Project was likely to cause significant adverse environmental effects and, if so, whether such effects could be justified).

[195] These provisions are to the same effect as sections 29 and 31 of the *Canadian Environmental Assessment Act, 2012*. I dismiss the relevance of section 30 to this analysis because it had no application to the environmental assessment under review in *Gitxaala*. Further, and more importantly, section 30 played no significant role in the Court's analysis.

[196] It follows that the analysis in *Gitxaala* was based upon a proper understanding of the legislative scheme, notwithstanding the Court's reference to sections 29 and 31 of the *Canadian Environmental Assessment Act, 2012* instead of the applicable provisions.

[197] Put another way, the error was in no way material to the Court's analysis of the respective roles of the Joint Review Panel, which prepared the report to the Governor in Council, and the Governor in Council, which received the panel's recommendations and made the decisions required under the legislative scheme.

[198] Indeed, the technical nature of the erroneous references was acknowledged by Raincoast in its application for leave to appeal the *Gitxaala* decision to the Supreme Court of Canada. At paragraph 49 of its memorandum of argument it described the Court's error to be "technical in nature" (Trans Mountain's Compendium, volume 2, tab 35). To the same effect, Vancouver does not argue that the Court's error was material to its analysis. Vancouver simply notes the error in footnote 118 of its memorandum of fact and law.

[199] Accordingly, I see no error in the *Gitxaala* decision that merits departing from its analysis.

(e) *Gitxaala* thwarts review of the decision of the National Energy Board

[200] Finally, Vancouver argues that subsection 54(1) of the *National Energy Board Act* and 31(1) of the *Canadian Environmental Assessment Act, 2012* both make the Board's report a prerequisite to the decision of the Governor in Council. As the Governor in Council is not an adjudicative body, meaningful review must come in the form of judicial review of the report of the Board. The decision in *Gitxaala* thwarts such review.

[201] I respectfully disagree. As this Court noted in *Gitxaala* at paragraph 125, the Governor in Council is required to consider any deficiency in the report submitted to it. The decision of the Governor in Council is then subject to review by this Court under section 55 of the *National Energy Board Act*. The Court must be satisfied that the decision of the Governor in Council is lawful, reasonable and constitutionally valid. If the decision of the Governor in Council is based upon a materially flawed report the decision may be set aside on that basis. Put another way, under the legislation the Governor in Council can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report. In this context the Board's report may be reviewed to ensure that it was a "report" that the Governor in Council could rely upon. The report is not immune from review by this Court and the Supreme Court.

(f) Conclusion on whether the report of the National Energy Board is amenable to judicial review

[202] For these reasons, I have concluded that the report of the National Energy Board is not justiciable. It follows that I would dismiss the six applications for judicial review which challenge that report. In the circumstance where the arguments about justiciability played a small part in the hearing I would not award costs in respect of these six applications.

[203] As the City of Vancouver did not seek and obtain leave to challenge the Order in Council, it follows that the City is precluded from challenging the Order in Council.

C. Should the decision of the Governor in Council be set aside on administrative law grounds?

1. The standard of review to be applied to the decision of the Governor in Council

[204] In *Gitxaala*, when considering the standard of review to be applied to the decision of the Governor in Council, the Court wrote that it was not legally permissible to adopt a "one-size-fits-all" approach to any particular administrative decision-maker. Rather, the standard of review must be assessed in light of the relevant legislative provisions, the structure of the legislation and the overall purpose of the legislation (*Gitxaala*, paragraph 137).

[205] I agree. Particularly in the present case it is necessary to draw a distinction between the standard of review applied to what I will refer to as the administrative law components of the Governor in Council's decision and that applied to the constitutional component which required

the Governor in Council to consider the adequacy of the process of consultation and, if necessary, accommodation. This is an approach accepted and urged by the parties.

(a) The administrative law components of the decision

[206] In *Gitxaala*, the Court conducted a lengthy standard of review analysis (*Gitxaala*, paragraphs 128-155) and concluded that, because the Governor in Council's decision was a discretionary decision founded on the widest considerations of policy and public interest, the standard of review was reasonableness (*Gitxaala*, paragraph 145).

[207] Canada, Trans Mountain and the Attorney General of Alberta submit that *Gitxaala* was correctly decided on this point.

[208] Tsleil-Waututh, Raincoast and Living Oceans submit that the governing authority is not *Gitxaala*, but rather is the earlier decision of this Court in *Council of the Innu of Ekuanitshit v. Canada (Attorney General*), 2014 FCA 189, 376 D.L.R. (4th) 348. In this case the Court found the reasonableness standard of review applied to a decision of the Governor in Council approving the federal government's response to a report of a joint review panel prepared under the now repealed *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*Canadian Environmental Assessment Act, 1992*). The Court rejected the submission that the correctness standard applied to the question of whether the Governor in Council and the responsible authorities had respected the requirements of the *Canadian Environmental Assessment Act, 1992* before making their decisions under subsections 37(1) and 37(1.1) of that Act. Under these provisions the Governor in Council and the responsible authorities were required to review the

report of the joint review panel and determine whether the project at issue was justified despite its adverse environmental effects.

[209] This said, while deference was owed to decisions made pursuant to subsections 37(1) and 37(1.1), the Court wrote that "a reviewing court must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme." (*Innu of Ekuanitshit*, paragraph 44).

[210] To the submission that *Innu of Ekuanitshit* is the governing authority, Tsleil-Waututh adds two additional points: first and, in any event, the "margin of appreciation" approach followed in *Gitxaala* is no longer good law; and, second, issues of procedural fairness are to be reviewed on the standard of correctness. Tsleil-Waututh's additional submissions are adopted by the City of Burnaby.

[211] I see no inconsistency between the *Innu of Ekuanitshit* and *Gitxaala* for the following reasons.

[212] First, the Court in *Gitxaala* acknowledged that it was bound by *Innu of Ekuanitshit*. However, because of the very different legislative scheme at issue in *Gitxaala*, the earlier decision did not satisfactorily determine the standard of review to be applied to the decision of the Governor in Council at issue in *Gitxaala* (*Gitxaala*, paragraph 136). This Court did not doubt the correctness of *Innu of Ekuanitshit* or purport to overturn it.

[213] Second, in each case the Court determined the standard of review to be applied to the decision of the Governor in Council was reasonableness. It was within the reasonableness standard that the Court found in *Innu of Ekuanitshit* that the Governor in Council's decision must still be made within the bounds of the statutory scheme.

[214] Third, and finally, the conclusion in *Innu of Ekuanitshit* that a reviewing court must ensure that the Governor in Council's decision was exercised "within the bounds established by the statutory scheme" (*Innu of Ekuanitshit*, paragraph 44) is consistent with the requirement in *Gitxaala* that the Governor in Council must determine and be satisfied that the Board's process and assessment complied with the legislative requirements, so that the Board's report qualified as a proper prerequisite to the decision of the Governor in Council. Then, it is for this Court to be satisfied that the decision of the Governor in Council was lawful, reasonable and constitutionally valid. To be lawful and reasonable the Governor in Council must comply with the purview and rationale of the legislative scheme.

[215] Reasonableness review requires a court to assess whether the decision under review falls within a range of possible, acceptable outcomes which are defensible on the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47).

[216] Reasonableness review is a contextual inquiry. Reasonableness "takes its colour from the context" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 59; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at paragraph 57); in every case the fundamental question "is the scope of decision-making power

conferred on the decision-maker by the governing legislation." (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paragraph 18).

[217] Thus, when a court reviews a decision made in the exercise of a statutory power, reasonableness review requires the decision to have been made in accordance with the terms of the statute: see, for example, *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194, [2011] 3 F.C.R. 344, at paragraphs 29-30. Put another way, an administrative decision-maker is constrained in the outcomes it may reach by the statutory wording (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paragraph 21).

[218] The Supreme Court recently considered this in the context of a review of a decision of the Specific Claims Tribunal. The Tribunal is required by its governing legislation to adjudicate specific claims "in accordance with law and in a just and timely manner." The majority of the Court observed that the Tribunal's mandate expressly tethered "the scope of its decision-making power to the applicable legal principles." and went on to note that the "range of reasonable outcomes available to the Tribunal is therefore constrained by these principles" (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 D.L.R. (4th) 239, at paragraphs 33-34).

[219] With respect to Tsleil-Waututh's two additional points, I believe the first point was addressed above. Reasonableness "takes its colour from the context." To illustrate, reasonableness review of a policy decision affecting many entities is of a different nature than

reasonableness review of, say, a decision on the credibility of evidence before an adjudication tribunal.

[220] The second point raises the question of the standard of review to be applied to questions of procedural fairness.

[221] As this Court noted in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 474 N.R. 366, at paragraph 67, the standard of review for questions of procedural fairness is currently unsettled.

[222] As Trans Mountain submits, in cases such as *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75, at paragraphs 70-72, this Court has applied the standard of correctness with some deference to the decision-maker's choice of procedure (see also *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraphs 79 and 89).

[223] This said, in my view it is not necessary to resolve any inconsistency in the jurisprudence because, as will be explained below, even on a correctness review I find there is no basis to set aside the Order in Council on the basis of procedural fairness concerns.

(b) The constitutional component

[224] As explained above, a distinction exists between the standard of review applied to the administrative law components of the Governor in Council's decision and the standard applied to

the component which required the Governor in Council to consider the adequacy of the process of consultation with Indigenous peoples, and if necessary, accommodation.

[225] Citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraphs 61-63, the parties agree that the existence and extent of the duty to consult are legal questions reviewable on the standard of correctness. The adequacy of the consultation is a question of mixed fact and law which is reviewable on the standard of reasonableness. I agree.

[226] Reasonableness review does not require perfect satisfaction (*Gitxaala*, paragraphs 182-183 and the cases cited therein). The question to be answered is whether the government action "viewed as a whole, accommodates the collective aboriginal right in question". Thus, "[s]o long as every reasonable effort is made to inform and to consult, such efforts would suffice." (*Haida Nation*, paragraph 62, citing *R. v. Gladstone*, [1996] 2 S.C.R. 723 and *R. v. Nikal*, [1996] 1 S.C.R. 1013). The focus of the analysis should not be on the outcome, but rather on the process of consultation and accommodation (*Haida Nation*, paragraph 63).

[227] Having set out the governing standards of review, I next consider the various flaws that are said to vitiate the decision of the Governor in Council.

2. Did the Governor in Council err in determining that the Board's report qualified as a report so as to be a proper condition precedent to the Governor in Council's decision?

[228] The Board's errors said to vitiate the decision of the Governor in Council were briefly summarized above at paragraph 128. For ease of reference I reorganize and repeat that the applicants variously assert that the Board erred by:

a. breaching the requirements of procedural fairness;
b. failing to decide certain issues before it recommended approval of the Project;
c. failing to consider alternatives to the Westridge Marine Terminal;
d. failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*; and,
e. erring in its treatment of the *Species at Risk Act*.

The effect of each of these errors is said to render the Board's report materially deficient such that it was not a "report" that the Governor in Council could rely upon. A decision made by the Governor in Council without a "report" before it must be unreasonable; the statute makes it clear that the Governor in Council can only reach a decision when informed by a "report" of the Board.

[229] I now turn to consider each alleged deficiency.

(a) Was the Board's process procedurally fair?

(i) Applicable legal principles

[230] The Board, as a public authority that makes administrative decisions that affect the rights, privileges or interests of individuals, owes a duty of procedural fairness to the parties before it. However, the existence of a duty of fairness does not determine what fairness requires in a particular circumstance.

[231] It is said that the concept of procedural fairness is eminently variable, and that its content is to be decided in the context and circumstances of each case. The concept is animated by the desire to ensure fair play. The purpose of the participatory rights contained within the duty of fairness has been described to be:

> … to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

(*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, at paragraph 22).

[232] In *Baker*, the Supreme Court articulated a non-exhaustive list of factors to be considered when determining what procedural fairness requires in a given set of circumstances: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme, including the existence of an appeal procedure; the importance of the decision to the

lives of those affected; the legitimate expectations of the person challenging the decision; and, the choice of procedures made by the decision-maker.

[233] Applying these factors, the City of Burnaby argues that the content of the procedural duty owed to it was significant.

[234] Other applicants and the respondents did not make submissions on the content of the procedural duty of fairness.

[235] Having regard to the adjudicative nature of the decision at issue, the court-like procedures prescribed by the *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, the absence of an unrestricted statutory right of appeal (subsection 22(1) of the *National Energy Board Act* permits an appeal on a question of law or jurisdiction only with leave of this Court) and the importance of the Board's decision to the parties, I accept Burnaby's submission that the content of the duty of fairness owed by the Board to the parties was significant. The parties were entitled to a meaningful opportunity to present their cases fully and fairly. Included in the right to present a case fully is the right to effectively challenge evidence that contradicts that case. I will consider below more precisely the content of this duty.

[236] Having briefly summarized the legal principles that apply to issues of procedural fairness, I next enumerate the assertions of procedural unfairness.

(ii) The asserted breaches of procedural fairness

[237] The City of Burnaby asserts that the Board breached a duty of fairness owed to it by:

a. failing to hold an oral hearing;
b. failing to provide Burnaby with an opportunity to test Trans Mountain's evidence by cross-examination;
c. failing to require Trans Mountain to respond to Burnaby's written Information Requests and denying Burnaby's motions to compel further and better responses to the Information Requests;
d. delegating the assessment of critically important information until after the Board's report and the Governor in Council's decision;
e. failing to provide sufficient reasons concerning:
    i. alternative means of carrying out the Project;
    ii. the risks, including seismic risk, related to fire and spills;
    iii. the suitability of the Burnaby Mountain Tunnel;
    iv. the protection of municipal water sources; and,
    v. whether, and on what basis, the Project is in the public interest.

[238] Tsleil-Waututh submits that the Board breached the duty of fairness by restricting its ability to test Trans Mountain's evidence and by permitting Trans Mountain to file improper reply evidence.

[239] The Stó:lō submit that it was procedurally unfair to subject their witnesses who gave oral traditional Indigenous evidence to cross-examination when Trans Mountain's witnesses were not cross-examined.

[240] Squamish briefly raised the issue of inadequate response to their Information Request to Natural Resources Canada, and the Board's terse rejection of their requests for further and better responses from Natural Resources Canada, the Department of Fisheries and Oceans and Trans Mountain.

[241] Each assertion will be considered.

(iii) The failure to hold a full oral hearing and to allow cross-examination of Trans Mountain's witnesses

[242] It is convenient to deal with these two asserted errors together.

[243] The applicants argue that the Board's decision precluding oral cross-examination was "a stark departure from the previous practice for a project of this scale." (Burnaby's memorandum of fact and law, paragraph 160) that deprived the Board of an important and established method for determining the truth. The applicants argue that this was particularly unfair because Trans Mountain failed to participate in good faith in the Information Request process with the result that the process did not provide an effective, alternative method to test Trans Mountain's evidence.

[244] The respondents Canada and Trans Mountain answer that:

- The Board has discretion to determine whether a hearing proceeds as a written or oral hearing, and the Board is entitled to deference with respect to its choice of procedure.

- The process was tailored to take into account the number of participants, the volume of evidence and the technical nature of the information to be received by the Board.
- Many aspects of the hearing were conducted orally: the oral Indigenous traditional evidence, Trans Mountain's oral summary argument, the interveners' oral summary arguments and any reply arguments.
- Cross-examination is never an absolute right. A decision-maker may refuse or limit cross-examination so long as there is an effective means to challenge and test evidence.

[245] I acknowledge the importance of cross-examination at common law. However, because the content of the duty of fairness varies according to context and circumstances, the duty of fairness does not always require the right of cross-examination. For example, in a multi-party public hearing related to the public interest, fairness was held not to require oral cross-examination (*Unicity Taxi Ltd. v. Manitoba Taxicab Board* (1992), 80 Man. R. (2d) 241, [1992] 6 W.W.R. 35 (Q.B.); aff'd (1992) 83 Man. R. (2d) 305, [1992] M.J. No. 608 (C.A.)). The Court dismissed the allegation of unfairness because "in the conduct of multi-faceted and multi-party public hearings [cross-examination] tends to become an unwieldy and even dangerous weapon that may lead to disturbance, disruption and delay."

[246] Similarly, in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, the Supreme Court found that the Chippewas of the Thames were given an adequate opportunity to participate in the decision-making process of the Board (reasons, paragraph 51). This finding was supported by the Court's enumeration of the following facts: the Board held an oral hearing; provided early notice of the hearing process to affected Indigenous groups and sought their formal participation; granted intervener status to the

Chippewas of the Thames; provided participant funding to allow the Chippewas of the Thames to tender evidence and pose formal Information Requests to the project proponent, to which they received written responses; and permitted the Chippewas of the Thames to make oral closing submissions. No right of oral cross-examination was granted (reasons, paragraph 52), yet the process provided an adequate right to participate.

[247] These decisions are of course not determinative of the requirements of fairness in the present context.

[248] The relevant context is discussed by the Board in its Ruling No. 14, which dealt with a motion requesting that the hearing order be amended to include a phase for oral cross-examination of witnesses. After quoting an administrative law text to the effect that procedural fairness is not a fixed concept, but rather is one that varies with the context and the interest at stake, the Board wrote:

> Here, the context is that the Board will be making a recommendation to the Governor in Council. The recommendation will take into account whether the pipeline is and will be required by the present and future public convenience and necessity. The Board's recommendation will be polycentric in nature as it involves a wide variety of considerations and interests. Persons directly affected by the Application include Aboriginal communities, land owners, governments, commercial interests, and other stakeholders. The motion and several of the comments in support of it appear to place significant reliance on the potential credibility of witnesses. The Board notes that this is not a criminal or civil trial. The Board's hearing also does not involve an issue of individual liberty. It is a process for gathering and testing evidence for the Board's preparation, as an expert tribunal, of its recommendation to the Governor in Council about whether to issue a certificate under section 52 of the NEB Act. The Board will also be conducting an environmental assessment and making a recommendation under CEAA 2012.
>
> Hearing processes are designed individually and independently by the Board based on the specific circumstances of the application. Each process is designed to provide for a fair hearing, but the processes are not necessarily the same. For

this Application, the Hearing Order provides two opportunities to ask written information requests. There is also an opportunity to file written evidence, and to provide both written and oral final argument. For Aboriginal groups that also wish to present Aboriginal traditional evidence orally, there is an opportunity to do this.

Regarding the nature of the statutory scheme, section 8 of the NEB Act authorizes the Board to make rules about the conduct of hearings before the Board. The Rules provide that public hearings may be oral or written, as determined by the Board. The Board has previously held fully written hearings for section 52 oil and gas pipeline applications. Hearings can also be oral, with significant written components, as is the case here. In addition to the hearing procedures set out in the Rules, the Board makes rules about hearing procedures in its Hearing Order and associated rulings and bulletins.

….

Additional legislative requirements for the Board's public hearings are found in subsection 11(4) of the NEB Act, which requires that applications before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, and within the time limit provided. This subsection of the NEB Act was added in 2012. For this Application, the legislated time limit, which is 15 months after the completeness determination is made, is 2 July 2015.

As the legislative time limits are recent, there is no legitimate expectation as to the hearing procedures that will be used to test the evidence. In this case, the Board has provided notice about the procedures that will apply.

In the Board's view, the legislation makes it clear that the Board is master of its own procedure and can establish its own procedures for each public hearing with regard to the conduct of hearings. This includes the authority to determine for a particular public hearing the manner in which evidence will be received and tested. In the circumstances of this hearing, where there are 400 intervenors and much of the information is technical in nature, the Board has determined that it is appropriate to test the evidence through written processes. All written evidence submitted will be subject to written questioning by up to 400 parties, and the Board.

(underlining added, footnotes omitted)

[249] Further aspects of the relevant context are discussed in the Board's final report at page 4:

For the Board's review of the Project application, the hearing had significant written processes as well as oral components. With the exception of oral traditional evidence described below, evidence was presented in writing, and

> testing of that evidence was carried out through written questions, known as Information Requests (IRs). Intervenors submitted over 15,000 questions to Trans Mountain over two major rounds of IRs. Hundreds of other questions were asked in six additional rounds of IRs on specific evidence. If an intervenor believed that Trans Mountain provided inadequate responses to its questions, it could ask the Board to compel Trans Mountain to provide a more complete response. Trans Mountain could do the same in respect of IRs it posed to intervenors on their evidence. There was also written questioning on various additional evidence, including supplemental, replacement, late and Trans Mountain's reply evidence.
>
> The Board decided, in its discretion in determining its hearing procedure, to allow testing of evidence by IRs and determined that there would not be cross examination in this hearing. The Board decided that, in the circumstances of this hearing where there were 400 intervenors and legislated time limits, and taking into consideration the technical nature of the information to be examined, it was appropriate to test the evidence through written processes. In the final analysis, the written evidence submitted was subjected to extensive written questioning by up to 400 participants and the Board. The Board is satisfied that the evidence was appropriately tested in its written process and that its hearing was fair for all parties and met natural justice requirements. …
>
> (underlining added, footnote omitted)

[250] Having set out the context relevant to determining the content of the duty of fairness, and the Board's discussion of the context, the next step is to apply the contextual factors enumerated in *Baker* to determine whether the absence of oral cross-examination was inconsistent with the participatory rights required by the duty of fairness. The heart of this inquiry is directed to whether the parties had a meaningful opportunity to present their case fully and fairly.

[251] Applying the first *Baker* factor, the nature of the Board's decision is different from a judicial decision. The Board is required to apply its expertise to the record before it in order to make recommendations about whether the Project is and will be required by public convenience and necessity, and whether the Project is likely to cause significant adverse environmental effects that can or cannot be justified in the circumstances. Each recommendation requires the Board to

consider a broad spectrum of considerations and interests, many of which depend on the Board's discretion. For example, subsection 52(2) of the *National Energy Board Act* requires the Board's recommendation to be based on "all considerations that appear to it to be directly related to the pipeline and to be relevant". The Board's environmental assessment is to take into account "any other matter relevant to the environmental assessment that the [Board] requires to be taken into account" (paragraph 19(1)(*j*) of the *Canadian Environmental Assessment Act, 2012*). The nature of the decision points in favour of more relaxed requirements under the duty of fairness.

[252] The statutory scheme also points to more relaxed requirements. The Board may determine that a pipeline application be dealt with wholly in writing (Rule 22(1), *National Energy Board Rules of Practice and Procedure, 1995*). The Board is required to deal with matters expeditiously, and within the legislated time limit. When the hearing order providing for Information Requests, not oral cross-examination, was issued on April 2, 2014, the Board was required to deliver its report by July 2, 2015. In legislating this time limit Parliament must be presumed to have contemplated that pipeline approval projects could garner significant public interest such that, as in this case, 400 parties successfully applied for leave to intervene. One aspect of the statutory scheme does point to a higher duty of fairness: the legislation does not provide for a right of appeal (save with leave on a question of law or jurisdiction). However, as discussed at length above, the Board's decision is subject to scrutiny in proceedings such as this.

[253] The importance of the decision is a factor that points toward a heightened fairness requirement.

[254] For the reasons given by the Board, I do not see any basis for a legitimate expectation that oral cross-examination would be permitted. To the Board's reasons I would add that such an expectation would be contrary to the Board's right to determine that an application be reviewed wholly in writing. While the Board did permit oral cross-examination in its review of the Northern Gateway Pipeline, in that case the Board's report discloses that intervener status was granted to 206 entities—roughly half the number of entities given intervener status in this case.

[255] Finally, the Board's choice of procedure, while not determinative, must be given some respect, particularly where the legislation gives the Board broad leeway to choose its own procedure, and the Board has experience in deciding appropriate hearing procedures.

[256] I note that when the Board rendered its decision on the request that it reconsider Ruling No. 14 so as to allow oral cross-examination, the applicants had received Trans Mountain's responses to their first round of Information Requests; many had brought motions seeking fuller and better answers. The Board ruled on the objections on September 26, 2014. Therefore, the Board was well familiar with the applicants' stated concerns, as is seen in Ruling No. 51 when it declined to reconsider its earlier ruling refusing to amend the hearing order to allow oral cross-examination.

[257] Overall, while the importance of the decision and the lack of a statutory appeal point to stricter requirements under the duty of fairness, the other factors point to more relaxed requirements. Balancing these factors, I conclude that the duty of fairness was significant. Nevertheless, the duty of fairness was not breached by the Board's decisions not to allow oral

cross-examination and not to allow a full oral hearing. The Board's procedure did allow the applicants a meaningful opportunity to present their cases fully and fairly.

[258] Finally on this issue, the Board allowed oral traditional Indigenous evidence because "Aboriginal people have an oral tradition that cannot always be shared adequately in writing." (Ruling No. 14, page 5). With respect to Stó:lō's concerns about permitting oral questioning of oral traditional evidence, the Board permitted "Aboriginal groups [to] choose to answer any questions in writing or orally, whichever is practical or appropriate by their determination." (Ruling No. 14, page 5). This is a complete answer to the concerns of the Stó:lō.

[259] I now turn to the next asserted breach of procedural fairness.

(iv) Trans Mountain's responses to the Information Requests

[260] The City of Burnaby and Squamish argue that Trans Mountain provided generic, incomplete answers to the Information Requests and the Board failed in its duty to compel further and better responses.

[261] During the oral hearing before this Court Burnaby reviewed in detail: Burnaby's first Information Request questioning Trans Mountain about its consideration of alternatives to expanding the pipeline, tank facilities and marine terminal in a major metropolitan area; Trans Mountain's response; the Board's denial of Burnaby's request for a fuller answer; Burnaby's second Information Request; Trans Mountain's response; the Board's denial of Burnaby's request for a fuller answer; the Board's first Information Request to Trans Mountain questioning

alternative means of carrying out the Project; Trans Mountain's response; the Board's second Information Request; and, Trans Mountain's response to the Board's second Information Request. Burnaby argues that Trans Mountain provided significantly more information to the Board than it did to Burnaby, but the information Trans Mountain provided was still insufficient.

[262] Squamish made brief reference in oral argument to the Board's failure to order fuller answers about the Crown's assessment of the strength of its claims to Aboriginal rights and title.

[263] As can be seen from Burnaby's oral submission, it brought motions before the Board to compel better answers in respect of both of Trans Mountain's responses to Burnaby's Information Requests.

[264] I begin consideration of this issue by acknowledging that most, but not all, of Burnaby's requests for fuller answers were denied by the Board. However, procedural fairness does not guarantee a completely successful outcome. The Board did order some further and better answers in respect of each motion. Burnaby must prove more than just that the Board did not uphold all of its objections.

[265] The Board's reasons for declining to compel further answers are found in two of the Board's rulings: Ruling No. 33 (A4 C4 H7) in respect of the first round of Information Requests directed to Trans Mountain by the interveners, and Ruling No. 63 (A4 K8 G4) in respect of the second round of the interveners' Information Requests. Each ruling was set out in the form of a letter which attached an appendix. The appendix listed each question included in the motions to

compel, organized by intervener, and provided "the primary reason" the motion to compel was granted or denied. Each ruling also provided in the body of the decision "overall comments about the motions and the Board's decision".

[266] The Board set out the test it applied when considering motions to compel in the following terms:

> …the Board looks at the relevance of the information sought, its significance, and the reasonableness of the request. The Board balances these factors so as to satisfy the purpose of the [Information Request] process, while preventing an intervenor from engaging in a 'fishing expedition' that could unfairly burden the applicant.

[267] In its decision the Board also provided general information describing circumstances that led it to decline to compel further answers. Of relevance are the following two situations:

- In some instances, Trans Mountain provided a full answer to the question asked, but the intervener disagreed with the answer. In these cases, rather than seeking to compel a further answer, the Board advised the interveners to file their own evidence in response or to provide their views during final argument.
- In some cases, Trans Mountain may not have answered all parts of an intervener's Information Request. However, in those cases where the Board was of the view that the response provided sufficient information and detail for the Board to consider the application, the Board declined to compel a further response.

[268] It is clear that the Board viewed Burnaby's requests for fuller answers about Trans Mountain's consideration and rejection of alternate locations for the marine terminal to fall within the second situation described above.

[269] The Board's second Information Request to Trans Mountain on this point was answered by Trans Mountain on July 21, 2014, and its answer was served upon all of the interveners. Therefore, the Board was aware of this response when on September 26, 2014, it rejected Burnaby's motion in Ruling No. 33.

[270] That the Board found Trans Mountain's answer to its second Information Request to be sufficient is reflected in the Board's report, where at pages 241 to 242 the Board relied on the content of Trans Mountain's response to its second Information Request to articulate Trans Mountain's consideration of the alternatives to the Westridge Marine Terminal. At page 244 of the report, the Board found Trans Mountain's "alternative means assessment" to be appropriate. The Board went on to acknowledge Burnaby's concern that Trans Mountain had not provided an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat or Roberts Bank. However, the Board disagreed, finding that "Trans Mountain has provided an adequate assessment, including consideration of the technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations."

[271] Obviously, Burnaby disagrees with this assessment. However, it has not demonstrated how the Board's conduct concerning Burnaby's Information Requests breached the requirements of procedural fairness. For example, Burnaby has not pointed to evidence that contradicted Trans Mountain's stated reasons for rejecting alternative marine terminal locations. Trans Mountain stated that its assessment was based on feasibility of coincident marine and pipeline access, and technical, economic and environmental considerations of the screened alternative locations. Any

demonstrated conflict in the evidence on these points may have supported a finding that meaningful participation required Trans Mountain to provide more detailed information.

[272] In support of its submission concerning procedural fairness Squamish pointed to a question it directed to Natural Resources Canada. It asked whether that entity had "assessed the strength of Squamish's claim to aboriginal rights in the area of the proposed Project" and if so, to provide "that assessment and any material upon which that assessment is based."

[273] The response Squamish received to its Information Request was:

> The Crown has conducted preliminary depth of consultation assessments for all Aboriginal groups, including Squamish Nation, whose traditional territory intersects with or is proximate to the proposed pipeline right of way, marine terminal expansion and designated marine shipping lanes. (Depth of consultation assessments consider both potential impacts to rights and the strength of claim to rights.) The Crown's depth of consultation assessment is iterative and is expected to evolve as the [Board] review process unfolds and as Aboriginal groups submit their evidence to the [Board] and engage in Phase III consultations with the Crown. The Crown has assessed depth of consultation for the Squamish Nation as "high." This preliminary conclusion was filed into evidence [by the Major Projects Management Office] on May 27, 2015.
>
> The starting point for these assessments is to work with information the Crown has in hand, but Squamish Nation is invited to provide information that they believe could assist the Crown in understanding the nature and scope of their rights.
>
> (underlining added)

[274] Squamish objected to the Board that its request was only partly addressed, and requested that Natural Resources Canada provide the material on which its assessment was based.

[275] In reply to Squamish's motion to compel a further answer, Natural Resources Canada responded:

> In the context of the current hearing process, it is the view of [the Major Projects Management Office] that the further information and records sought by Squamish Nation will not be of assistance to the Panel in fulfilling its mandate.
>
> However, the Crown will communicate with the Squamish Nation in August 2015 to provide further information on Phase III Crown consultation and the Crown's approach to considering adverse impacts of the Project on potential or established Aboriginal and treaty rights. This forthcoming correspondence will summarize the Crown's understanding of the strength of Squamish Nation's claim for rights and title.

[276] The Board denied Squamish's request for a fuller answer on the primary ground that the information Squamish sought "would not contribute to the record in any substantive way and, therefore, would not be material to the Board's assessment."

[277] Given the mandate of the Board, the iterative nature of the consultation process and the fact that direct Crown consultation would take place in Phase III following the release of the Board's report, Squamish has not shown that it was a breach of procedural fairness for the Board not to compel a fuller answer to its question.

(v) The asserted deferral and delegation of the assessment of important information

[278] The City of Burnaby next argues that the Board impermissibly deferred "the provision of critically important information to after the Report stage, and after the [Governor in Council's decision]" (memorandum of fact and law, paragraph 164). Burnaby says that by doing so, the Board acted contrary to the statutory regime and breached the principle of *delegatus non potest*

delegare. At this point in its submissions, Burnaby did not suggest what specific aspect of the statutory regime was contravened, or how the Board or the Governor in Council improperly delegated their statutory responsibility. At this stage, Burnaby deals with this as an issue of procedural fairness. I deal with the statutory scheme argument commencing at paragraph 322.

[279] Burnaby points to a number of issues where it alleges that the Board failed to weigh the evidence and expert opinions put before it. Burnaby says:

- It provided expert evidence that the Project presents serious and unacceptable safety risks to the neighbourhoods that are proximate to the Burnaby Terminal as a result of fire, explosion and boil-over, and that Trans Mountain had failed to assess these risks.
- It established gaps in Trans Mountain's geotechnical investigation of the tunnel option and a lack of analysis of the feasibility of the tunnel option.
- It identified significant information gaps with respect to the Westridge Marine Terminal, including gaps concerning: the final design; spill risk; fire risk; geotechnical risk; and, the ability to respond to these risks.
- It adduced evidence that the available fire response resources were inadequate.
- It demonstrated the risk to Simon Fraser University following an incident at the Burnaby Terminal because of the tunnel's proximity to the only evacuation route from the University.

[280] Burnaby argues that the Board declined to compel further information from Trans Mountain on these points, and instead imposed conditions that required Trans Mountain to do certain specified things in the future. For example, the Board imposed conditions requiring Trans Mountain to file with the Board for approval a report to revise the terminal risk assessments, including the Burnaby Terminal risk assessment, to include consideration of the risks not assessed (Board Conditions 22 and 129). Board Condition 22 had to be met at least six months

before Trans Mountain commenced construction; Condition 129 had to be met at least three months before Trans Mountain applied to open each terminal. Burnaby also notes that many conditions imposed by the Board were not subject to subsequent Board approval.

[281] Burnaby argues that this process prevented meaningful testing of information filed after the Board issued its report recommending that the Project be approved. Further, the Governor in Council did not have access to the material to be filed in response to the Board's conditions when it made its determination of the public interest.

[282] Underpinning these arguments is Burnaby's assertion that the "Board's rulings deprived Burnaby of the ability to review and assess the validity of the alternatives assessment (or to confirm that one was made)." (memorandum of fact and law, paragraph 41).

[283] I can well understand Burnaby's concern—the consequence of a serious spill or explosion and fire in a densely populated metropolitan area might be catastrophic. However, in my respectful view, Burnaby's understandable desire to be able to independently review and assess the validity of the assessment of alternatives to the expansion of the Westridge Marine Terminal, or other matters that affect the City, is inconsistent with the regulatory scheme enacted by Parliament. Parliament has vested in the Board the authority and responsibility to consider and then make recommendations to the Governor in Council on matters of public interest; the essence of the Board's responsibility is to balance the Project-related benefits against the Project-related burdens and residual burdens, and to then make recommendations to the Governor in Council. In this legislative scheme, the Board is not required to facilitate an interested party's

independent review and assessment of a project. It is not for this Court to opine on the appropriateness of the policy expressed and implemented in the *National Energy Board Act*. Rather, the Court's role is to apply the legislation as Parliament has enacted.

[284] The Supreme Court has recognized the Board's "expertise in the supervision and approval of federally regulated pipeline projects" and described the Board to be "particularly well positioned to assess the risks posed by such projects". The Supreme Court went on to note the Board's "broad jurisdiction to impose conditions on proponents to mitigate those risks" and to acknowledge that it is the Board's "ongoing regulatory role in the enforcement of safety measures [which] permits it to oversee long-term compliance with such conditions" (*Chippewas of the Thames First Nation*, paragraph 48). While the Supreme Court was particularly focused on the Board's expertise in the context of its ability to assess risks posed to Indigenous groups, the Board's expertise extends to the full range of risks inherent in the operation of a pipeline, including the risks raised by Burnaby.

[285] Burnaby's submission must be assessed in the light of the Board's approval process. I will set out the Board's approval process at some length because of the importance of this issue to the City of Burnaby and other applicants.

[286] The Board described its approval process in Section 1.3 of its report:

> Trans Mountain's Application was filed while the Project was at an initial phase of the regulatory lifecycle, as is typical of applications under section 52 of the NEB Act. As set out in the Board's Filing Manual, the Board requires a broad range of information when a section 52 application is filed. At the end of the hearing, the level of information available to the Board must be sufficient to allow it to make a recommendation to the GIC that the Project is or is not in the public

interest. There also must be sufficient information to allow the Board to draft conditions that would attach to any new and amended CPCNs, and other associated regulatory instruments (Instruments), should the Project be approved by the GIC.

The Board does not require final information about every technical detail during the application stage of the regulatory process. For example, much of the information filed with respect to the engineering design would be at the conceptual or preliminary level. Site-specific engineering information would not be filed with the Board until after the detailed routing is confirmed, which would be one of the next steps in the regulatory process should the Project be approved. Completion of the detailed design of the project, as well as subsequent construction and operations, would have to comply with:

- the NEB Act, regulations, including the National Energy Board Onshore Pipeline Regulations (OPR), referenced standards and applicable codes;

- the company's conceptual design presented, and commitments made in the Application and hearing proceedings; and

- conditions which the Board considers necessary.

The Board may impose conditions requiring a company to submit detailed information for review (and in some cases, for approval) by the Board before the company is permitted to begin construction. Further information, such as pressure testing results, could be required in future leave to open applications before a company would be permitted to begin pipeline operations. In compliance with the OPR, a company is also required to fully develop an emergency response plan prior to beginning operations. In some cases, the Board has imposed conditions with specific requirements for the development, content and filing of the emergency response plan (see Table 1). This would be filed and fully assessed at a condition compliance stage once detailed routing is known. Because the detailed routing information is necessary to perform this assessment, it would be premature to require a fully detailed emergency response plan to be filed at the time of the project application.

While the project application stage is important, as set out in Chapter 3, there are further detailed plans, studies and specifications that are required before the project can proceed. Some of these are subject to future Board approval, and others are filed with the Board for information, disclosure, and/or future compliance enforcement purposes. The Board's recommendation on the project application is not a final determination of all issues. While some hearing participants requested the final detailed engineering or emergency response plans, the Board does not require further detailed information and final plans at this stage of the regulatory lifecycle.

> To set the context for its reasons for recommendation, the Board finds it helpful to identify the fundamental consideration used in reaching any section 52 determination. The overarching consideration for the Board's public interest determination at the application stage is: can this pipeline be constructed, operated and maintained in a safe manner. The Board found this to be the case. While this initial consideration is fundamental, a finding that a pipeline could be constructed, operated and maintained in a safe manner does not mean a pipeline is necessarily in the public interest as there are other considerations that the Board must weigh, as discussed below. However, the analysis would go no further if the answer to this fundamental question were answered in the negative, as an unsafe pipeline can never be in the public interest.
>
> (underlining added, footnote omitted)

[287] The Board went on to describe how projects are regulated through their lifecycle in Chapter 3, particularly in Sections 3.1 to 3.5:

> 3.0 Regulating through the Project lifecycle
>
> The approval of a project, through issuance of one or more Certificate of Public Convenience and Necessity (CPCN) and/or orders incorporating applicable conditions, forms just one phase in the Board's lifecycle regulation. The Board's public interest determination relies upon the subsequent execution of detailed design, construction, operation, maintenance and, ultimately, abandonment of a project in compliance with applicable codes, commitments and conditions, such as those discussed in Chapter 1. Throughout the lifecycle of an approved project, as illustrated in Figure 4, the Board holds the pipeline company accountable for meeting its regulatory requirements in order to keep its pipelines and facilities safe and secure, and protect people, property and the environment. To accomplish this, the Board reviews or assesses condition filings, tracks condition compliance, verifies compliance with regulatory requirements, and employs appropriate enforcement measures where necessary to quickly and effectively obtain compliance, prevent harm, and deter future non-compliance.
>
> After a project application is assessed and the Board makes its section 52 recommendation (as described in Chapter 2, section 2.1), the project cannot proceed until and unless the Governor in Council approves the project and directs the Board to issue the necessary CPCN. If approved, the company would then prepare plans showing the proposed detailed route of the pipeline and notify landowners. A detailed route hearing may be required, subject to section 35 of the *National Energy Board Act* (NEB Act). The company would also proceed with the detailed design of the project and could be required to undertake additional studies, prepare plans or meet other requirements pursuant to NEB conditions on any CPCN or related NEB order. The company would be required to comply with

all conditions to move forward with its project, prior to and during construction, and before commencing operations. While NEB specialists would review all condition filings, those requiring approval of the Board would require this approval before the project could proceed.

Once construction is complete, the company would need to apply for the Board's permission (or "leave") to open the project and begin operations. While some conditions may apply for the life of a pipeline, typically the majority must be satisfied prior to beginning operations or within the first few months or years of operation. However, the company must continue to comply with the *National Energy Board Onshore Pipeline Regulations* (OPR) and other regulatory requirements to operate the pipeline safely and protect the environment.

…

If the Project is approved, the Board would employ its established lifecycle compliance verification and enforcement approach to hold Trans Mountain accountable for implementing the proposed conditions and other regulatory requirements during construction, and the subsequent operation and maintenance of the Project.

3.1 Condition compliance

If the Project is approved and Trans Mountain decides to proceed, it would be required to comply with all conditions that are included in the CPCNs and associated regulatory instruments (Instruments). The types of filings that would be required to fulfill the conditions imposed on the Project, if approved, are summarized in Table 4.

If the Project is approved, the Board would oversee condition compliance, make any necessary decisions respecting such conditions, and eventually determine, based on filed results of field testing, whether the Project could safely be granted leave to open.

Documents filed by Trans Mountain on condition compliance and related Board correspondence would be available to the public on the NEB website. All condition filings, whether or not they are for approval, would be reviewed and assessed to determine whether the company has complied with the condition, and whether the filed information is acceptable within the context of regulatory requirements and standards, best practices, professional judgement and the goals the condition sought to achieve. If a condition is "for approval," the company must receive formal approval, by way of a Board letter, for the condition to be fulfilled.

If a filing fails to fulfill the condition requirements or is determined to be inadequate, the Board would request further information or revisions from the company by a specified deadline, or may direct the company to undertake additional steps to meet the goals that the condition was set out to achieve.

> 3.2 Construction phase
>
> During construction, the Board would require Trans Mountain to have qualified inspectors onsite to oversee construction activities. The Board would also conduct field inspections and other compliance verification activities (as described in section 3.5) to confirm that construction activities meet the conditions of the Project approval and other regulatory requirements, to observe whether the company is implementing its own commitments and to monitor the effectiveness of the measures taken to meet the condition goals, and ensure worker and public safety and protection of the environment.
>
> 3.3 Leave to open
>
> If the Project is approved and constructed, the Board will require Trans Mountain to also apply, under section 47 of the NEB Act, for leave to open the pipelines and most related facilities. This is a further step that occurs after conditions applicable to date have been met and the company wishes to begin operating its pipeline and facilities. The Board reviews the company's submissions for leave to open, including the results of field pressure testing, and may seek additional information from the company. Before granting leave to open, the Board must be satisfied that the pipeline or facility has been constructed in compliance with requirements and that it can be operated safely. The Board can impose further terms and conditions on a leave to open order, if needed.
>
> (underlining added, figures and tables omitted)

[288] In Section 3.5 the Board set out its compliance and enforcement programs noting that:

> While all companies are subject to regulatory oversight, some companies receive more than others. In other words, high consequence facilities, challenging projects and those companies who are not meeting the Board's regulatory expectations and goals can expect to see the Board more often than those companies and projects with routine operations.

[289] No applicant challenged the accuracy of the Board's formulation of its approval process and subsequent compliance verification and enforcement approach. The City of Burnaby has not shown how the Board's multi-step approval process is either procedurally unfair or an improper delegation of authority. Implicit in the Board's imposition of a condition, such as a condition requiring a revised risk assessment, or a condition requiring information regarding tunnel

location, construction methods, and the like, is the Board's expectation that the condition may realistically be complied with, and that compliance with the condition will allow the pipeline to be constructed, operated and maintained in a safe manner. Also implicit in the Board's imposition of a condition is its understanding of its ability to assess condition filings (whether or not the condition requires formal approval), and its ability to oversee compliance with its conditions.

[290] Transparency with respect to Trans Mountain's compliance with conditions is provided by the Board publishing on its website all documents filed by Trans Mountain relating to condition compliance and all related, responsive Board correspondence.

[291] As for the role of the Governor in Council in such a tiered approval process, the recitals to the Order in Council show that the Board's conditions were placed before the Governor in Council. Therefore, the Governor in Council must be seen to have been aware of the extent of the matters left for future review by the Board, and to have accepted the Board's assessment and recommendation about the public interest on that basis.

(vi) Failing to provide adequate reasons

[292] The City of Burnaby next argues that the Board erred by failing to provide sufficient reasons on the following issues:

a. alternative means of carrying out the Project;
b. risks relating to fire and spills (including seismic risk);
c. the suitability of the Burnaby Mountain Tunnel;
d. the protection of municipal water sources; and,

e. whether, and on what basis, the Project is in the public interest.

[293] I begin my analysis by noting that the adequacy of reasons is not a "stand-alone basis for quashing a decision". Rather, reasons are relevant to the overall assessment of reasonableness. Further, reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraph 14).

[294] This is consistent with the Court's reasoning in *Dunsmuir* where the Supreme Court explained the notion of reasonableness review and spoke of the role reasons play in reasonableness review:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process

> of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" *(Canada (Attorney General) v. Mossop*, 2008 SCC 9, [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).
>
> (underlining added)

[295] Reasons need not include all of the relevant arguments, statutory provisions or jurisprudence. A decision-maker need not make an explicit finding on each constituent element leading to the final conclusion. Reasons are adequate if they allow the reviewing court to understand why the decision-maker made its decision and permit the reviewing court to determine whether the conclusion is within the range of acceptable outcomes.

[296] I now turn to consider Burnaby's submissions in the context of the Board's reasons.

Alternative means of carrying out the Project

[297] Burnaby's concern about alternative means of carrying out the Project centers on the Board's treatment of alternative locations for the marine terminal. In Section 11.1.2 the Board dealt with the requirement imposed by paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012* that an environmental assessment of a designated project must take into account "alternative means of carrying out the designated project that are technically and economically feasible". The views of the Board are expressed in this section on pages 244 through 245.

[298] Of particular relevance to Burnaby's concern are the first two paragraphs of the Board's reasons:

> The Board finds that Trans Mountain's route selection process, route selection criteria, and level of detail for its alternative means assessment are appropriate. The Board further finds that aligning the majority of the proposed pipeline route alongside, and contiguous to, existing linear disturbances is reasonable, as this would minimize the environmental and socio-economic impacts of the Project.
>
> The Board acknowledges the concern raised by the City of Burnaby that Trans Mountain did not provide an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat, B.C., or Roberts Bank in Delta, B.C. The Board finds that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations.

[299] In my view, these reasons allowed the Governor in Council and allow this Court to know why the Board found Trans Mountain's assessment of alternative means to be adequate or appropriate—the Board accepted the facts conveyed by Trans Mountain and found that these facts provided an appropriately detailed consideration of the alternative means. In my further view, the reasons, when read with the record, also allow the Court to consider whether the Board's treatment of alternatives to the Westridge Marine Terminal were so materially flawed that the Board's report was not a "report" that the Governor in Council could rely upon. This is a substantive issue I deal with below commencing at paragraph 322.

Assessment of risks

[300] Burnaby's concerns about the assessment of risks centre on the Burnaby Terminal risk assessment, the Westridge Marine Terminal risk assessment, the Emergency Fire Response plan and the evacuation of Simon Fraser University.

Burnaby Terminal

[301] The Board's consideration of terminal expansions generally is found in Section 6.4 of its report. The Burnaby Terminal is discussed at pages 92 through 95 of the Board's report. After setting out the evidence, including Burnaby's evidence, at page 95 the Board expressed its reasons on the Burnaby Terminal as follows:

> The Burnaby Terminal is uphill of the neighborhood of Forest Grove. An issue of potential concern is the possibility, however remote, of a multiple-tank failure in a common impounding area exceeding the available secondary containment capacity under certain conditions. The Board would impose a condition requiring Trans Mountain to demonstrate that the secondary containment system would be capable of draining large spills away from Tank 96, 97 or 98 to the partial RI. Trans Mountain must also demonstrate that the secondary containment system has the capacity to contain a spill from a multiple-tank rupture scenario (Condition 24).
>
> The City of Burnaby and the City of Burnaby Fire Department raised concerns about fire and safety risks at the Burnaby Terminal following, in particular, those associated with boil-overs. Trans Mountain claimed that boil-over events are unlikely, yet did not quantify the risks through rigorous analysis. The Board is of the view that a complete assessment of risk requires consideration of the cumulative risk from all tanks at a terminal. The Board would impose conditions requiring Trans Mountain to revise the terminal risk assessments, including the Burnaby Terminal, to demonstrate how the mitigation measures will reduce the risks to levels that are As Low As Reasonably Practicable (ALARP) while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria considering all tanks in each respective terminal (Conditions 22 and 129).

[302] With respect to the geotechnical design, the Board wrote at page 97:

> The Board acknowledges the concerns of participants regarding the preliminary nature of the geotechnical design evidence provided. However, the Board is of the view that the design information and the level of detail provided by Trans Mountain with respect to the geotechnical design for the Edmonton Terminal West Tank Area and the Burnaby Terminal are sufficient for the Board at the application stage. The Board notes that more extensive geotechnical work will be completed for the detailed engineering and design phase of the Project.
>
> …

> With regard to the selection of Seismic Use Group (SUG) for the design of the tanks, the Board notes that Trans Mountain has not made a final determination. Nevertheless, should the Project be approved, the Board will verify that Trans Mountain's tanks have secondary controls to prevent public exposure, in accordance with SUG I design criteria, by way of Conditions 22, 24 and 129.

[303] In my view, these reasons adequately allow the Court to understand why the Board rejected Burnaby's evidence and why it imposed the conditions it did.

Westridge Marine Terminal

[304] The Board dealt with the Westridge Marine Terminal expansion in Section 6.5 of its report.

[305] The Board expressed its views at pages 100 through 102. With respect to the design approach the Board wrote:

> Trans Mountain has committed to design, construct, and operate the Westridge Marine Terminal (WMT) in accordance with applicable regulations, standards, codes and industry best practices. The Board accepts Trans Mountain's design approach, including Trans Mountain's effort to eliminate two vapour recovery tanks in the expanded WMT by modifying the vapour recovery technology. The Board considers this to be a good approach for eliminating potential spills and fire hazards. The Board would impose Condition 21 requiring Trans Mountain to provide its decision as well as its rationale to either retain or eliminate the proposed relief tank.

[306] With respect to the geotechnical design, the Board wrote:

> The Board acknowledges the City of Burnaby's concern regarding the level of detail of the geotechnical information provided in the hearing for the Westridge Marine Terminal (WMT) offshore facilities. However, the Board is of the view that Trans Mountain has demonstrated its awareness of the requirements for the geotechnical design of the offshore facilities and accepts Trans Mountain's geotechnical design approach.

> To confirm that soil conditions have been adequately assessed for input to the final design of the WMT offshore facilities, the Board would impose conditions requiring Trans Mountain to file a final preliminary geotechnical report for the design of the offshore facilities, and the final design basis for the offshore pile foundation layout once Trans Mountain has selected the pile design (Conditions 34 and 83).
>
> To verify the geotechnical design approach for the WMT onshore facilities the Board would impose Condition 33 requiring Trans Mountain to file a preliminary geotechnical report for the onshore facilities prior to the commencement of construction.
>
> The Board would examine the geotechnical reports upon receipt and advise Trans Mountain of any further requirements for the fulfilment of the above conditions prior to the commencement of construction.

[307] I have previously dealt with Burnaby's concern with the Board's failure to compel further and better information from Trans Mountain at the hearing stage, and to instead impose conditions requiring Trans Mountain to do certain things in future. Burnaby's concerns relating to the assessment of risks centre on this approach taken by the Board. Burnaby has not demonstrated how the Board's reasons with respect to the Westridge Marine Terminal risk assessment are inadequate.

Emergency fire response

[308] The Board responded to Burnaby's concerns about adequate resources to respond to a fire as follows at page 156:

> The Board shares concerns raised by the City of Burnaby Fire Department and others about the need for adequate resources to respond in the case of a fire. The Board finds the 6-12 hour response time proposed by Trans Mountain for industrial firefighting contractors to arrive on site as inadequate, should they be needed immediately for a response to a fire at the Burnaby Terminal. The Board would impose conditions requiring Trans Mountain to complete a needs assessment with respect to the development of appropriate firefighting capacity for a safe, timely, and effective response to a fire at the Westridge Marine Terminal (WMT) and at the Edmonton, Sumas, and Burnaby Terminals. The

> conditions would require Trans Mountain to assess and evaluate resources and equipment to address fires, and a summary of consultation with appropriate municipal authorities and first responders that will help inform a Firefighting Capacity Framework (Conditions 118 and 138).

[309] Again, Burnaby's concern is not so much with respect to the adequacy of the Board's reasons, but rather with the Board's approach to dealing with Burnaby's concerns through the imposition of conditions—in this case conditions that do not require formal Board approval. On this last point, the Board's explanation of its process for the review of conditions supports the conclusion that an inadequate response to a condition, even a condition not requiring formal Board approval, would be detected by the Board's specialists. Further, the Board oversees compliance with the conditions it imposes.

[310] In any event, I see no inadequacy in the Board's reasons.

Suitability of the Burnaby Mountain Tunnel

[311] The Board deals with the Burnaby Mountain Tunnel in Sections 6.2.2 and 6.2.3. The Board's views, in part, are expressed as follows at pages 81 and 82:

> Regarding the City of Burnaby's concern with Trans Mountain's geotechnical investigation, the Board is of the view that the level of detail of the geotechnical investigation for the tunnel option is sufficient for the purpose of assessing the feasibility of constructing the tunnel. The Board notes that a second phase of drilling is planned for the development of construction plans at the tunnel portals, and that additional surface boreholes or probe holes could be drilled from the tunnel face during construction. The Board is of the view that both the tunnel and street options are technically feasible, and accepts Trans Mountain's proposal that the streets option be considered as an alternative to the tunnel option.
>
> The Board is not aware of the use of the concrete or grout-filled tunnel installation method for other hydrocarbon pipelines in Canada. The Board is concerned that damage to the pipe or coating may occur during installation of the pipelines or grouting, and that there will be limited accessibility for future maintenance and

> repairs. The Board is also concerned that there may be voids or that cracks could form in the grout. The Board would require Trans Mountain to address these and other matters, including excavation, pipe handing, backfilling, pressure testing, cathodic protection, and leak detection, through the fulfillment of Conditions 26, 27 and 28 on tunnel design, construction, and operation.
>
> The Board would impose Condition 29 regarding the quality and quantity of waste rock from the tunnel and Trans Mountain's plans for its disposal.
>
> The Board would also impose Condition 143 requiring Trans Mountain to conduct baseline inspections, including in-line inspection surveys, of the new delivery pipelines in accordance with the timelines and descriptions set out in the condition. The Board is of the view that these inspections would aid in mitigating any manufacturing and construction related defects, and in establishing re-inspection intervals.

[312] Burnaby has not demonstrated how these reasons are inadequate.

Protection of municipal water sources

[313] While Burnaby enumerated this as an issue on which the Board gave inadequate reasons, Burnaby made no submissions on this point and did not point to any particular section of the Board's reasons said to be deficient. In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.

Public interest

[314] Again, while Burnaby enumerated this issue as an issue on which the Board gave inadequate reasons, Burnaby made no submissions on the point.

[315] The Board's finding with respect to public interest is contained in Chapter 2 of the Board's report where, among other things, the Board described the respective benefits and burdens of the Project and then balanced the benefits and burdens in order to conclude that the

Project “is in the present and future public convenience and necessity, and in the Canadian public interest”. In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.

(vii) Trans Mountain’s reply evidence

[316] At paragraph 71 of its memorandum of fact and law, Tsleil-Waututh makes the bare assertion that the Board “permitted [Trans Mountain] to file improper reply evidence”. While Tsleil-Waututh referenced in a footnote its motion record filed in response to Trans Mountain’s reply evidence, it did not make any submissions on how the Board erred or how the reply evidence was improper. Nor did Tsleil-Waututh reference the Board’s reasons issued in response to its motion.

[317] Tsleil-Waututh argued before the Board that, rather than testing Tsleil-Waututh’s evidence through Information Requests, Trans Mountain filed extensive new or supplementary evidence in reply. Tsleil-Waututh alleged that the reply evidence was substantially improper in nature. Tsleil-Waututh sought an order striking portions of Trans Mountain’s reply evidence. In the alternative Tsleil-Waututh sought, among other relief, an order allowing it to issue Information Requests to Trans Mountain about its reply evidence and allowing it to file sur-reply evidence.

[318] The Board, in Ruling No. 96, found that Trans Mountain’s reply evidence was not improper. In response to the objections raised before it, the Board found that:

- Trans Mountain's reply evidence was not evidence that Trans Mountain ought to have brought forward as evidence-in-chief in order to meet its onus.
- Trans Mountain's reply evidence was filed in response to new evidence adduced by the interveners.
- Given the large volume of evidence filed by the interveners, the length of Trans Mountain's reply evidence was not a sufficient basis on which to find it to be improper.
- To the extent that portions of the reply evidence repeated evidence already presented, this caused no prejudice to the interveners who had already had an opportunity to test the evidence and respond to it.

[319] The Board allowed Tsleil-Waututh to test the reply evidence through one round of Information Requests. The Board noted that the final argument stage was the appropriate stage for interveners and Trans Mountain to make submissions to the Board about the weight to be given to the evidence.

[320] Tsleil-Waututh has not demonstrated any procedural unfairness arising from the Board's dismissal of its motion to strike portions of Trans Mountain's reply evidence.

(viii) Conclusion on procedural fairness

[321] For all the above reasons the applicants have not demonstrated that the Board breached any duty of procedural fairness.

(b) Did the Board fail to decide certain issues before recommending approval of the Project?

[322] Both Burnaby and Coldwater make submissions on this issue. Additionally, Coldwater, Squamish and Upper Nicola make submissions about the Board's failure to decide certain issues in the context of the Crown's duty to consult. The latter submissions will be considered in the analysis of the adequacy of the Crown's consultation process.

[323] Burnaby's and Coldwater's submissions may be summarized as follows.

[324] Burnaby raises two principal arguments: first, the Board failed to consider and assess the risks and impacts of the Project to Burnaby, instead deferring the collection of information relevant to the risks and impacts and consideration of that information until after the decision of the Governor in Council when Trans Mountain was required to comply with the Board's conditions; and, second, the Board failed to consider alternative means of carrying out the Project and their environmental effects. Instead, contrary to paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012*, the Board failed to require Trans Mountain to include with its application an assessment of the Project's alternatives and failed to require Trans Mountain to provide adequate answers in response to Burnaby's multiple Information Requests about alternatives to the Project.

[325] With respect to the first error, Burnaby asserts that it is a "basic principle of law that a tribunal or a court must weigh and decide conflicting evidence. It cannot defer determinations post-judgment." (Burnaby's memorandum of fact and law, paragraph 142). In breach of this

principle, the Board did not require Trans Mountain to provide further evidence, nor did the Board weigh or decide conflicting evidence. Instead, the Board deferred assessment of critical issues by imposing a series of conditions on Trans Mountain.

[326] With respect to the second error, Burnaby states that Trans Mountain failed to provide evidence about alternative routes and locations for portions of the Project, including the Burnaby Terminal and the Westridge Marine Terminal. Thus, Burnaby says the Board "had no demonstrated basis on the record to decide" about preferred options or to decide that Trans Mountain used "criteria that justify and demonstrate how the proposed option was selected and why it is the preferred option." (Burnaby's memorandum of fact and law, paragraph 133).

[327] Coldwater asserts that contrary to paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012*, the Board failed to look at the West Alternative as an alternative means of carrying out the Project. Briefly stated, the West Alternative is an alternative route for a segment of the new pipeline. The approved route for this segment of the new pipeline passes through the recharge zone of the aquifer that supplies the sole source of drinking water for 90% of the residents of the Coldwater Reserve and crosses two creeks which are the only known, consistent sources of water that feed the aquifer. The West Alternative is said by Coldwater to pose the least apparent danger to the aquifer.

[328] Trans Mountain responds that the Board considered the risks and impacts of the Project to Burnaby and determined that there was sufficient evidence to conclude that the Project can be constructed, operated and maintained in a safe manner. Further, it was reasonable for the Board

to implement conditions requiring Trans Mountain to submit additional information for Board review or approval throughout the life of the Project. This Court's role is not to reweigh evidence considered by the Board.

[329] Trans Mountain notes that the proponent's application and the subsequent Board hearing represent the process by which the Board collects enough information to ensure that a project can be developed safely and that its impacts are mitigated. At the end of the hearing, the Board requires sufficient information to assess the Project's impacts, and whether the Project can be constructed, operated and maintained safely, and to draft terms and conditions to attach to a certificate of public convenience and necessity, should the Governor in Council approve the Project. It follows that the Board did not improperly defer its consideration of Project impacts to the conditions.

[330] To the extent that some applicants suggest that the Board acted contrary to the "precautionary principle" Trans Mountain responds that the precautionary principle must be applied with the corollary principle of "adaptive management". Adaptive management responds to the difficulty, or impossibility, of predicting all of the environmental consequences of a project on the basis of existing knowledge. Adaptive management permits a project with uncertain, yet potentially adverse, environmental impacts to proceed based on mitigation measures and adaptive management techniques designed to identify and deal with unforeseen effects (*Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] 4 F.C. 672, at paragraph 24).

[331] With respect to the assessment of alternative means, Trans Mountain notes that it presented evidence that it had conducted a feasibility analysis of alternative locations to the Westridge Marine Terminal and the Burnaby Terminal. Based on technical, economic and environmental considerations Trans Mountain had eliminated these options because of the significantly increased costs and larger environmental impacts associated with these alternatives.

[332] Trans Mountain also argues that it presented evidence to confirm that its routing criteria followed the existing pipeline alignment and other linear facilities wherever possible. Additionally, it presented various routing alternatives to the Board. Trans Mountain's preferred corridor through Burnaby Mountain was developed in response to requests that it consider a trenchless option through Burnaby Mountain (as opposed to routing the new pipeline through residential streets). Further, while it had initially considered the West Alternative route around the Coldwater Reserve, Trans Mountain rejected this alternative because it necessitated two crossings of the Coldwater River and involved geo-technical challenges and greater environmental disturbances.

[333] Based on the evidence before it the Board found that:

- Trans Mountain provided an adequate assessment of technically and economically feasible alternatives, including alternative locations;
- the Burnaby Mountain corridor minimized Project impacts and risks;
- Trans Mountain's route selection process and criteria, and the level of detail it provided for its alternative means assessment, were appropriate; and
- the Board imposed Condition 39 to deal with Coldwater's concerns regarding the aquifer. This condition required Trans Mountain to file with the Board, at least six months prior to commencing construction between two specified points, a

> hydrogeological report relating to Coldwater's aquifer. This report must describe, delineate and characterize a number of things. For example, based on the report's quantification of the risks posed to the groundwater supplies for the Coldwater Reserve, the report must "describe proposed measures to address identified risks, including but not limited to considerations related to routing, project design, operational measures, or monitoring".

[334] Trans Mountain submits that while the applicants disagree with the Board's finding about the range of alternatives, the Board has discretion to determine the range of alternatives it must consider and it is not this Court's role to reweigh the Board's assessment of the facts.

(i) Did the Board fail to assess the risks and impacts posed by the Project to Burnaby?

[335] At paragraphs 278 to 291 I dealt with Burnaby's argument that the Board breached the duty of procedural fairness by deferring and delegating the assessment of important information. This argument covers much of the same ground, except it is not couched in terms of procedural fairness.

[336] The gist of Burnaby's concern is reflected in its argument that "[i]t is a basic principle of law that a tribunal or court must weigh and decide conflicting evidence. It cannot defer determinations post-judgment."

[337] This submission is best considered in concrete terms. The risks the Board is said not to have assessed are the risks posed by the Burnaby Terminal, the tunnel route through Burnaby Mountain, the Westridge Marine Terminal, the lack of available emergency fire response

resources to respond to a fire at the Westridge Marine and Burnaby terminals and, finally, the risk in relation to the evacuation of Simon Fraser University following an incident at the Burnaby Terminal. Illustrative of Burnaby's concerns is its specific and detailed argument with respect to the assessment of the risk associated with the Burnaby Terminal.

[338] With respect to the assessment of the risks associated with the Burnaby Terminal, Burnaby points to the report of its expert, Dr. Ivan Vince, which identified deficiencies or information gaps in Trans Mountain's risk assessment for the Burnaby Terminal. A second report prepared by Burnaby's Deputy Fire Chief identified gaps in Trans Mountain's analysis of fire risks and fire response capability.

[339] Burnaby acknowledges that the Board recognized these gaps and deficiencies. Thus, it found that while Trans Mountain claimed that boil-over events are unlikely, Trans Mountain "did not quantify the risks through a rigorous analysis" and that "a complete assessment of risk requires consideration of the cumulative risk from all tanks at a terminal". Burnaby argues, however, that despite recognizing this deficiency, the Board then failed to require Trans Mountain to provide further information and assessment prior to the issuance of the Board's report. Instead, the Board imposed conditions requiring Trans Mountain to file for the Board's approval a report revising the terminal risk assessments, including the Burnaby Terminal risk assessment, and including consideration of the risks not assessed (Conditions 22 and 129).

[340] Condition 22 specifically required the revised risk assessment to quantify and/or include the following:

a. the effect of any revised spill burn rates;
b. the potential consequences of a boil-over;
c. the potential consequences of flash fires and vapour cloud explosions;
d. the cumulative risk based on the total number of tanks in the terminal, considering all potential events (pool fire, boil-over, flash fire, vapour cloud explosion);
e. the domino (knock-on) effect caused by a release of the contents of one tank on other tanks within the terminals and impoundment area(s), or other tanks in adjacent impoundment areas; and,
f. risk mitigation measures, including ignition source control methods.

[341] The Board required that for those risks that could not be eliminated "Trans Mountain must demonstrate in each risk assessment that mitigation measures will reduce the risks to levels that are As Low As Reasonably Practicable (ALARP) while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria for risk acceptability."

[342] Burnaby concludes its argument on this point by stating that this demonstrates that when the Board completed its report and made its recommendation to the Governor in Council the Board did not have information on the risks enumerated in Condition 22, or information on whether these risks could be mitigated. It follows, Burnaby submits, that the Board failed in its duty to weigh and decide conflicting evidence.

[343] Burnaby advances similar arguments in respect of the other risks described above.

[344] In my view, Burnaby's argument illustrates that the Board did look critically at the competing expert evidence about risk assessment. After weighing the competing expert reports, the Board determined that Burnaby's evidence did reveal gaps and deficiencies in Trans

Mountain's risk assessments. Burnaby's real complaint is not that the Board did not consider and weigh conflicting evidence. Rather, its complaint is that the Board did not then require Trans Mountain to in effect re-do its risk assessment.

[345] However this, in my respectful view, overlooks the Board's project approval process, a process described in detail at paragraphs 285 to 287 above.

[346] This process does not require a proponent to file in its application information about every technical engineering detail. What is required is that by the end of the Board's hearing the Board have sufficient information before it to allow it to form its recommendation to the Governor in Council about whether the project is in the public interest and, if approved, what conditions should attach to the project. Included in the consideration of the public interest is whether the project can be constructed, operated and maintained safely.

[347] This process reflects the technical complexity of projects put before the Board for approval. What was before the Board for consideration was Trans Mountain's study and application for approval of a 150 metre-wide pipeline corridor for the proposed pipeline route. At the hearing stage much of the information filed with the Board about the engineering design was at a conceptual or preliminary level.

[348] Once a project is approved, one of the next steps in the regulatory process is a further hearing for the purpose of confirming the detailed routing of a project. Only after the detailed route is approved by the Board can site-specific engineering information be prepared and filed

with the Board. Similarly, detailed routing information is necessary before things such as a fully detailed emergency response plan acceptable to the Board may be prepared and filed (report, page 7).

[349] The Board describes the approval of a project to be "just one phase" in the Board's lifecycle regulation. Thereafter the Board's public interest determination "relies upon the subsequent execution of detailed design, construction, operation, maintenance and, ultimately, abandonment of a project in compliance with applicable codes, commitments and conditions" (report, page 19).

[350] As stated above, implicit in the Board's imposition of a condition is the Board's expert view that the condition can realistically be complied with, and that compliance with the condition will allow the pipeline to be constructed, operated and maintained in a safe manner. After the Board imposes conditions, mechanisms exist for the Board to assess information filed in response to its conditions and to oversee compliance with its conditions.

[351] Burnaby obviously disagrees with the Board's assessment of risk. However, Burnaby has not shown that the Board's approval process is in any way contrary to the legislative scheme. Nor has it demonstrated that the approval process impermissibly defers determinations post-judgment. Courts cannot determine issues after a final judgment is rendered because of the principle of *functus officio*. While this principle has some application to administrative decision-makers it has less application to the Board whose mandate is ongoing to regulate through a project's entire lifecycle.

(ii) Did the Board fail to consider alternative means of carrying out the Project?

[352] As explained above, Burnaby's concern is that Trans Mountain did not provide sufficient information to allow the Board to conclude that Trans Mountain's assessment of alternatives was adequate. Burnaby says that the Board simply accepted Trans Mountain's unsupported assertion that the alternatives would result in "significantly greater cost, larger footprint and additional environmental effects, as compared to expanding existing facilities" without testing Trans Mountain's assertion. Burnaby argues that evidence is required to support that assertion "so that the evidence may be tested by intervenors and weighed by the Board in determining whether the preferred location is the best environmental alternative and in the public interest." (Burnaby's memorandum of fact and law, paragraph 136).

[353] I begin consideration of Burnaby's submission with the observation that Burnaby's challenge is a challenge to the Board's assessment of the sufficiency of the evidence before it. The Board, as an expert Tribunal, is entitled to significant deference when making such a fact-based assessment.

[354] Moreover, in my respectful view, Burnaby's submission fails to take into account that paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012* does not require the Board to have regard to any and all alternative means of carrying out a designated project. The Board is required to consider only those alternative means that are "technically and economically feasible".

[355] While Burnaby relies upon guidance from the Canadian Environmental Assessment Agency as to the steps to be followed in the assessment of alternative means, and also relies upon the guidance set out in the Board's Filing Manual about the filing requirements for the consideration of alternatives, these criteria apply only to the treatment of true alternatives, that is alternatives that are technically and economically feasible.

[356] I now turn to Burnaby's specific concern that the Board simply accepted Trans Mountain's assertion that Project alternatives would result in "significantly greater cost, larger footprint and additional environmental effects, as compared to expanding existing facilities" without testing this assertion. Burnaby argues that the Board was obliged to require that Trans Mountain provide evidence about alternative routes and locations for the Burnaby Terminal and the Westridge Marine Terminal so that the evidence could be tested by it and other interveners.

[357] The impugned quotation comes from Trans Mountain's response to Burnaby's first Information Request (Exhibit H to the affidavit of Derek Corrigan). As previously referred to above at paragraph 269, in addition to Burnaby's Information Requests, the Board also served two Information Requests on Trans Mountain questioning it about alternative marine terminals.

[358] The preamble to the Board's second Information Request referenced Trans Mountain's first response to the Board in which it stated that it had considered potential alternative marine terminal locations based on the feasibility of coincident marine and pipeline access, and screened them based on technical, economic, and environmental considerations. The preamble also referenced Trans Mountain's response that it had ultimately concluded that constructing and

operating a new marine terminal and supporting infrastructure would result in significantly greater cost, a larger footprint and significantly greater environmental effects as compared to the existing facilities. Based on this conclusion Trans Mountain did not continue with a further assessment of alternative termini for the Project.

[359] One of the specific inquiries directed to Trans Mountain by the Board in its second Information Request was:

> Please elaborate on Trans Mountain's rationale for the Westridge Marine Terminal as the preferred alternative, including details to justify Trans Mountain's statement in [Trans Mountain's response to the Board's first Information Request] that constructing and operating a new marine terminal and supporting infrastructure would result in significantly greater cost, a larger footprint, and additional environmental effects, as compared to expanding existing facilities.

[360] In its response to the Board, Trans Mountain began by explaining the consideration it had given the option of a northern terminal. Trans Mountain's assessment ultimately "favoured expansion of the existing system south over a new northern lateral [pipeline] and terminal." This assessment was based on the following considerations. The northern option involved:

- A 250 kilometre longer pipeline with a concomitant 10% to 20% higher project capital cost.
- Greater technical challenges, including routing through high alpine areas of the Coast Mountains, or extensive tunneling to avoid these areas. These technical challenges, while not determined to be insurmountable, resulted in greater uncertainty for both cost and construction schedule.
- Fewer opportunities to benefit from existing operations, infrastructure and relationships. These benefits involved both using the existing Trans Mountain right-of-way, facilities, programs and personnel, and the synergies flowing from other existing infrastructure such as road access, power, and marine infrastructure.

> The inability to benefit from existing operations would increase the footprint and the potential impact of the northern option.

[361] Based on these considerations, Trans Mountain concluded that expansion along the existing Trans Mountain pipeline route was the more favourable option because of the higher costs and the greater uncertainty of both cost and schedule that accompanied the northern option.

[362] Trans Mountain then turned to explain its consideration of the alternative southern terminals. Five southern alternative locations were considered: (i) Howe Sound, which was eliminated because there was no feasible pipeline access west of Hope, it would require a new lateral pipeline from the Kamloops area, it involved extreme terrain and there was limited land available in close proximity for storage facilities; (ii) Vancouver Harbour, which was eliminated because there were no locations with coincident feasible pipeline access and no land for storage facilities; (iii) Sturgeon Bank, which was eliminated because there was no feasible land available in close proximity for storage facilities; (iv) Washington State, which was eliminated because it involved a longer pipeline and complex regulatory issues (including additional permits required by both Washington State and federal authorities); and, (v) Boundary Bay, which was eliminated because of insufficient water depth.

[363] This left for consideration Roberts Bank. Trans Mountain conducted a screening level assessment based on “desktop studies” of technical, economic and environmental considerations for marine access, storage facilities and pipeline routing for a terminal at that location.

[364] After setting out the assumed technical configuration for the Roberts Bank dock, storage and pipeline, Trans Mountain reviewed the engineering and geotechnical considerations. While no unsurmountable engineering or geotechnical issues were identified, Trans Mountain's assessment showed that relative to the Westridge Marine Terminal, the Roberts Bank alternative "required a significantly larger dock structure, a large new footprint for the storage terminal, a longer right of way, and a greater diversion from the existing corridor. The extent and cost of ground improvement necessary for the dock and storage terminal also presented a significant source of uncertainty."

[365] Trans Mountain then reviewed the relevant environmental considerations. Trans Mountain's assessment showed that while both Westridge and Roberts Bank:

> … have unique and important environmental values, based on the setting the environmental conditions at Roberts Bank appeared to be more substantial and uncertain than at Westridge Terminal, particularly given the larger footprint required for the dock and storage terminal. Without effective mitigation accidents or malfunctions at Roberts Bank could result in greater and more immediate consequences for the natural [environment].

[366] Trans Mountain then detailed the salient First Nations' considerations. For the purpose of the screening assessment, Trans Mountain assumed First Nation concerns and interests to be similar to those for the Westridge Terminal and likely to include concerns for impacts on traditional rights, environmental protection, and potential interest in economic opportunities.

[367] Trans Mountain then reviewed the land use considerations, concluding that relative to the Westridge Terminal "the Roberts Bank alternative would result in a greater change in land use both for the storage terminal and the dock structure. As surrounding development is less than that

for Westridge accidents or malfunctions at this location would be expected to affect fewer people."

[368] Trans Mountain's assessment next looked to the estimated cost differences. While operating costs were not quantified for comparison purposes, "given the additional dock and storage terminal required these costs would be higher for the Roberts Bank alternative."

[369] The assessment then looked at marine access considerations. While Roberts Bank offered a shorter and relatively less complex marine transit:

> [T]here is an existing well established marine safety system for vessels calling at Westridge. Although Roberts Bank would allow service to larger vessels which would result in potentially lower transport costs for shippers and lower probability of oil spill accidents larger cargos result in potentially larger spill volumes. While the overall effect on marine spill risk was not determined it is expected that larger cargos would require a greater investment in spill response.

[370] Trans Mountain then set out the conclusions it drew from its assessment. While the Westridge and Roberts Bank terminal alternatives each had positive and negative attributes, especially when viewed from any one perspective, overall Trans Mountain's rationale for the Westridge Marine Terminal as a preferred alternative was based on the expectation that Roberts Bank would result in:

- Significantly greater cost—Trans Mountain estimated a $1.2 billion higher capital cost and assumed higher operating costs for the Roberts Bank alternative.
- A larger footprint and additional environmental effects—Roberts Bank would result in an additional storage terminal with an estimated 100 acres of land required, a larger dock structure with a 7 kilometre trestle, and a 14 kilometre longer pipeline that diverges further from the existing pipeline corridor.

[371] I have set out Trans Mountain's response to the Board at some length because of the importance of this issue to Burnaby. In my view, two points arise from Trans Mountain's response to the Board.

[372] First, its response was not as conclusory as Burnaby's submission might suggest. Second, Trans Mountain's explanation for eliminating a northern alternative and the six, southern alternatives on the ground they were not technically or economically feasible was based on factual and technical considerations well within the expertise of the Board. To illustrate, the Board would have an understanding of the technical challenges posed when routing through high alpine areas. It would also be familiar with considerations such as the expense and environmental impact that accompany the construction of a longer pipeline, away from an existing pipeline corridor, or a new storage facility. The Board would have an appreciation of the need for coincident pipeline access and land for storage facilities and of the efficiencies that flow from things such as the use of existing infrastructure and relationships.

[373] In relevant part, the Board's conclusion on alternative means was:

> The Board finds that Trans Mountain's route selection process, route selection criteria, and level of detail for its alternative means assessment are appropriate. The Board further finds that aligning the majority of the proposed pipeline route alongside, and contiguous to, existing linear disturbances is reasonable, as this would minimize the environmental and socio-economic impacts of the Project.
>
> The Board acknowledges the concern raised by the City of Burnaby that Trans Mountain did not provide an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat, B.C., or Roberts Bank in Delta, B.C. The Board finds that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations.
>
> (underlining added)

[374] Burnaby has not demonstrated that the Board's finding that Trans Mountain provided an appropriate level of detail in its alternative means assessment was flawed. This was a fact-based assessment well within the Board's area of expertise.

(iii) Did the Board fail to look at the West Alternative as an alternative route for the new pipeline?

[375] In its project application, Trans Mountain initially proposed four alternative routes for the new pipeline through the Coldwater River Valley. These were referred to as the Modified Reserve Route, the East Alternative, the Modified East Alternative and the West Alternative. While initially its preferred route was identified to be the East Alternative, Trans Mountain later changed its preferred route to be the Modified East Alternative. Coldwater alleges that at some point early in the process Trans Mountain unilaterally withdrew the West Alternative from consideration without notice to Coldwater. Coldwater also alleges that the East and Modified East Alternatives pose the greatest risk of contaminating the aquifer that supplies drinking water to the Coldwater Reserve, and that the West Alternative is the only route to pose no apparent threat to the aquifer.

[376] Before the Board, Coldwater argued that Trans Mountain did not adequately assess alternative locations for the new pipeline through the Coldwater River Valley. Coldwater requested that the Board require a re-examination of routing options for the Coldwater River Valley before any recommendation on the Project was made.

[377] The Board, in its report, acknowledged Coldwater's concerns at pages 241, 285 and 289.

[378] The Board noted, at page 245, that "the detailed route for the Project has not been finalized, and that this hearing assessed the general route for the Project, the potential environmental and socio-economic effects of the Project, as well as all evidence and commitments made by Trans Mountain regarding the design, construction and safe operation of the pipeline and associated facilities."

[379] At page 290 the Board found that Trans Mountain had not sufficiently shown that there was no potential interaction between the aquifer underlying the Coldwater Reserve and the proposed Project route. Therefore, the Board imposed Condition 39 requiring Trans Mountain to file a hydrogeological study to more precisely determine the potential for interactions and impacts on the aquifer and to assess the need for any additional measures to protect the aquifer, including monitoring measures (Condition 39 was described in greater detail above at paragraph 333).

[380] Coldwater argues that the Board breached its statutory obligation to consider alternative means of carrying out the designated project. Further, this breach cannot be cured at the detailed route hearing because at a detailed route hearing the Board can only consider limited routing options within the approved pipeline corridor. The West Alternative is well outside the approved corridor. Coldwater submits that the Board's only option at the detailed route hearing is to decline to approve the detailed routing and to reject Trans Mountain's Plan, Profile and Book of Reference (PPBoR); Coldwater says this is an option the Board would be unwilling to pursue given the Project's post-approval momentum.

[381] I agree that at a detailed route hearing the Board may only approve, or refuse to approve, a proponent's PPBoR. However, this does not mean that at a detailed route hearing the Board is precluded from considering routes outside of the approved pipeline corridor.

[382] Subsection 36(1) of the *National Energy Board Act* requires the Board "to determine the best possible detailed route of the pipeline and the most appropriate methods and timing of constructing the pipeline." This provision does not limit the Board to considering the best possible detailed route within the approved pipeline corridor. This was recognized by the Board in *Emera Brunswick Pipeline Company Ltd. (Re)*, 2008 LNCNEB 10, at page 30.

[383] Additionally, section 21 of the *National Energy Board Act* permits the Board to review, vary or rescind any decision or order, and in *Emera* the Board recognized, at page 31, that where a proposed route is denied on the basis of evidence of a better route outside of the approved pipeline corridor an application may be made under section 21 to vary the corridor in that location.

[384] It follows that the Board would be able to vary the route of the new pipeline should the hydrogeological study to be filed pursuant to Condition 39 require an alternative route, such as the West Alternative route, in order to avoid risk to the Coldwater aquifer.

[385] As the pipeline route through the Coldwater River Valley remains a live issue, depending on the findings of the hydrogeological report, it follows that Coldwater has not demonstrated that the Board breached its statutory obligation to consider alternative means.

[386] The next error said to vitiate the Board's report is its alleged failure to consider alternatives to the Westridge Marine Terminal.

> (c) Did the Board fail to consider alternatives to the Westridge Marine Terminal?

[387] In my view, this issue was fully canvassed in the course of considering Burnaby's argument that the Board impermissibly failed to decide certain issues for recommended approval of the Project.

> (d) Did the Board err by failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*?

[388] Tsleil-Waututh argues that the Board breached the requirements of the *Canadian Environmental Assessment Act, 2012* by excluding Project-related marine shipping from the definition of the "designated project" which was to be assessed under that Act. In turn, the Governor in Council is said to have unreasonably exercised its discretion when it relied upon the Board's materially flawed report—in effect the Governor in Council did not have a "report" before it and, thus, could not proceed to its decision. Tsleil-Waututh adds that the Board failed to comply with the requirements of subsection 31(1) of the *Canadian Environmental Assessment Act, 2012* by:

i. failing to determine whether the environmental effects of Project-related marine shipping are likely, adverse and significant;
ii. concluding that the Project is not likely to cause significant adverse environmental effects; and,

iii. failing to determine whether the significant adverse environmental effects likely to be caused by Project-related marine shipping can be justified under the circumstances.

[389] The significant adverse effect of particular concern to Tsleil-Waututh are the Project's significant adverse effects upon the endangered Southern resident killer whales and their use by Indigenous peoples.

[390] Tsleil-Waututh's submissions are adopted by Raincoast and Living Oceans. To these submissions they add that the Board's decision to exclude Project-related shipping from the definition of the "designated project" was not a discretionary scoping decision as Trans Mountain argues. Rather, the Board erroneously interpreted the statutory definition of "designated project".

[391] The definition of "designated project" is found in section 2 of the *Canadian Environmental Assessment Act, 2012*: see paragraph 57 above. The parties agree that the issue of whether Project-related marine shipping ought to have been included as part of the defined designated project turns on whether Project-related marine shipping is a "physical activity that is incidental" to the pipeline component of the Project. This is not a pure issue of statutory interpretation. Rather, it is a mixed question of fact and law heavily suffused by evidence.

[392] In response to the submissions of Tsleil-Waututh, Raincoast and Living Oceans, Canada and Trans Mountain make two submissions. First, they submit that the Board reasonably concluded that the increase in marine shipping was not part of the designated project. Second,

and in any event, they argue that the Board conducted an extensive review of marine shipping. Therefore, the question for the Court becomes whether the Board's assessment was substantively adequate, such that the Governor in Council still had a "report" before it such that the Board's assessment could be relied upon. Canada and Trans Mountain answer that question in the affirmative.

[393] Before commencing my analysis, it is important to situate the Board's scoping decision and the exclusion of Project-related shipping from the definition of the Project. The definition of the designated project truly frames the scope of the Board's analysis. Activities included as part of the designated project are assessed under the *Canadian Environmental Assessment Act, 2012* with its prescribed list of factors to be considered. Further, as the Board acknowledged in Chapter 10 of its report, the *Species at Risk Act* imposes additional obligations on the Board when a designated project is likely to affect a listed wildlife species. These obligations are discussed below, commencing at paragraph 442.

[394] This assessment is to be contrasted with the assessment of activities not included in the definition of the designated project. These excluded activities are assessed under the *National Energy Board Act* if the Board is of the opinion that any public interest may be affected by the issuance of a certificate of public convenience and necessity, or by the dismissal of the proponent's application. On this assessment the Board is to have regard to all considerations that "appear to it to be directly related to the pipeline and to be relevant". Parenthetically, to the extent that there is potential for the effects of excluded activities to interact with the

environmental effects of a project, these effects are generally assessed under the cumulative effects portion of the *Canadian Environmental Assessment Act, 2012* environmental assessment.

[395] I begin my analysis with Trans Mountain's application to the Board for a certificate of public convenience and necessity for the Project. In Volume 1 of the application, at pages 1-4, Trans Mountain describes the primary purpose of the Project to be "to provide additional transportation capacity for crude oil from Alberta to markets in the Pacific Rim including BC, Washington State, California and Asia." In Volume 2 of the application, at pages 2-27, Trans Mountain describes the marine shipping activities associated with the Project. Trans Mountain notes that of the 890,000 barrels per day capacity of the expanded system, up to 630,000 barrels per day, or 71%, could be delivered to the Westridge Marine Terminal for shipment by tanker. To place this in perspective, currently in a typical month five tankers are loaded with diluted bitumen at the Westridge Marine Terminal, some of which are the smaller, Panamax tankers. The expanded system would be capable of serving up to 34 of the larger, Aframax tankers per month (with actual demand influenced by market conditions).

[396] This evidence demonstrates that marine shipping is, at the least, an element that accompanies the Project. Canada argues that an element that accompanies a physical activity while not being a major part of the activity is not "incidental" to the physical activity. Canada says that this was what the Board implicitly found.

[397] The difficulty with this submission is that it is difficult to infer that this was indeed the Board's finding, albeit an implicit finding. I say this because in its scoping decision the Board

gave no reasons for its conclusion. In the second paragraph of the decision, under the introductory heading, the Board simply set out its conclusion:

> For the purposes of the environmental assessment under the CEAA 2012, the designated project includes the various components and physical activities as described by Trans Mountain in its 16 December 2013 application submitted to the NEB. The Board has determined that the potential environmental and socio-economic effects of increased marine shipping activities to and from the Westridge Marine Terminal that would result from the designated project, including the potential effects of accidents or malfunctions that may occur, will be considered under the NEB Act (see the NEB's Letter of 10 September 2013 for filing requirements specific to these marine shipping activities). To the extent that there is potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board will consider those effects under the cumulative effects portion of the CEAA 2012 environmental assessment.
>
> (underlining added)

[398] Having defined the designated project not to include the increase in marine shipping, the Board dealt with the Project-related increase in marine shipping activities in Chapter 14 of its report. Consistent with the scoping decision, at the beginning of Chapter 14 the Board stated, at page 323:

> As described in Section 14.2, marine vessel traffic is regulated by government agencies, such as Transport Canada, Port Metro Vancouver, Pacific Pilotage Authority and the Canadian Coast Guard, under a broad and detailed regulatory framework. The Board does not have regulatory oversight of marine vessel traffic, whether or not the vessel traffic relates to the Project. There is an existing regime that oversees marine vessel traffic. The Board's regulatory oversight of the Project, as well as the scope of its assessment of the Project under the *Canadian Environmental Assessment Act* (CEAA 2012), reaches from Edmonton to Burnaby, up to and including the Westridge Marine Terminal (WMT). However, the Board determined that potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur, are relevant to the Board's consideration of the public interest under the NEB Act. Having made this determination, the Board developed a set of Filing Requirements specific to the issue of the potential effects of Project-related marine shipping activities to complement the Filing Manual.

(underlining added, footnotes omitted)

[399] Two points emerge from this passage. The first point is the closest the Board came to explaining its scoping decision was that the Board did not have regulatory oversight over marine vessel traffic. There is no indication that the Board grappled with this important issue.

[400] The issue is important because the Project is intended to bring product to tidewater; 71% of this product could be delivered to the Westridge Marine Terminal for shipment by tanker. Further, as explained below, if Project-related shipping forms part of the designated project additional requirements apply under the *Species at Risk Act*. Finally, Project-related tankers carry the risk of significant, if not catastrophic, adverse environmental and socio-economic effects should a spill occur.

[401] Neither Canada nor Trans Mountain point to any authority to the effect that a responsible authority conducting an environmental assessment under the *Canadian Environmental Assessment Act, 2012* must itself have regulatory oversight over a particular subject matter in order for the responsible authority to be able to define a designated project to include physical activities that are properly incidental to the Project. The effect of the respondents' submission is to impermissibly write the following italicized words into the definition of "designated project": "It includes any physical activity that is incidental to those physical activities *and that is regulated by the responsible authority*."

[402] In addition to being impermissibly restrictive, the Board's view that it was required to have regulatory authority over shipping in order to include shipping as part of the Project is

inconsistent with the purposes of the *Canadian Environmental Assessment Act, 2012* enumerated in subsection 4(1). These purposes include protecting the components of the environment that are within the legislative authority of Parliament and ensuring that designated projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects.

[403] The second point that arises is that the phrase "incidental to" is not defined in the *Canadian Environmental Assessment Act, 2012*. It is not clear that the Board expressly directed its mind to whether Project-related marine shipping was in fact an activity "incidental" to the Project. Had it done so, the Canadian Environmental Assessment Agency's "Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012" provides a set of criteria relevant to the question of whether certain activities should be considered "incidental" to a project. These criteria are:

i. the nature of the proposed activities and whether they are subordinate or complementary to the designated project;
ii. whether the activity is within the care and control of the proponent;
iii. if the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to "direct or influence" the carrying out of the activity;
iv. whether the activity is solely for the benefit of the proponent or is available for other proponents as well; and,
v. the federal and/or provincial regulatory requirements for the activity.

[404] The Board does not advert to, or grapple with, these criteria in its report. Had the Board grappled with these criteria it would have particularly considered whether marine shipping is

subordinate or complementary to the Project and whether Trans Mountain is able to "direct or influence" aspects of tanker operations.

[405] In this regard, Trans Mountain stated in its application, on pages 8A-33 to 8A-34, that while it did not own or operate the vessels calling at the Westridge Marine Terminal, "it is an active member in the maritime community and works with BC maritime agencies to promote best practices and facilitate improvements to ensure the safety and efficiency of tanker traffic in the Salish Sea." Trans Mountain also referenced its Tanker Acceptance Standard whereby it can prevent any tanker not approved by it from loading at the Westridge Marine Terminal.

[406] The Board recognized Trans Mountain's ability to give directions to tanker operators in Conditions 133, 134 and 144 where, among other things, the Board required Trans Mountain to:

- confirm that it had implemented its commitments to enhanced tug escort by prescribing minimum tug capabilities required to escort outbound, laden tankers and by including these minimum capabilities as part of its Tanker Acceptance Standard;
- file an updated Tanker Acceptance Standard and a summary of any revisions made to the Standard; and,
- file annually a report documenting the continued implementation of Trans Mountain's marine shipping-related commitments noted in Condition 133, any instances of non-compliance with Trans Mountain's requirements and the steps taken to correct instances of non-compliance.

[407] To similar effect, as discussed below in more detail, Trans Mountain committed in the TERMPOL review process to require, through its tanker acceptance process, that tankers steer a certain course upon exiting the Juan de Fuca Strait.

[408] Trans Mountain's ability to "direct or influence" tanker operations was a relevant factor for the Board to consider.

[409] The Board's reasons do not well-explain its scoping decision, do not grapple with the relevant criteria and appear to be based on a rationale that is not supported by the statutory scheme. As explained in more detail below, it follows that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision.

[410] It follows that it is necessary to consider the respondents' alternate submission that the assessment the Board conducted was, nevertheless, substantially adequate such that the Governor in Council could rely upon it for the purpose of assessing the public interest and the environmental effects of the Project. To do this I will first consider the deficiencies said to arise from the assessment of Project-related shipping under the *National Energy Board Act*, as opposed to its assessment under the *Canadian Environmental Assessment Act, 2012*. I will then turn to the Board's findings, as set out in its report, in order to determine whether the Board's report was materially deficient or substantially adequate.

(i) The deficiencies said to arise from the Board's assessment of Project-related marine shipping under the *National Energy Board Act*

[411] Had the Project been defined to include Project-related marine shipping, subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* would have required the Board to

consider, and make findings, concerning the factors enumerated in section 19. In the present case, these include:

- the environmental effects of marine shipping, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project, and any cumulative effects likely to result from the designated project in combination with other physical activities that have or will be carried out;
- the significance of these effects;
- mitigation measures that are technically and economically feasible that would mitigate any significant adverse effects of marine shipping; and,
- alternative means of carrying out the designated project that are technically and economically feasible. This would include alternate shipping routes.

[412] I now turn to address the Board's consideration of Project-related shipping.

(ii) The Board's consideration of Project-related marine shipping and its findings

[413] I begin by going back to the Board's statement, quoted above at paragraph 398, that "potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur" were relevant to the Board's consideration of the public interest under the *National Energy Board Act*. In this context, in order to ensure that the Board had sufficient information about those effects, the Board developed the specific filing requirements referred to by the Board in the passage quoted above.

[414] These filing requirements required Trans Mountain to provide a detailed description of the increase in marine shipping activities including: the frequency of passages, passage routing,

speed, and passage transit time; and, the alternatives considered, such as passage routing, frequency of passages and tanker type utilized.

[415] Trans Mountain's assessment of accidents and malfunctions related to the increase in marine shipping was required to include descriptions of matters such as:

- measures to reduce the potential for accidents and malfunctions to occur, including an overview of relevant regulatory regimes;
- credible worst case spill scenarios and smaller spill scenarios;
- the fate and behaviour of any hydrocarbons that may be spilled;
- the potential environmental and socio-economic effects of credible worst case spill scenarios and smaller spill scenarios, taking into account the season-specific behaviour, trajectory, and fate of the hydrocarbon(s) spilled, as well as the range of weather and marine conditions that could prevail during the spill event; and,
- Trans Mountain's preparedness and response planning, including an overview of the relevant regulatory regimes.

[416] Trans Mountain was required to provide information on navigation and safety including:

- an overview of the relevant regulatory regimes and the role of the different organizations involved;
- any additional mitigation measures in compliance with, or exceeding regulatory requirements, proposed by Trans Mountain to further facilitate marine shipping safety; and,
- an explanation of how the regulatory regimes and any additional measures promote the safety of the increase in marine shipping activities.

[417] The filing requirements also required specific information relating to all mitigation measures related to the increase in marine shipping activities.

[418] I now turn to specifically consider Chapter 14 of the Board's report and its consideration of the Project-related increase in marine shipping activities. Because the applicants' primary concern centers on the Project's impact on the Southern resident killer whales and their use, I will focus on the Board's consideration of this endangered species, including spill prevention and the effects of spills. The Board did also consider and make findings about the impact of increased Project-related shipping on air emissions, greenhouse gases, marine and fish habitat, marine birds, socio-economic effects, heritage resources and human health effects.

[419] The Board began by describing the extent of existing, future, and Project-related shipping activities. It then moved to a review of the regulatory framework and some federal improvement initiatives. The Board's report describes how marine shipping is regulated under the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 and administered by Transport Canada, the Canadian Coast Guard and other government departments.

[420] The Board then moved, in Section 14.3, to the assessment of the effects of increased marine shipping, focusing on changes to the environmental and socio-economic setting caused by the routine operation of Project-related marine vessels. It noted that while it assessed the potential environmental and socio-economic factors of increased marine shipping as part of its public interest determination under the *National Energy Board Act*, the Board "followed an approach similar to the environmental assessment conducted under [the *Canadian Environmental Assessment Act, 2012*] … to the extent it was appropriate, to inform the Board's public interest determination."

[421] The Board went on to explain that in order to consider whether the effects of marine shipping were likely to cause significant environmental effects, it considered the existing regulatory scheme in the absence of any specific mitigation measures. This reflected the Board's view that since marine shipping was beyond its regulatory authority, it did not have the ability to impose specific mitigation conditions to address environmental effects of Project-related marine shipping. The Board also explained that it considered any cumulative effects that were likely to arise from Project-related shipping, in combination with environmental effects arising from other current or reasonably foreseeable marine vessel traffic in the area.

[422] Finally, before turning to its assessment of the Project's effects, the Board stated that its assessment had considered:

- adverse impacts of Project-related marine shipping on *Species at Risk Act* (SARA)-listed wildlife species and their critical habitat;
- all reasonable alternatives to Project-related marine shipping that would reduce impact on SARA-listed species' critical habitat; and,
- measures to avoid or lessen any adverse impacts, consistent with applicable recovery strategies or action plans.

[423] The Board then went on to make the following findings and statements with respect to marine mammals generally:

- Underwater noise from Project-related marine vessels would result in sensory disturbances to marine mammals. The disturbance is expected to be long-term as it is likely to occur for the duration of operations of Project-related vessel traffic.
- When assessing the impact of Project-related shipping on specific species, the Board's approach was to consider the temporal and spatial impact, and its reversibility.

- Project-related marine vessels have the potential to strike a marine mammal, which could result in lethal or non-lethal effects. Further, the increase in Project-related marine traffic would contribute to the cumulative risk of marine mammal vessel strikes. The Board acknowledged Trans Mountain's commitment to provide explicit guidance for reporting both marine mammal vessel strikes and mammals in distress to appropriate authorities.
- The Board accepted the evidence of the Department of Fisheries and Oceans and Trans Mountain to the effect that there were no direct mitigation measures that Trans Mountain could apply to reduce or eliminate potential adverse effects from Project-related tankers. It recognized that altering vessel operations, for example by shifting shipping lanes away from marine mammal aggregation areas or reducing marine vessel speed, could be an effective mitigation measure. However, these specific measures were outside of the Board's regulatory authority, and out of Trans Mountain's control. The Board encouraged other regulatory authorities, such as Transport Canada or Fisheries and Oceans Canada to explore initiatives that would aim to reduce the potential effects of marine vessels on marine mammals.
- The Board recognized initiatives currently underway, or proposed, and noted Trans Mountain's commitment to participate in some of these initiatives. The Board imposed Condition 132 requiring Trans Mountain to develop a Marine Mammal Protection Program, and to undertake or support initiatives that focus on understanding and mitigating Project-related effects. Such Protection Program is to be filed prior to the commencement of Project operations.
- The Board explained that Condition 132 was meant to ensure that Trans Mountain fulfilled its commitments to participate in the development of industry-wide shipping practices in conjunction with the appropriate authorities. At the same time, the Board recognized that the Marine Mammal Protection Program offered no assurance that effective mitigation would be developed and implemented to address Project-related effects on marine mammals.
- The Board acknowledged the recommendation of the Department of Fisheries and Oceans that Trans Mountain explore the use of marine mammal on-board

> observers on Project-related marine vessels. The Board expressed its agreement and set out its expectation that it would see an initiative of this type incorporated as part of Trans Mountain's Marine Mammal Protection Program.

[424] The Board also acknowledged Trans Mountain's commitment to require Project-related marine vessels to meet any future guidelines or standards for reducing underwater noise from commercial vessels as they come into force.

[425] The Board went on to make the following findings with specific reference to the Southern resident killer whale:

- The Southern resident killer whale population has crossed a threshold where any additional adverse environmental effects would be considered significant. The current level of vessel traffic in the regional study area and the predicted future increase of vessel traffic in that area, even excluding Project-related marine vessels, "have and would increase the pressure on the Southern resident killer whale population."
- The Board expressed its expectation that Project-related marine vessels would represent a maximum of 13.9% of all vessel traffic in the regional study area, excluding the Burrard Inlet, and would decrease over time as the volume of marine vessel movements in the area is anticipated to grow. Therefore, while the effects from Project-related marine vessels would be a small fraction of the total cumulative effects, the Board acknowledged that this increase in marine vessels associated with the Project "would further contribute to cumulative effects that are already jeopardizing the recovery of the Southern resident killer whale. The effects associated with Project-related marine vessels will impact numerous individuals of the Southern resident killer whale population in a habitat identified as critical to the recovery". The Board classified these effects as "high magnitude". Consequently, the Board found that "the operation of Project-related

marine vessels is likely to result in significant adverse effects to the Southern resident killer whale."

- The Board recognized that the "Recovery Strategy for the Northern and Southern Resident Killer Whale" prepared by the Department of Fisheries and Oceans identified vessel noise as "a threat to the acoustic integrity of Southern resident killer whale critical habitat, and that physical and acoustic disturbance from human activities may be key factors causing depletion or preventing recovery of resident killer whale populations."
- The Board noted that the death of a Southern resident killer whale from a Project-related marine vessel collision, despite the low likelihood of such an event, would have population level consequences. The Board acknowledged that Project-related marine vessels would encounter a killer whale relatively often, however, "given the limited number of recorded killer whale marine vessel strikes and the potential avoidance behaviors of killer whales" the Board accepted the evidence of Trans Mountain and the Department of Fisheries and Oceans that the probability of a Project-related marine mammal vessel strike on a Southern resident killer whale was low.
- The Board expressed the view that the recovery of the Southern resident killer whale requires complex, multi-party initiatives, and that the Department of Fisheries and Oceans and other organizations are currently undertaking numerous initiatives to support the recovery of the species, including finalizing an action plan. The Board acknowledged Trans Mountain's commitment to support the objectives and recovery measures identified in the action plan. The draft action plan included a detailed prioritized list of initiatives. The Board expressed its expectation that Trans Mountain would support these initiatives within the Marine Mammal Protection Program. The Board encouraged initiatives, including initiatives of the federal government, to prioritize and implement specific measures to promote recovery of the species.
- Finally, the Board concluded that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale."

[426] The Board then considered the impact of marine shipping on the traditional use of marine resources by Indigenous communities, finding that:

- There would be disruptions to Indigenous marine vessels and harvesters, and this may disrupt activities or access to specific sites. However, in the Board's view these disruptions would be temporary, occurring only during the period of time when Project-related tanker vessels are in transit. Thus, it was of the view that Indigenous marine vessel users would maintain the ability to continue to harvest marine resources and to access subsistence and cultural sites in the presence of these periodic and short-term disruptions.
- Therefore, the Board found that, with the exception of the effects on the Southern resident killer whale, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities and sites would be low.
- Given the low frequency, duration and magnitude of effects associated with potential disruptions, and Trans Mountain's commitments to provide regular updated information on Project-related marine vessel traffic to Indigenous communities, the Board found that adverse effects on traditional marine resource uses, activities and sites were not likely and that, overall, Project-related marine traffic's contribution to overall effects related to changes in traditional marine use patterns was not likely to be significant.
- Project-related marine traffic's contribution to cumulative effects was found to be of low to medium magnitude, and reversible in the long term. The Board therefore found significant adverse cumulative effects associated with Project-related marine vessel traffic on traditional marine resource use was not likely to be significant, with the exception of effects associated with the traditional use of the Southern resident killer whale, which were considered significant.
- Recognizing the cultural importance of the killer whale to certain Indigenous groups, the Board found that "the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale."

[427] Finally, in Sections 14.4 to 14.6 the Board considered spill prevention. It made the following findings:

- The Board accepted the evidence filed by Trans Mountain regarding marine shipping navigation and safety, including the reports filed as part of the TERMPOL Review Process.
- Although a large spill from a tanker associated with the Project would result in significant adverse environmental and socio-economic effects, such an event is not likely.
- Even with response efforts, any large spill would result in significant adverse environmental and socio-economic effects.
- Trans Mountain, in conjunction with the Western Canada Marine Response Corporation, proposed appropriate measures to respond to potential oil spills from Project-related tankers. These proposed measures exceed regulatory requirements and would result in a response capacity that is double, and a delivery time that is half, that required by the existing planning standards. The Board gave substantial weight to the fact that the TERMPOL Review Committee and the Canadian Coast Guard did not identify any particular concerns with marine spill response planning associated with the Project.
- The environmental effects of a spill from a tanker would be highly dependent on the particular circumstances, such as the amount and the type of product(s) spilled, the location of the spill, the response time, the effectiveness of containment and cleanup, the valued components that were impacted, and the weather and time of year of the spill.
- A small spill, quickly contained, could have adverse effects of low magnitude, whereas a credible worst-case spill could have adverse effects of larger geographic extent and longer duration, and such effects would probably be significant. Moreover, spills could impact key marine habitats such as salt marshes, eelgrass beds and kelp forests, which could, in turn, affect the numerous species that rely upon them. Spills could also affect terrestrial species along the coastline, including SARA-listed terrestrial plant species.

- Although impacts from a credible worst-case spill would probably be adverse and significant, natural recovery of the impacted areas and species would likely return most biological conditions to a state generally similar to pre-spill conditions. Such recovery might be as quick as a year or two for some valued components, or might take as long as a decade or more for others. Valuable environmental values and uses could be lost or diminished in the interim. For some valued components, including certain SARA-species, recovery to pre-spill conditions might not occur.
- Mortality of individuals of SARA-listed species could result in population level impacts and could jeopardize recovery. For example, the impact on a Southern resident killer whale of exposure to an oil spill potentially would be catastrophic.
- There is a very low probability of a credible worst-case event.
- The effects of a credible worst-case spill on the current use of lands, waters and resources for traditional purposes by Indigenous people would likely be adverse and significant. However, the probability of such a worst-case event is very low.

[428] With respect to the Board's reference to the report of the TERMPOL Review Committee, one of the topics dealt with in that report was Project routing. It was noted, in Section 3.2, that the "shipping route to and from Trans Mountain's terminal to the open sea is well-established and used by deep sea tankers as well as other vessel types such as cargo vessels, cruise ships and ferries." Later in the report it was noted that "Aframax class tankers currently use the proposed route, demonstrating that tanker manoeuvrability issues are not a concern."

[429] Notwithstanding, the Review Committee did make one finding with respect to the shipping route. Finding 9 was to the effect that "Trans Mountain's commitment to require via its tanker acceptance process that Project tankers steer a course no more northerly than due West (270°) upon exiting the Juan de Fuca Strait will enhance safety and protection of the marine environment by providing the shortest route out of the Canadian" economic exclusion zone.

[430] Returning to the Board's report, the end result of the Board's assessment of the Project was that, notwithstanding the impacts of the Project upon the Southern resident killer whales and Indigenous cultural uses associated with them, with the implementation of Trans Mountain's environmental protection procedures and mitigation, and the Board's recommended conditions, the Project is not likely to cause significant adverse environmental effects. This was the Board's recommendation under section 29 of the *Canadian Environmental Assessment Act, 2012*.

(iii) Was the Board's assessment of Project-related marine shipping substantially adequate?

[431] I begin with the Board's description of its approach to the assessment of marine shipping. It "followed an approach similar to the environmental assessment conducted under" the *Canadian Environmental Assessment Act, 2012* "to the extent it was appropriate". Consistent with this approach, the Board's filing requirements in respect of marine shipping required Trans Mountain to provide information about mitigation measures and alternatives—factors which subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* require be considered in an environmental assessment.

[432] Bearing in mind that the primary focus of the applicants' concern about the Board's assessment of Project-related marine shipping is the Board's assessment of the adverse effects of the Project on Southern resident killer whales, the previous review of the Board's findings demonstrates that the Board considered the Project's effects on the Southern resident killer whales, including the environmental effects of malfunctions or accidents that might occur, the significance of those effects and the cumulative effects of the Project on efforts to promote

recovery of the species. The Board found the operation of the Project-related tankers was likely to result in significant, adverse effects to the Southern resident killer whale population.

[433] Given the Board's finding that the Project was likely to result in significant adverse effects on the Southern resident killer whale, and its finding that Project-related marine vessel traffic would further contribute to the total cumulative effects (which were determined to be significant), the Board found that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Indigenous use associated with the Southern resident killer whale.

[434] The Board then considered mitigation measures through the limited lens of its regulatory authority. It found there were no direct mitigation measures Trans Mountain could apply to reduce or eliminate potential adverse effects from Project-related tankers.

[435] The Board stated that it considered all reasonable alternatives to Project-related marine shipping that would reduce the impact on SARA-listed species' critical habitat. This would include the critical habitat of the Southern resident killer whale. As part of this consideration, the Board directed Information Request No. 2 to Trans Mountain. In material part, Trans Mountain responded that the only known potential mitigation measures relevant to the Salish Sea to reduce the risk of marine mammal vessel strikes would be to alter the shipping lanes in order to avoid sensitive habitat (that is areas where whales aggregate), and to set speed restrictions. Trans Mountain advised that shipping lanes and speed restrictions are set at the discretion of Transport Canada.

[436] Thereafter, the Board issued an Information Request to Transport Canada that, among other things, requested Transport Canada to summarize any initiatives it was currently supporting or undertaking that evaluated potential alternative shipping lanes or vessel speed reductions along the southern coast of British Columbia with the intent of reducing impacts on marine mammals from marine shipping. Transport Canada responded that it was "not currently contemplating alternative shipping lanes or vessel speed restrictions for the purpose of reducing impacts on marine mammals from marine shipping in British Columbia". However, Transport Canada noted it was participating in the Enhancing Cetacean Habitat and Observation Program led by Port Metro Vancouver.

[437] Transport Canada's statement that it had no current intent to make alterations to shipping lanes or to impose vessel speed restrictions would seem to have pre-empted further consideration of routing alternatives by the Board.

[438] This review of the Board's report has shown that the Board in its assessment of Project-related marine shipping considered:

- the effects of Project-related marine shipping on Southern resident killer whales;
- the significance of the effects;
- the cumulative effect of Project-related marine shipping on the recovery of the Southern resident killer whale population;
- the resulting significant, adverse effects on the traditional Indigenous use associated with the Southern resident killer whale;
- mitigation measures within its regulatory authority; and,
- reasonable alternatives to Project-related marine shipping.

[439] Given the Board's approach to the assessment and its findings, the Board's report was adequate for the purpose of informing the Governor in Council about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups. The Board's report adequately informed the Governor in Council of the significance of these effects, the Board's view there were no direct mitigation measures Trans Mountain could apply to reduce potential adverse effects from Project-related tankers, and that there were potential mitigation measures beyond the Board's regulatory authority and so not the subject of proper consideration by the Board or conditions. Perhaps most importantly, the report put the Governor in Council on notice that the Board defined the Project not to include Project-related marine shipping. This decision excluded the effects of Project-related shipping from the definition of the Project as a designated project and allowed the Board to conclude that, as it defined the Project, the Project was not likely to cause significant adverse effects.

[440] The Order in Council and its accompanying Explanatory Note demonstrate that the Governor in Council was fully aware of the manner in which the Board had assessed Project-related marine shipping under the *National Energy Board Act*. The Governor in Council was also fully aware of the effects of Project-related marine shipping identified by the Board and that the operation of Project-related vessels is likely to result in significant adverse effects upon both the Southern resident killer whale and Indigenous cultural uses of this endangered species.

[441] Having found that the Governor in Council understood the Board's approach and resulting conclusions, it remains to consider the reasonableness of the Governor in Council's

reliance on the Board's report to approve the Project. This is considered below, after considering the applicants' submissions with respect to the *Species at Risk Act*.

(e) Did the Board err in its treatment of the *Species at Risk Act*?

[442] The purposes of the *Species at Risk Act* are: to prevent wildlife species from being extirpated or becoming extinct; to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity; and, to manage species of special concern to prevent them from becoming endangered or threatened (section 6).

[443] Important protections are found in section 77 of the Act, which is intended to protect the critical habitat of listed wildlife species, and section 79, which is intended to protect listed wildlife species and their critical habitat from new projects. Listed wildlife species are those species listed in Schedule 1 of the Act, a list of wildlife species at risk. Sections 77 and 79 are set out in the Appendix to these reasons.

[444] Raincoast and Living Oceans argue that as a result of unreasonably defining the designated project not to include Project-related marine shipping, the Board failed to meet the requirement of subsection 79(2) of the *Species at Risk Act*. As a result of this error they say it was unreasonable for the Governor in Council to rely upon the Board's report without first ensuring that the Board had complied with subsection 79(2) of the Act with respect to Southern resident killer whales. They also argue that it was unreasonable for the Governor in Council not to comply with its additional, independent obligations under subsection 77(1) of the *Species at Risk Act*.

[445] I will deal first with the applicability of section 79 of the Act.

(i) Did the Board err by concluding that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related marine shipping?

[446] Section 79 obligates every person required "to ensure that an assessment of the environmental effects of a project is conducted" to:

i. promptly notify the competent minister or ministers if the project "is likely to affect a listed wildlife species or its critical habitat." (subsection 79(1));
ii. identify the adverse effects of the project on the listed wildlife species and its critical habitat (subsection 79(2)); and,
iii. if the project is carried out, ensure that measures are taken "to avoid or lessen those effects and to monitor them." The measures taken must be taken in a way that is consistent with any applicable recovery strategy and action plans (subsection 79(2)).

[447] Subsection 79(3) defines a "project" to mean, among other things, a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*.

[448] The Board acknowledged its obligations under section 79 of the *Species at Risk Act* in the course of its environmental assessment (Chapter 10, page 161). However, because it had not defined the designated project to include Project-related marine shipping, the Board rejected Living Oceans' submission that the Board's obligations under section 79 of the *Species at Risk Act* applied to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale (Chapter 14, page 332). Notwithstanding this conclusion that section 79 did not apply, for reasons that are not explained in its report, the Board did comply with the

obligation under subsection 79(1) to notify the responsible ministers that the Project might affect Southern resident killer whales and their habitat. The Board did this by letter dated April 23, 2014 (a letter sent approximately three weeks after the Board made its scoping decision).

[449] I have found that the Board unjustifiably excluded Project-related marine shipping from the Project's description. It follows that the failure to apply section 79 of the *Species at Risk Act* to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale was also unjustified.

[450] Both Canada and Trans Mountain argue that, nonetheless, the Board substantially complied with its obligations under section 79 of the *Species at Risk Act*. Therefore, as with the issue of Project-related marine shipping, the next question is whether the Board substantially complied with its obligations under section 79.

(ii) Did the Board substantially comply with its obligations under section 79 of the *Species at Risk Act*?

[451] The respondents argue that, in addition to complying with the notification requirement found in subsection 79(1), the Board considered:

- the adverse impacts of marine shipping on listed wildlife species and their critical habitat;
- all reasonable alternatives to marine shipping that would reduce impact on listed species' critical habitat; and
- measures, consistent with the applicable recovery strategies or action plans, to avoid or lessen any adverse impacts of the Project.

[452] Canada and Trans Mountain submit that as a result the Board met its requirements "where possible." (Trans Mountain's memorandum of fact and law, paragraph 120). On this last point, Trans Mountain submits that the Board lacked authority to impose conditions or otherwise ensure that measures were taken to avoid or lessen the effects of marine shipping on species at risk. Thus, while the Board could identify potential mitigation measures, and encourage the appropriate regulatory authorities to take further action, it could not ensure compliance with subsection 79(2) of the *Species at Risk Act*.

[453] Canada and Trans Mountain have accurately summarized the Board's findings that are relevant to its consideration of Project-related shipping in the context of the *Species at Risk Act*. However, I do not accept their submission that the Board's consideration of the Project's impact on the Southern resident killer whale substantially complied with its obligation under section 79 of the *Species at Risk Act*. I reach this conclusion for the following reason.

[454] By defining the Project not to include Project-related marine shipping, the Board failed to consider its obligations under the *Species at Risk Act* when it considered the Project's impact on the Southern resident killer whale. Had it done so, in light of its recommendation that the Project be approved, subsection 79(2) of the *Species at Risk Act* required the Board to ensure, if the Project was carried out, that "measures are taken to avoid or lessen" the Project's effects on the Southern resident killer whale and to monitor those measures.

[455] While I recognize the Board could not regulate shipping, it was nonetheless obliged to consider the consequences at law of its inability to "ensure" that measures were taken to

ameliorate the Project's impact on the Southern resident killer whale. However, the Board gave no consideration in its report to the fact that it recommended approval of the Project without any measures being imposed to avoid or lessen the Project's significant adverse effects upon the Southern resident killer whale.

[456] Because marine shipping was beyond the Board's regulatory authority, it assessed the effects of marine shipping in the absence of mitigation measures and did not recommend any specific mitigation measures. Instead it encouraged other regulatory authorities "to explore any such initiatives" (report, page 349). While the Board lacked authority to regulate marine shipping, the final decision-maker was not so limited. In my view, in order to substantially comply with section 79 of the *Species at Risk Act* the Governor in Council required the Board's exposition of all technically and economically feasible measures that are available to avoid or lessen the Project's effects on the Southern resident killer whale. Armed with this information the Governor in Council would be in a position to see that, if approved, the Project was not approved until all technically and economically feasible mitigation measures within the authority of the federal government were in place. Without this information the Governor in Council lacked the necessary information to make the decision required of it.

[457] The reasonableness of the Governor in Council's reliance on the Board's report is considered below.

[458] For completeness I now turn to the second argument advanced by Raincoast and Living Oceans: it was unreasonable for the Governor in Council to fail to comply with its additional, independent obligations under subsection 77(1) of the *Species at Risk Act*.

(iii) Was the Governor in Council obliged to comply with subsection 77(1) of the *Species at Risk Act*?

[459] Subsection 77(1) applies when any person or body, other than a competent minister, issues or approves "a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species". The person or body may authorize such an activity only if they have consulted with the competent minister, considered the impact on the species' critical habitat and formed the opinion that: (a) all reasonable alternatives to the activity that would reduce the impact on the critical habitat have been considered and the best solution has been adopted; and (b) all feasible mitigation measures will be taken to minimize the impact on the critical habitat.

[460] The Board accepted that:

> … vessel noise is considered a threat to the acoustic integrity of Southern resident killer whale critical habitat, and that physical and acoustic disturbance from human activities may be key factors causing depletion or preventing recovery of resident killer whale populations.
>
> (report, page 350)

[461] It also accepted that the impact of a Southern resident killer whale being exposed to an oil spill "is potentially catastrophic" (report, page 398).

[462] Based on these findings, Raincoast and Living Oceans submit that Project-related shipping "may destroy" critical habitat so that subsection 77(1) was engaged.

[463] I respectfully disagree. The Order in Council directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the expansion project. The Governor in Council did not issue or approve a licence, permit or other authorization that authorized marine shipping.

[464] Further, subsection 77(1.1) of the *Species at Risk Act* provides that subsection 77(1) does not apply to the Board when, as in the present case, it issues a certificate pursuant to an order made by the Governor in Council under subsection 54(1) of the *National Energy Board Act*. I accept Canada's submission that Parliament would not have intended to exempt the Board from the application of subsection 77(1) while at the same time contemplating that the Governor in Council was not exempted and was obliged to comply with subsection 77(1). This is particularly so given the Board's superior expertise in assessing impacts on habitat and mitigation measures. If subsection 77(1) applied, the Board's ability to meet its obligations was superior to that of the Governor in Council.

(f) Conclusion: the Governor in Council erred by relying upon the Board's report as a proper condition precedent to the Governor in Council's decision

[465] Trans Mountain's application was complex, raising challenging issues on matters as diverse as Indigenous rights and concerns, pipeline integrity, the fate and behaviours of spilled hydrocarbons in aquatic environments, emergency prevention, preparedness and response, the

need for the Project and its economic feasibility and the effects of Project-related shipping activities.

[466] The approval process was long and demanding for all participants; after the hearing the Board was left to review tens of thousands of pages of evidence.

[467] Many aspects of the Board's report are not challenged in this proceeding.

[468] This said, I have found that the Board erred by unjustifiably excluding Project-related marine shipping from the Project's definition. While the Board's assessment of Project-related shipping was adequate for the purpose of informing the Governor in Council about the effects of such shipping on the Southern resident killer whale, the Board's report was also sufficient to put the Governor in Council on notice that the Board had unjustifiably excluded Project-related shipping from the Project's definition.

[469] It was this exclusion that permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related marine shipping. This exclusion then permitted the Board to conclude that, notwithstanding its conclusion that the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project (as defined by the Board) was not likely to cause significant adverse environmental effects. The Board could only reach this conclusion by defining the Project not to include Project-related shipping.

[470] The unjustified exclusion of Project-related marine shipping from the definition of the Project thus resulted in successive deficiencies such that the Board's report was not the kind of "report" that would arm the Governor in Council with the information and assessments it required to make its public interest determination and its decision about environmental effects and their justification. In the language of *Gitxaala* this resulted in a report so deficient that it could not qualify as a "report" within the meaning of the legislation and it was unreasonable for the Governor in Council to rely upon it. The Board's finding that the Project was not likely to cause significant adverse environmental effects was central to its report. The unjustified failure to assess the effects of marine shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the effects of the Project was so critical that the Governor in Council could not functionally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

[471] I have considered the reference in the Explanatory Note to the Order in Council to the government's commitment to the proposed Action Plan for the Southern resident killer whale and the then recently announced Oceans Protection Plan. These inchoate initiatives, while laudable and to be encouraged, are by themselves insufficient to overcome the material deficiencies in the Board's report because the "report" did not permit the Governor in Council to make an informed decision about the public interest and whether the Project is likely to cause significant adverse environmental effects as the legislation requires.

[472] There remains to consider the issue of the remedy which ought to flow from the unreasonable reliance upon the Board's report. In my view, this is best dealt with following consideration of the adequacy of the Crown's consultation process.

[473] My conclusion that the Board's report was so flawed that it was unreasonable for the Governor in Council to rely upon it arguably makes it unnecessary to deal with the argument advanced on behalf of the Attorney General of British Columbia. It is nonetheless important that it be briefly considered.

3. The challenge of the Attorney General of British Columbia

[474] As explained above at paragraphs 64 and 65, after the Board submits a report to the Governor in Council setting out the Board's recommendation under section 52 of the *National Energy Board Act* about whether a certificate of public convenience and necessity should issue, the Governor in Council may, among other options, by order direct the Board to issue a certificate of public convenience and necessity. Irrespective of the option selected, the Governor in Council's order "must set out the reasons for making the order" (subsection 54(2) of the *National Energy Board Act*). The Attorney General of British Columbia intervened in this proceeding to argue that, in breach of this statutory obligation, the Governor in Council failed to give reasons explaining why the Project is not likely to cause significant adverse environmental effects and why the Project is in the public interest.

[475] The Attorney General also argued in its written memorandum, but not orally, that the Governor in Council failed to consider the "disproportionate impact of Project-related marine

shipping spill risks on the Province of British Columbia". This failure is said to render the Governor in Council's decision unreasonable.

[476] In consequence, the Attorney General of British Columbia supports the request of the applicants that the Governor in Council's Order in Council be set aside.

(a) Did the Governor in Council fail to comply with the obligation to give reasons?

[477] The lynchpin of the Attorney General's argument is his submission that the Governor in Council's reasons must be found "within the four corners of the Order in Council" and nowhere else. Thus, the Attorney General submits that it is impermissible to have regard to the accompanying Explanatory Note or to documents referred to in the Explanatory Note, including the Board's report and the Crown Consultation Report. Read in this fashion, the Order in Council does not explain why the Governor in Council found the Project is not likely to cause any significant adverse environmental effects or was in the public interest.

[478] I respectfully reject the premise of this submission. Subsection 54(2) does not dictate the form the Governor in Council's reasons should take, requiring only that the "order must set out the reasons". Given the legislative nature and the standard format of an Order in Council (generally a series of recitals followed by an order) Orders in Council are not well-suited to the provision of lengthy reasons. In the present case, the two-page Order in Council was accompanied by the 20-page Explanatory Note. They were published together in the Canada Gazette. Given this joint publication, it would, in my view, be unduly formalistic to set aside the

Order in Council on the ground that the reasons found in the attached Explanatory Note were placed in an attachment to the order, and not within the "four square corners" of the order.

[479] Similarly, it would be unduly formalistic not to look to the content of the Board's report that informed the Governor in Council when rendering its decision. The Order in Council specifically referenced the Board's report and the terms and conditions set out in an appendix to the report, and expressly accepted the Board's public interest recommendation. This conclusion that the Order in Council may be read with the Board's report is consistent with this Court's decision in *Gitxaala*, where the Court accepted Canada's submission that the Order in Council should be read together with the findings and recommendations in the report of the joint review panel. This Court read the Order in Council together with the report and other documents in the record and found that the Governor in Council had met its statutory obligation to give reasons.

[480] I therefore find that the Governor in Council also in this case complied with its statutory obligation to give reasons.

(b) Did the Governor in Council fail to consider the impact of Project-related shipping spill risks on the Province of British Columbia?

[481] I disagree that the Governor in Council failed to consider the impact of shipping spill risks. The Explanatory Note shows the Governor in Council considered that:

- The Board found the risk of a major crude oil spill occurring was low (Explanatory Note, page 10).
- The Board imposed conditions relating to accidents and malfunctions (Explanatory Note, page 13).

[482] Under the heading “Government response to what was heard” the Explanatory Note set out the following about the risk of spills:

> Communities are deeply concerned about the risk and impacts that oil spills pose to their land, air, water and communities. In addition to the terms and conditions related to spills identified by the NEB, land-based oil spills are subject to both federal and provincial jurisdiction. Federally regulated pipelines are subject to NEB regulation and oversight, which requires operators to develop comprehensive emergency management programs and collaborate with local responders in the development of these programs. B.C. also recently implemented regulations under the provincial *Environmental Management Act* to strengthen provincial oversight and require industry and government to collaborate in response to spills in B.C.
>
> The Government recently updated its world-leading pipeline safety regime through the *Pipeline Safety Act*, which came into force in June 2016. The Act implements $1 billion in “absolute liability” for companies operating major crude oil pipelines to clarify that operators will be responsible for all costs associated with spills irrespective of fault up to $1 billion; operators remain liable on an unlimited basis beyond this amount when they are negligent or at fault. The Act also requires proponents to carry cash on hand to ensure they are in a position to immediately respond to emergencies.
>
> With respect to ship source spills, the Government recently announced $1.5 billion in new investment in a national Oceans Protection Plan to enhance its world-leading marine safety regime. The Oceans Protection Plan has four main priority areas:
>
> - creating a world-leading marine safety system that improves responsible shipping and protects Canada’s waters, including new preventative and response measures;
> - restoring and protecting the marine ecosystems and habitats, using new tools and research;
> - strengthening partnerships and launching co-management practices with Indigenous communities, including building local emergency response capacity; and
> - investing in oil spill cleanup research and methods to ensure that decisions taken in emergencies are evidence-based.
>
> The Plan responds to concerns related to potential marine spills by strengthening the Coast Guard’s ability to take command in marine emergencies, toughening

> requirements for industry response to incidents, and by enhancing Indigenous partnerships.

[483] While the Attorney General of British Columbia disagrees with the Governor in Council's assessment of the risk of a major spill from Project-related shipping, there is no merit to the submission that the Governor in Council failed to consider the risk of spills posed by Project-related shipping.

[484] I now turn to consider the adequacy of the consultation process.

D. Should the decision of the Governor in Council be set aside on the ground that Canada failed to consult adequately with the Indigenous applicants?

1. The applicable legal principles

[485] Before commencing the analysis, it is helpful to discuss briefly the principles that have emerged from the jurisprudence which has considered the scope and content of the duty to consult. As explained in the opening paragraphs of these reasons, the applicable principles are not in dispute; what is in dispute is whether, on the facts of this case (which are largely agreed), Canada fulfilled its constitutional duty to consult.

[486] The duty to consult is grounded in the honour of the Crown and the protection provided for "existing aboriginal and treaty rights" in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (*Haida Nation*, paragraph 32).

[487] The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation,* paragraph 35). The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project.

[488] The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Indigenous claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation*, paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paragraph 36).

[489] When the claim to title is weak, the Indigenous interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice (*Haida Nation*, paragraph 43). When a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to Indigenous peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons to show that Indigenous concerns were considered and how those concerns were factored into the decision (*Haida Nation*, paragraph 44).

[490] Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal.

[491] The Supreme Court has found the Board to possess both the procedural powers necessary to implement consultation and the remedial powers to accommodate, where necessary, affected Indigenous claims and Indigenous and treaty rights. The Board's process can, therefore, be relied on by the Crown to fulfil, in whole or in part, the Crown's duty to consult (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, paragraph 34).

[492] As referenced above at paragraph 284, the Supreme Court has described the Board as having considerable institutional expertise both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Indigenous or treaty rights substantially overlap with the project's potential environmental impact, the Board "is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available" (*Clyde River*, paragraph 33).

[493] When the Crown relies on a regulatory or environmental assessment process to fulfil the duty to consult, such reliance is not delegation of the Crown's ultimate responsibility to ensure consultation is adequate. Rather, it is a means by which the Crown can be satisfied that Indigenous concerns have been heard and, where appropriate, accommodated (*Haida Nation*, paragraph 53).

[494] The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Indigenous groups a veto over what can be done with land pending final proof of their claim. What is required is a process of balancing interests—a process of give and take. Nor does consultation equate to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation (*Haida Nation*, paragraphs 42, 48 and 62).

[495] Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (*Haida Nation*, paragraph 47).

[496] Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised […] through a meaningful process of consultation" (*Haida Nation*, paragraph 42). The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (*Haida Nation*, paragraph 45).

[497] At the same time, Indigenous claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached (*Haida Nation*, paragraph 42).

[498] In the present case, much turns on what constitutes a meaningful process of consultation.

[499] Meaningful consultation is not intended simply to allow Indigenous peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, paragraph 54).

[500] The duty is not fulfilled by simply providing a process for exchanging and discussing information. There must be a substantive dimension to the duty. Consultation is talking together for mutual understanding (*Clyde River*, paragraph 49).

[501] As the Supreme Court observed in *Haida Nation* at paragraph 46, meaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." Where deep consultation is required, a dialogue must ensue that leads to a demonstrably serious consideration of accommodation. This serious consideration may be demonstrated in the Crown's consultation-related duty to provide written reasons for the Crown's decision.

[502] Where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to explain in written reasons the impacts of Indigenous concerns on decision-making

becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of impacts on Indigenous rights (*Gitxaala*, paragraph 315).

[503] Further, the Crown is obliged to inform itself of the impact the proposed project will have on an affected First Nation, and, if appropriate in the circumstances, communicate its findings to the First Nation and attempt to substantially address the concerns of the First Nation (*Mikisew Cree First Nation*, paragraph 55).

[504] Consultation must focus on rights. In *Clyde River*, the Board had concluded that significant environmental effects to marine mammals were not likely and effects on traditional resource use could be addressed through mitigation measures. The Supreme Court held that the Board's inquiry was misdirected for the purpose of consultation. The Board was required to focus on the Inuit's treaty rights; the "consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*" (emphasis in original) (*Clyde River*, paragraph 45). Mitigation measures must provide a reasonable assurance that constitutionally protected rights were considered as rights in themselves—not just as an afterthought to the assessment of environmental concerns (*Clyde River*, paragraph 51).

[505] When consulting on a project's potential impacts the Crown must consider existing limitations on Indigenous rights. Therefore, the cumulative effects and historical context may inform the scope of the duty to consult (*Chippewas of the Thames*, paragraph 42).

[506] Two final points. First, where the Crown knows, or ought to know, that its conduct may adversely affect the Indigenous right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it (*Gitxaala*, paragraph 236).

[507] Second, it is important to understand that the public interest and the duty to consult do not operate in conflict. As a constitutional imperative, the duty to consult gives rise to a special public interest that supersedes other concerns commonly considered by tribunals tasked with assessing the public interest. In the case of the Board, a project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*Clyde River*, paragraph 40).

2. The standard to which Canada is to be held in fulfilling the duty

[508] As briefly explained above at paragraph 226, Canada is not to be held to a standard of perfection in fulfilling its duty to consult. The Supreme Court of Canada has expressed this concept as follows:

> Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in … information and consultation the concept of reasonableness must come into play. … So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> (*Haida Nation*, paragraph 62)
>
> (underlining added)

[509] As in *Gitxaala*, in this case "the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ." (*Gitxaala*, paragraph 182).

[510] Against this legal framework, I turn to the design and execution of Canada's four-phase consultation process. This process began in May 2013 with the filing of the Project description and ended in November 2016 with the decision of the Governor in Council to approve the Project and direct the issuance of a certificate of public convenience and necessity.

3. Application of the legal principles to the evidence

[511] The Indigenous applicants express a myriad of concerns and asserted deficiencies with respect to the consultation process. Broadly speaking, they challenge both the design of the process and the execution of the process.

[512] I will deal first with the asserted deficiencies in the design of the process selected and followed by Canada, and then consider the asserted deficiencies in the execution of the process.

(a) Was the consultation process deficient because of the design of the process selected and followed by Canada?

[513] Generally speaking, the most salient concerns expressed with respect to the design of the consultation process are the assertions that:

i. The consultation framework was unilaterally imposed.

ii. The National Energy Board process is inadequate for fulfilling consultation obligations.

iii. Insufficient funding was provided.

iv. The process allowed the Project to be approved when essential information was lacking.

[514] Each assertion will be considered in turn.

(i) The consultation framework was unilaterally imposed

[515] There was no substantive consultation with the Indigenous applicants about the four-phase consultation process.

[516] However, as Canada argues, the Crown possesses a discretion about how it structures a consultation process and how it meets its consultation obligations (*Gitxaala*, paragraph 203, citing *Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443, 566 A.R. 259, at paragraph 39). What is required is a process that allows Canada to make reasonable efforts to inform and consult (*Haida Nation*, at paragraph 62).

[517] Canada's four-phase consultation process is described above at paragraphs 72 through 75. While I deal below with the asserted frailties of the Board's hearing process in this particular case, the Supreme Court has recently re-affirmed that the Crown may rely on a regulatory agency to fulfil the Crown's duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Chippewas of the Thames*,

paragraph 32). In the present case, no applicant asserts that the National Energy Board lacked any necessary statutory power so as to be able to fulfil in part the Crown's duty to consult. It follows that Canada could rely upon a consultation process which relied in part on the Board's hearing process, so long as Canada remained mindful of its constitutional obligation to ensure before approving the Project that consultation was adequate.

[518] Canada implemented a five-phase consultation framework for the review of the Northern Gateway Project. In *Gitxaala*, this Court found that the framework was reasonable (*Gitxaala*, paragraph 8). When the two consultation frameworks are compared there is little to distinguish them. An additional first phase was required in the Northern Gateway framework simply because the project was reviewed by a joint review panel, not the Board.

[519] Given Canada's discretion as to how the consultation process is structured and the similarity of this consultation process to that previously found by this Court to be reasonable, I am satisfied that Canada did not act in breach of the duty to consult by selecting the four-phase consultation process it adopted.

(ii) The Board's process is said to be inadequate for fulfilling consultation obligations

[520] A number of deficiencies are asserted with respect to the Board's process and its adequacy for fulfilling, to the extent possible, consultation obligations. The asserted deficiencies include:

- The Board's decision not to allow cross-examination of Trans Mountain's evidence.

- The Board's treatment of oral traditional evidence.
- The Board's timeframe which is said not to have provided sufficient time for affected Indigenous groups to inform themselves of the complexity of the Project and to participate with knowledge of the issues and impacts on them.
- The Board's failure to consult with affected Indigenous groups about any of the decisions the Board made prior to or during the hearing, including the list of issues for the hearing, the panel members who would hear the application, the design of the regulatory review and the environmental assessment, the decision-making process and the report and its recommendations.
- The failure of the Board's process to provide the required dialogue and consultation directly with Canada in circumstances where it is said that consultation in Phase III would be too little, too late.

[521] It is convenient to deal with the first four deficiencies together as the Board's choice of procedures, its decision-making process and its ultimate decision flow from its powers as a regulator under the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*.

[522] As explained above, the Supreme Court has found that meaningful Crown consultation can be carried out wholly or in part through a regulatory process (*Chippewas of the Thames*, paragraph 32). Prior to this decision, concern had been expressed about the tension said to result if a tribunal such as the Board were required both to carry out consultation on behalf of the Crown and then adjudicate on the adequacy of the consultation. The Supreme Court responded that such concern is addressed by observing that while it is the Crown that owes the constitutional duty to consult, agencies such as the Board are required to make legal decisions that comply with the Constitution. The Supreme Court went on to explain, at paragraph 34, that:

> When the [Board] is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution.
>
> (underlining added)

[523] Applying these principles to the submissions before this Court, and bearing in mind that at this point I am only addressing submissions with respect to the adequacy of the design of the consultation process, the Board was required to provide a process that was impartial and fair and in accordance with its statutory framework and the Constitution.

[524] As explained above, section 8 of the *National Energy Board Act* authorizes the Board to make rules about the conduct of hearings before it, and the Board's rules allow the Board to determine whether public hearings held before it are oral or written. Section 52 of the *National Energy Board Act* requires the Board to render its report to the Minister within strict timelines. It follows that the Board could decide not to allow oral cross-examination, could determine how oral traditional evidence would be received and could schedule the hearing to comply with section 52 of the *National Energy Board Act* so long as, at the end of the hearing, it was satisfied that it had exercised its responsibilities in a manner that was fair and impartial and consistent with its governing legislation and section 35 of the *Constitution Act, 1982*.

[525] Similarly, the Board was authorized as a neutral arbitrator to make the decisions required of it under the legislation, including decisions about which issues would be decided during the hearing, the composition of the hearing panel and the content of its ultimate report. So long as these decisions were made in a manner that was fair and impartial, and in accordance with the

legislative scheme and subsection 35(1) of the *Constitution Act, 1982* they too were validly made. The Indigenous applicants have not shown that any additional dialogue or process was required between the Board and the Indigenous applicants in order for the Board's decision to be constitutionally sound.

[526] Put another way, when the Board's process is relied on in whole or in part to fulfil the obligation to consult, the regulatory hearing process does not change and the Board's role as neutral arbitrator does not change. What changes is that the Board's process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied.

[527] I now consider the last deficiency said to make the Board's process inadequate for fulfilling even in part the duty to consult: the failure of the Board's process to provide the required consultation directly with Canada.

[528] The Indigenous applicants do not point to any jurisprudence to support their submission that Canada was required to dialogue directly with them during the Board's hearing process (that is, during Phase II) and I believe this submission may be dealt with briefly.

[529] As stated above, meaningful Crown consultation can be carried out wholly through a regulatory process so long as where the regulatory process relied upon by the Crown does not achieve adequate consultation or accommodation, the Crown takes further steps to meet its duty

to consult by, for example, filling any gaps in consultation on a case-by-case basis (*Clyde River*, paragraph 22).

[530] In the present case, Phase III was designed in effect to fill the gaps left by the Phase II regulatory process—Phase III was to focus on outstanding concerns about the Project-related impacts upon potential or established Indigenous or treaty rights and on any incremental accommodation measures that Canada should address. Leaving aside the question of whether Phase III adequately addressed gaps in the consultation process, a point dealt with below, the Indigenous applicants have not shown that the consultation process required Canada's direct involvement in the regulatory process.

[531] For all of these reasons, I am satisfied that the Board's process was adequate for fulfilling its consultation obligations.

[532] The next concern with respect to the design of the consultation process is that it is said that insufficient participant funding was provided.

(iii) The funding provided is said to have been inadequate

[533] Two Indigenous applicants raise the issue of inadequate funding: Squamish and SSN.

[534] Squamish sought participant funding of $293,350 to participate in the Board process but was granted only $44,270, plus travel costs for one person to attend the hearing. Canada later provided $26,000 to Squamish to participate in consultation following the close of the Board

hearing record. The Squamish appendix to the Crown Consultation Report notes that the British Columbia Environmental Assessment Office also offered Squamish $5,000 in capacity funding to participate in consultations.

[535] Chief Campbell of the Squamish Nation provided evidence that the funding provided to Squamish was not adequate for Squamish to obtain experts to review and respond to the 8 volume, 15,000 page, highly technical Project application. Nor, in his view, was the funding adequate for Squamish to undertake a comprehensive assessment of the impacts of the Project on Squamish rights and title. He notes that Squamish's limited budget is fully subscribed to meet the needs of its members and that the sole purpose of Squamish's involvement in the hearing and consultation process was "defensive: to protect our rights and title."

[536] SSN requested in excess of $300,000 for legal fees, expert fees, travel costs, meeting attendance costs and information collecting costs. It received $36,920 in participant funding, plus travel for two representatives to attend the hearing. Canada later offered $39,000 to SSN to participate in consultation following the close of the Board hearing record. The British Columbia Environmental Assessment Office also offered some capacity funding.

[537] SSN states that Canada knew that SSN requested funding in largest part to complete a traditional land and resource use study. It states that Canada knew that such studies had been completed for other Indigenous groups in relation to the Project, but that neither Canada nor the proponent had undertaken such a study for SSN.

[538] I accept that the level of participant funding provided constrained participation in the process before the National Energy Board by the Squamish and the SSN. However, as Canada submits, it is difficult to see the level of participant funding as being problematic in a systematic fashion when only two applicants address this issue.

[539] In *Gitxaala*, this Court rejected the submission that inadequate funding had been provided for participation before the joint review panel and in the consultation process. The Court noted, at paragraph 210, that the evidence filed in support of the submissions did:

> … not explain how the amounts sought were calculated, or detail any financial resources available to the First Nations outside of that provided by Canada. As such, the evidence fails to demonstrate that the funding available was so inadequate as to render the consultation process unreasonable.

[540] Much the same can be said of the evidence filed on this application. While SSN did append its request for participant funding as Exhibit D to the affidavit of its affiant Jeanette Jules, at the time this application was submitted SSN had not determined which expert or experts would be hired, it could not advise as to how many hours the expert(s) would likely bill or what the expert(s)' hourly rate(s) would be. The information provided was simply that it was expected that $80,000 was required to prepare a traditional land use study and that an additional $30,000 was required as the approximate cost of a wildlife study. No information was provided by either applicant about financial resources available to it.

[541] The evidence has not demonstrated that the level of participant funding was so inadequate as to render the entire consultation process unreasonable.

(iv) The process allowed the Project to be approved when essential information was lacking

[542] The final deficiency asserted with respect to the structure of the consultation process relates to the nature of the Board's process for approving projects. A number of Indigenous applicants argue that Canada's reliance upon the Board's hearing process was unreasonable in circumstances where potential impacts to title and rights remained unknown because studies of those potential impacts, and of the measures proposed in the Board's report to mitigate potential impacts, were left to a later date after the Governor in Council approved the Project. It is argued that without identification of all of the impacts of the Project Canada cannot rely on the Board's assessment of impacts to fulfil the duty to consult.

[543] Commencing at paragraph 286 above, I describe in some detail the Board's approval process in the context of the submission of the City of Burnaby that the Board's approval process was procedurally unfair because of what Burnaby characterized to be the deferral and delegation of the assessment of important information.

[544] Beginning at paragraph 322 above, I deal with the submissions of the City of Burnaby and Coldwater that the Governor in Council erred in determining that the Board's report qualified as a report because the Board did not decide certain issues before recommending approval of the Project. Consideration of the concerns advanced by Coldwater with respect to the Board's failure to deal with the West Alternative begins at paragraph 375 above. At paragraphs 384 and 385, I conclude that the pipeline route through the Coldwater River Valley remains a live issue.

[545] This places in context concerns raised by Coldwater and other applicants about the reasonableness of Canada's reliance on a process that left important issues unresolved at the time the Governor in Council approved the Project.

[546] In my view, this concern is addressed by the Supreme Court's analysis in the companion cases of *Clyde River* and *Chippewas of the Thames* where the Supreme Court explained that the Board's approval process may itself trigger the duty to consult where that process may result in adverse impacts upon Indigenous and treaty rights (*Clyde River*, paragraphs 25 to 29; *Chippewas of the Thames*, paragraphs 29 to 31).

[547] Examined in the context of Coldwater's concerns about the West Alternative and the protection of Coldwater's aquifer, this means that the Board's decision about the detailed pipeline routing in the vicinity of the Coldwater Reserve will trigger the duty to consult because Canada will have knowledge, real or constructive, of the potential impact of that decision upon Coldwater's aquifer located beneath the Coldwater Reserve. Once the duty is triggered, the Board may only make its decision if it informs itself of the impacts to the aquifer and takes the rights and interests of Coldwater into consideration before making its final decisions about pipeline routing and compliance with Condition 39 (*Chippewas of the Thames*, paragraph 48). Canada will remain responsible to ensure that the Board's decision upholds the honour of the Crown (*Clyde River*, paragraph 22). This is, I believe, a full answer to the concern that the consultation framework was deficient because certain decisions remain to be made after the Governor in Council approved the Project.

(v) Conclusion on the adequacy of the process selected and followed by Canada

[548] In *Clyde River* and *Chippewas of the Thames* the Supreme Court provided helpful guidance about the indicia of a reasonable consultation process. Applying those indicia:

- The Indigenous applicants were given early notice of the Project, the Board's hearing process, the framework of the consultation process and Canada's intention to rely on the National Energy Board process, to the extent possible, to discharge Canada's duty to consult.
- Participant funding was provided to the Indigenous applicants both by the Board and Canada (and the provincial Crown as well).
- The Board's process permitted Indigenous applicants to provide written evidence and oral traditional evidence, to question both Trans Mountain and the federal government interveners through Information Requests and to make written and oral closing submissions.
- The regulatory framework permitted the Board to impose conditions upon Trans Mountain that were capable of mitigating risks posed by the Project to the rights and title of the Indigenous applicants.
- After the Board's hearing record closed and prior to the decision by the Governor in Council, Canada provided a further consultation phase, Phase III, designed to enable Canada to deal with concerns not addressed by the hearing, the Board's proposed conditions and Trans Mountain's commitments.
- Canada understood, and advised the Indigenous applicants, that if Indigenous groups identified outstanding concerns in Phase III there were a number of options available to Canada. These included asking the National Energy Board to reconsider its recommendations and conditions, undertaking further consultations prior to issuing additional permits or authorizations and the use of existing or new policy and program measures to address outstanding concerns.

[549] I am satisfied that the consultation framework selected by Canada was reasonable. It was sufficient, if properly implemented, to enable Canada to make reasonable efforts to inform itself and consult. Put another way, this process, if reasonably implemented, could have resulted in mutual understanding on the core issues and a demonstrably serious consideration of accommodation.

(b) Was the consultation process deficient because of Canada's execution of the process?

[550] Canada argues that the consultation process allowed for deep consultation both in form and in substance. In particular it notes that:

- The Indigenous applicants were given early notice of the proposed Project, the Board hearing process and the consultation process, as well as Canada's intention to rely on the Board's process, to the extent possible, to discharge Canada's duty to consult.
- The Board required that Trans Mountain extensively consult before filing its application so as to attempt to address potential impacts by way of project modifications and design.
- Participant funding was provided to the Indigenous applicants by both Canada and the Board.
- The Indigenous applicants were afforded the opportunity before the Board to provide oral traditional and written evidence, to ask questions of Trans Mountain and the Federal interveners, and to make both written and oral submissions. The Board's report formulated conditions to mitigate, avoid or otherwise address impacts on Indigenous groups, and explained how Indigenous concerns were considered and addressed.
- Canada ordered an extension of the legislative timeframe for the Governor in Council's decision and met and corresponded with the Indigenous applicants to

discuss concerns that may not have been adequately addressed by the Board and to work together to identify potential accommodation measures.

- Canada developed the Crown Consultation Report to inform government decision-makers and sought feedback from the Indigenous applicants on two draft versions of the Crown Consultation Report.
- Canada reviewed upstream greenhouse gas emission estimates for the Project, struck a Ministerial Panel to seek public input and held a workshop in Kamloops.
- Canada developed additional accommodation measures including an Indigenous Advisory and Monitoring Committee, the Oceans Protection Plan and the Action Plan for the Recovery of the Southern Resident Killer Whale.
- Canada gave written reasons for conditionally approving the Project that showed how Indigenous concerns were considered and addressed.

[551] While in *Gitxaala* this Court found that the consultation process followed for the Northern Gateway project fell well short of the mark, Canada submits that the flaws identified by the Court in *Gitxaala* were remedied and not repeated. Specific measures were taken to remedy the flaws found in the earlier consultation. Thus:

i. Canada extended the consultation process by four months to allow deeper consultation with potentially affected Indigenous groups, greater public engagement and an assessment of the greenhouse gas emissions associated with the Project.

ii. The Order in Council expressly stated that the Governor in Council was "satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated". Reasons for this conclusion were given in the Explanatory Note.

iii. Canada shared its preliminary strength of claim assessments in August 2016 to allow Indigenous groups to comment on the assessments. Canada's ultimate assessments were set out in the Crown Consultation Report.

iv. Canada's officials met and dialogued with Indigenous groups. As well, several Ministers met with Indigenous groups. While the Governor in Council accepted the report of the National Energy Board, in addition to the Board's conditions the Crown Consultation Report contained a commitment to design, fund and implement an Indigenous Advisory and Monitoring Committee for the Project and the Explanatory Note referenced two new initiatives: the Economic Pathways Partnership and the Oceans Protection Plan.

v. In order to ensure that the Governor in Council received accurate information, two drafts of the Crown Consultation Report were distributed for comment and Indigenous groups were invited to provide their own submissions to the Governor in Council.

vi. The consultation was based on the unique facts and circumstances applicable to each Indigenous group. The Crown Consultation Report contained a detailed appendix for each potentially affected Indigenous group that dealt with: background information; a preliminary strength of claim assessment; a summary of the group's involvement in the Board and Crown Consultation process; a summary of the group's interests and concerns; accommodation proposals; the group's response to the Board's report; the potential impacts of the Project on the group's Indigenous interests; and the Crown's conclusions.

[552] I acknowledge significant improvements in the consultation process. To illustrate, in *Gitxaala* this Court noted, among other matters, that:

- requests for extensions of time were ignored (reasons, paragraphs 247 and 250);
- inaccurate information was put before the Governor in Council (reasons, paragraphs 255-262);
- requests for information went unanswered (reasons, paragraphs 272, 275-278);
- Canada did not disclose its assessment of the strength of the Indigenous parties' claim to rights or title or its assessment of the Project's impacts (reasons, paragraphs 288-309); and,

- Canada acknowledged that the consultation on some issues fell well short of the mark (reasons, paragraph 254).

[553] Without doubt, the consultation process for this project was generally well-organized, less rushed (except in the final stage of Phase III) and there is no reasonable complaint that information within Canada's possession was withheld or that requests for information went unanswered.

[554] Ministers of the Crown were available and engaged in respectful conversations and correspondence with representatives of a number of the Indigenous applicants.

[555] Additional participant funding was offered to each of the applicants to support participation in discussions with the Crown consultation team following the release of the Board's report and recommendations. The British Columbia Environmental Assessment Office also offered consultation funding.

[556] The Crown Consultation Report provided detailed information about Canada's approach to consultation, Indigenous applicants' concerns and Canada's conclusions. An individualized appendix was prepared for each Indigenous group (as described above at paragraph 551(vi)).

[557] However, for the reasons developed below, Canada's execution of Phase III of the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court. As such, the consultation process fell short of the required mark for reasonable consultation.

[558] To summarize my reasons for this conclusion, Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.

[559] On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. While there are some examples of responsiveness to concerns, these limited examples are not sufficient to overcome the overall lack of response. The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints. As this Court wrote in *Gitxaala*, at paragraph 265, speaking of the limited mandate of Canada's representatives:

> When the role of Canada's representatives is seen in this light, it is of no surprise that a number of concerns raised by Aboriginal groups—in our view, concerns very central to their legitimate interests—were left unconsidered and undiscussed. This fell well short of the conduct necessary to meet the duty to consult.

[560] Further, Phase III was to focus on two questions: outstanding concerns about Project-related impacts and any required incremental accommodation measures. Canada's ability to consult and dialogue on these issues was constrained by two further limitations: first, Canada's unwillingness to depart from the Board's findings and recommended conditions so as to

genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns in a genuine and adequate way; second, Canada's erroneous view that it was unable to impose additional conditions on Trans Mountain.

[561] Together these three factors led to a consultation process that fell short of the mark and was, as a result, unreasonable. Canada then exacerbated the situation by its late disclosure of its view that the Project did not have a high level of impact on the established and asserted rights of the Indigenous applicants—a disclosure made two weeks before they were required to submit their final response to the consultation process and less than a month before the Governor in Council approved the Project.

[562] I begin the analysis by underscoring the need for meaningful two-way dialogue in the context of this Project and then move to describe in more detail the three significant impediments to meaningful consultation: the Crown consultation team's implementation of their mandate essentially as note-takers, Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose additional conditions on Trans Mountain. I then discuss Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants. Finally, I review instances that show that as a result of these impediments the opportunity for meaningful dialogue was frustrated.

[563] The jurisprudence of the Supreme Court on the duty to consult is clear. The Indigenous applicants were entitled to a dialogue that demonstrated that Canada not only heard but also gave

serious consideration to the specific and real concerns the Indigenous applicants put to Canada, gave serious consideration to proposed accommodation measures, and explained how the concerns of the Indigenous applicants impacted Canada's decision to approve the Project. The instances below show how Canada fell short of its obligations.

(i) The need for meaningful two-way dialogue

[564] As a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation. As explained above at paragraphs 499 to 501, meaningful consultation is not simply a process of exchanging information. Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.

[565] The need for meaningful dialogue exists and operates in a factual context. Here, Phase III was a critically important part of the consultation framework. This was so for a number of reasons.

[566] First, Phase III was the first opportunity for the Indigenous applicants to dialogue directly with Canada about matters of substance, not process.

[567] Second, the Board's report did not deal with all of the subjects on which consultation was required. For example, the Board did not make any determinations about the nature and scope of asserted or established Indigenous rights, including title rights. Nor did the Board consider the

scope of the Crown's duty to consult or whether the duty was fulfilled. Nor did Trans Mountain in its application, or the Board in its report, assess how the residual effects of the Project, or the Project itself, could adversely impact traditional governance systems and claims to Aboriginal title (Crown Consultation Report, sections 1.4, 4.3.4 and 4.3.5). Canada was obliged to consult on these issues.

[568] Third, neither Trans Mountain nor the Board assessed the Project's impacts on a specific basis for each affected Indigenous group. Rather, Trans Mountain assessed the effects related to Project construction and operations (including potential accidents and malfunctions) that might impact biophysical resources and socio-economic components within the Project area, and the Indigenous uses, practices and activities associated with those resources. This approach was accepted by the Board (Board report, pages 51 to 52).

[569] Finally, Phase III began in earnest with the release of the Board's report and finalized conditions. This report contained findings of great importance to the applicants because the Board's findings led Canada to conclude that the Project had only a minor-to-moderate impact on the Indigenous applicants. As a matter of law, this conclusion directly affected both the depth of consultation required and the need for accommodation measures. The following two examples illustrate the importance of the Board's findings to the Indigenous applicants.

[570] The first example concerns the assessment of the Project's potential impact on freshwater fishing. The Board found that the proposed watercourse crossings designs, mitigation measures, reclamation activities and post-construction monitoring were appropriate and that they would

effectively reduce the extent of effects on fish and fish habitat. Watercourse crossings would be required to comply with federal and provincial laws and regulations and would require permits under the British Columbia *Water Sustainability Act*, S.B.C. 2014, c. 15. The Board agreed with Trans Mountain's self-assessment of the potential for serious harm in that the majority of proposed watercourse crossings would not constitute serious harm to fish for the purposes of the *Fisheries Act*, R.S.C. 1985, c. F-14 (Board report, pages 183 and 185).

[571] The Stó:lō have a constitutionally protected right to fish on the Fraser River, a right affirmed by the Supreme Court of Canada. In the Stó:lō appendix to the Crown Consultation Report, Canada concluded that Project construction and routine maintenance during operation would be expected to result in a minor-to-moderate impact on the Stó:lō's freshwater fishing and marine fishing and harvesting activities (Stó:lō appendix, pages 26 and 27). This assessment flowed directly from the Board's conclusion that Project-related activities could result in low-to-moderate magnitude effects on freshwater and marine fish and fish habitat and the Board's conclusion that its conditions, if the Project was approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Stó:lō appendix, pages 24 and 25).

[572] The second example relates to the ability of Indigenous groups to use the lands, waters and resources for traditional purposes. The Board found that this ability would be temporarily impacted by construction and routine maintenance activities, and that some opportunities for certain activities, such as harvesting or accessing sites or areas of traditional land resource use, would be temporarily interrupted. The Board was of the view that these impacts would be short-

term, as they would be limited to brief periods during construction and routine maintenance, and that these effects would be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the Westridge Marine Terminal site. The Board found these effects would be reversible in the short to long term, and low in magnitude (Board report, page 279). The Board also found that:

- Project-related pipeline, facility and Westridge Marine Terminal construction and operation, and marine shipping activities were likely to have low-to-moderate magnitude environmental effects on terrestrial, aquatic and marine species harvested by Indigenous groups as a whole (Board report, pages 204, 221 to 224 and 362);
- Construction of the Westridge Marine Terminal, the pipeline and associated facilities were likely to cause short-term temporary disruptions to Indigenous community members accessing traditional hunting, trapping and plant gathering sites (Board report, page 279); and,
- Project-related marine shipping activities were likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers were in transit (Board report, page 362).

[573] Based on these findings, Canada concluded that the impact of Project construction and operation and Project-related marine shipping activities on Tsleil-Waututh's and Squamish's hunting, trapping and plant gathering activity would be negligible-to-minor. The Project's impact on these activities was assessed to be minor for the Stó:lō and SSN, and minor-to-moderate for Coldwater and Upper Nicola.

[574] The critical importance of the Board's findings to the Indigenous applicants mandated meaningful dialogue about those findings. I now turn to consider Canada's execution of Phase III of the consultation process, commencing with the mandate of the Crown consultation team.

(ii) The implementation of the mandate of the Crown consultation team

[575] While Canada submits that the members of the Crown consultation team were not mere note-takers, the preponderance of the evidence is to the effect that the members of the Crown consultation team acted on the basis that, for the most part, their role was that of note-takers who were to accurately report the concerns of the Indigenous applicants to the decision-makers.

[576] My review of the evidence begins with the explanation of the team's mandate found in the Crown Consultation Report. I then move to the evidence of the interactions between the Crown consultation team and the Indigenous applicants during the consultation process.

[577] First, a word of explanation about the source of the evidence cited below. Unless otherwise noted, the evidence comes from meeting notes prepared by Canada. It was Canada's practice to prepare meeting notes following each consultation meeting, to send the draft notes to the affected Indigenous group for comment, and then to revise the notes based on the comments received before distributing a final version. The parties did not take issue with the accuracy of meeting notes. As shown below, where there was any disagreement on what had been said, the minutes set out each party's view of what had been said.

a. The Crown Consultation Report

[578] Section 3.3.4 of the Crown Consultation Report dealt with Phase III of the consultation process. Under the subheading "Post-NEB Hearing Phase Consultation" the report stated:

> … The mandate of the Crown consultation team was to listen, understand, engage and report to senior officials, Aboriginal group perspectives. The Minister of Natural Resources and other Ministers were provided a summary of these meetings.

b. The experience of Tsleil-Waututh

[579] At a meeting held on April 5, 2016, Erin O'Gorman of Natural Resources Canada "highlighted her mandate to listen and understand [Tsleil-Waututh's] perspective on how consultations should be structured, and move this information for decision. No mandate to defend the current approach."

[580] In the course of the introductions and opening remarks at a meeting held September 15, 2016, "Canada stressed that the Crown's ultimate goal is to understand the position and concerns of the [Tsleil-Waututh] on the proposed Trans Mountain Expansion project."

[581] At a meeting held on October 20, 2016, Canada's representatives advised that "[o]ur intention is to provide a report to cabinet and include all first Nations consulted, we are open to having [Tsleil-Waututh] input review and representation in that report, together with mitigation and accommodation measures." In response, a representative of Tsleil-Waututh "indicated he did not want consultations and a report of concerns to [Governor in Council]: that has occurred and

does not work." The response of the federal representatives to this was that "it was sufficient to convey information to the [Governor in Council] depending on how it's done."

c. The experience of Squamish

[582] On October 6, 2016, the Major Projects Management Office and the British Columbia Environmental Assessment Office jointly wrote to Squamish in response to a letter from Squamish setting out its views on the outstanding deficiencies in the Board review process and requesting a review of the consultation approach the Crown was taking to inform forthcoming federal and provincial decisions in respect of the Project. Under the heading "Procedural Concerns" Squamish was advised:

> The Crown Consultation Team's objective has always been to work with Squamish and other Aboriginal groups to put forward the best information possible to decision makers within the available regulatory timeframe, via this Consultation and Accommodation Report. Comments and input provided by Squamish will help the Crown Consultation Team to accurately convey Squamish's interests, concerns, and any specific proposals.
>
> The Crown is now focused on validating the key substantive concerns of Squamish, and has requested feedback on an initial draft report so that the Crown can include draft conclusions in a subsequent revision that will include the Crown's assessment of the seriousness of potential impacts from the Project on Aboriginal Interests, specific to each Aboriginal group.
>
> …
>
> At this stage in the process, following a four month extension of the federal legislated time limit, for a decision on the Project (required by December 19, 2016), we continue to want to ensure that Squamish's substantive concerns with respect to the Project, [Board] report (including recommended terms and conditions), and related proposals for mitigation or accommodation are accurately and comprehensively documented in the Consultation and Accommodation Report.
>
> (underlining added)

[583] At the only consultation meeting held with Squamish, Canada's consultation lead referenced the ethics the team abided by during each meeting with Indigenous groups: "honesty, truth, pursuing the rightful path and ensuring that accurate and objective, representative information is put before decision-makers."

[584] He later reiterated that "[i]t is the Crown's duty to ensure that accurate information on these outstanding issues is provided to decision-makers, including how Squamish perceives the project and any outstanding issues."

d. The experience of Coldwater

[585] At a meeting held with Coldwater on March 31, 2016, prior to the start of Phase III, the head of the Crown consultation team explained that:

> … the work of the Crown consultation team, to develop a draft report that helps document the potential impacts of the project on [Coldwater] rights and interests, will be the vehicle through which the Crown documents potentially outstanding issues and accommodation proposals. It may appear as though the Crown is relying solely on the [Board] process, however it is not. It is leading its own consultation activities and will be overlaying a separate analytical framework (i.e. the impacts-on-rights lens).

[586] At a meeting on May 4, 2016, discussing, among other things, the effect of the Project on Coldwater's aquifer the Crown consultation team advised:

> For specifics such as detailed routing, it is the [Board] which decides those. The responsibility that the Crown consultation team has is to make sure these issues are reflected in the Crown consultation report, so they can be considered by decision makers.
>
> (underlining added)

After Coldwater expressed its strong preference for the West Alternative Canada's representatives responded that:

> [t]his issue is one which is very detailed, and will need to be recorded carefully and accurately in the Crown consultation Report. The Crown consultation report can highlight that project routing is a central issue for Coldwater.
>
> (underlining added)

[587] At a consultation meeting held on October 7, 2016, again in the context of discussions about Coldwater's aquifer, one of Canada's representatives:

> … acknowledged that the aquifer hasn't been fully explored, but explained that the [Board] process has analysed the Project and that the Crown will not be taking an independent analysis beyond that. This is because the [Board] is a quasi-judicial tribunal with significant technical expertise. The Crown (federally and provincially) will not undertake an independent analysis of potential corridor routes. That said, the Crown will take Coldwater's concerns back to decision makers.
>
> …
>
> Coldwater asked what the point of consultation was if all that was coming from the Crown was a summary report to the [Governor in Council].
>
> (underlining added)

[588] In the later stages of the meeting during a discussion headed "Overview of Decision Making", Coldwater stated that based on the discussion with the Crown to date it did not seem likely that there would be a re-analysis of the West Alternative or any of the additional analysis Coldwater had asked for. Canada's representatives responded that:

> [The Crown's] position is that the detailed route hearing process and Condition 39 provide avenues to consider alternative routes, however the Crown is not currently considering alternative routes because the [Board] concluded that the applied for pipeline corridor is satisfactory. The Crown will ensure that Coldwater's concerns about the route are provided to the Cabinet, it will then be

> up to Cabinet to decide if those concerns warrant reconsideration of the current route.
>
> (underlining added)

e. The experience of Stó:lō

[589] An email sent from the Major Projects Management Office following an April 13, 2016, consultation meeting advised that:

> The Crown consultation team for [the Trans Mountain expansion] and the forthcoming Ministerial Representative (or Panel) will hear views on the project and whether there are any outstanding issues not addressed in the [Board's] final report and conditions or [Environment Canada's] assessment of upstream greenhouse gas emissions. This will provide another avenue for participants to provide their views on the upstream [greenhouse gas] assessment for [Trans Mountain expansion]. Any comments will be received and given consideration by the Government of Canada.
>
> (underlining added)

[590] On May 12, 2016, the Stó:lō wrote to the Minister of Natural Resources, the Honourable James Carr. It wrote about the Crown Consultation Report that:

> … we understood [Canada's representative] Mr. Neil to say that the federal decision-maker will be the Governor-in-Council and that [Natural Resources Canada], further to this Crown consultation, will not make recommendations with respect to this project. Instead, its report to the Governor-in-Council will be a summary of what it heard during its consultations with aboriginal peoples with some commentary. We further understood Mr. Whiteside [another federal representative] to say that the Governor-in-Council cannot, based on Crown consultations, add or make changes to the Terms and Conditions of the project as set out by the [Board]. If we have misunderstood these representations, we would appreciate being informed in writing. If we have not misunderstood these representations, we believe that [Natural Resources Canada] is misinterpreting its constitutional obligations and the authority of federal decision-makers.
>
> (underlining added)

[591] The Stó:lō went on to observe that "[a] high level of consultation means more than simply gathering information on aboriginal interests, cross checking those with the Terms and Conditions of the project and reporting those findings to the federal decision-maker." And that "[a] simple 'what we heard' report is inadequate to this task and the Governor-in-Council must be aware of its obligation to either reject or make changes to the project to protect and preserve the aboriginal rights, title and interests of the Stó:lō Collective."

[592] The Minister responded on July 15, 2016. The Minister agreed that addressing concerns required more than gathering and reporting information from consultation sessions and advised that if the Stó:lō Collective identified concerns that had not been fully addressed by the Board's terms and conditions consultation would "include efforts to preserve the Aboriginal rights in question." The Minister encouraged the Stó:lō Collective "to work with the Crown consultation team so that the Stó:lō Collective's interests are fully understood and articulated in the Crown Consultation and Accommodation Report" (underlining added). The Minister added that "[a]ny accommodation measures or proposals raised during Crown consultations will be included in this report and will inform the Government's decision on [the Project]."

f. The experience of Upper Nicola

[593] At a meeting held on March 31, 2016, after Chief McLeod expressed his desire for Upper Nicola's "intentions to be heard by decision makers, and asked that all of the information shared today be relayed to Minister Carr", Canada's representatives responded that "senior decision makers are very involved in this project and the Crown consultation team would be relaying the outcomes and the meeting records from the meeting today up the line." Canada's Crown

consultation lead noted that "wherever possible he would like to integrate some of the Indigenous words Chief McLeod spoke about into the Crown consultation report as a mechanism to relay the important messages which the Chief is talking about."

[594] At a meeting on May 3, 2016, immediately prior to the release of the Board's report and recommendations, Canada's consultation lead "reiterated the current mandate for the Crown consultation team, which is to listen, learn, understand, and to report up to senior decision makers" (underlining added). Upper Nicola's legal counsel responded that "the old consultation paradigm, where the Crown's officials meets with Aboriginal groups to hear from them their perspectives and then to report this information to decision makers, is no longer valid."

[595] Towards the end of the meeting, in response to a question about a recent media story which claimed that the Prime Minister had instructed his staff to develop a strategy for approving Trans Mountain, a senior advisor to Indigenous and Northern Affairs Canada advised that he had "received no instructions from his department that would change his obligation as a public servant to ensure that he does all he can to remain objective and impartial and to ensure that the views of Aboriginal groups are appropriately and accurately relayed to decision makers." The Crown consultation lead added that the "Crown consultation team has no view on the project. Its job is to support decision makers with accurate information" (underlining added).

g. The experience of SSN

[596] In an email of July 7, 2015, sent prior to the release of the Board's draft conditions, SSN was advised by the Major Projects Management Office that the Federal "Crown's consultation

will focus on an exchange of information and dialogue on two key documents", the Board's draft conditions and the draft Crown Consultation Report. With respect to the Crown Consultation Report, the email advised that the focus would be to determine "whether the Crown has adequately described the Aboriginal group's participation in the process, the substantive issues they have raised and the status of those issues (including Aboriginal groups' views on any outstanding concerns and residual issues arising from Phase III)" (underlining added).

[597] In a later email of June 17, 2016, SSN were informed that:

> The objective of the Crown consultation team moving forward is to consult collaboratively in an effort to reach consensus on outstanding issues and related impacts on constitutionally protected Aboriginal and treaty rights, as well as options for accommodating any impacts on rights that may need to be considered as part of the decision-making process. The status of these discussions will be documented in a Consultation and Accommodation Report that will help inform future decisions on the proposed project and any accompanying rationale for the government's decisions.
>
> (underlining added)

h. Conclusion on the mandate of the Crown consultation team

[598] As this review of the evidence shows, members of the Crown consultation team advised the Indigenous applicants on a number of occasions throughout the consultation process that they were there to listen and to understand the applicants' concerns, to record those concerns accurately in the Crown Consultation Report, and to pass the report to the Governor in Council. The meeting notes show the Crown consultation team acted in accordance with this role when discussing the Project, its impact on the Indigenous applicants and their concerns about the Project. The meeting notes show little or no meaningful responses from the Crown consultation team to the concerns of the Indigenous applicants. Instead, too often Canada's response was to

acknowledge the concerns and to provide assurance the concerns would be communicated to the decision-makers.

[599] As this Court explained in *Gitxaala* at paragraph 279, Canada was required to engage, dialogue and grapple with the concerns expressed to it in good faith by the Indigenous groups impacted by the Project. Meaningful dialogue required someone representing Canada empowered to do more than take notes—someone able to respond meaningfully to the applicants' concerns at some point in time.

[600] The exchanges with the applicants demonstrate that this was missing from the consultation process. The exchanges show little to facilitate consultation and show how the Phase III consultation fell short of the mark.

[601] The consultation process fell short of the required mark at least in part because the consultation team's implementation of its mandate precluded the meaningful, two-way dialogue which was both promised by Canada and required by the principles underpinning the duty to consult.

(iii) Canada's reluctance to depart from the Board's findings and recommended conditions and genuinely engage the concerns of the Indigenous applicants

[602] During Phase III each Indigenous applicant expressed concerns about the suitability of the Board's regulatory review and environmental assessment. These concerns were summarized and reported in the appendix to the Crown Consultation Report maintained for each Indigenous

applicant (Tsleil-Waututh appendix, pages 7-8; Squamish appendix, page 4; Coldwater appendix, pages 4-5; Stó:lō appendix, pages 12-14; Upper Nicola appendix, pages 5-6; SSN appendix, page 4). These concerns related to both the Board's hearing process and its findings and recommended conditions. The concerns expressed by the Indigenous applicants included:

- The exclusion of Project-related shipping from the definition of the "designated project" which was to be assessed under the *Canadian Environmental Assessment Act, 2012*.
- The inability to cross-examine Trans Mountain's witnesses, coupled with what were viewed to be inadequate responses by Trans Mountain to Information Requests.
- The Board's recommended terms and conditions were said to be deficient for a number of reasons, including their lack of specificity and their failure to impose additional conditions (for example, a condition that sacred sites be protected).
- The Board's findings were generic, thus negatively impacting Indigenous groups' ability to assess the potential impact of the Project on their title and rights.
- The Board's legislated timelines were extremely restrictive and afforded insufficient time to review the Project application and to participate meaningfully in the review process.
- The Board hearing process was an inappropriate forum for assessing impacts to Indigenous rights, and the Board's methods and conclusions regarding the significance and duration of the Project's impacts on Indigenous rights were flawed.

[603] However, missing from both the Crown Consultation Report and the individual appendices is any substantive and meaningful response to these concerns. Nor does a review of the correspondence exchanged in Phase III disclose sufficient meaningful response to, or dialogue about, the various concerns raised by the Indigenous applicants. Indeed, a review of the record of the consultation process discloses that Canada displayed a closed-mindedness when

concerns were expressed about the Board's report and was reluctant to depart from the findings and recommendations of the Board. With rare exceptions Canada did not dialogue meaningfully with the Indigenous applicants about their concerns about the Board's review. Instead, Canada's representatives were focused on transmitting concerns of the Indigenous applicants to the decision-makers, and nothing more. Canada was obliged to do more than passively hear and receive the real concerns of the Indigenous applicants.

[604] The evidence on this point comes largely from Tsleil-Waututh and Coldwater.

[605] I begin with the evidence of the Director of Tsleil-Waututh's Treaty, Lands and Resources Department, Ernie George. He affirmed that at a meeting held with representatives of Canada on October 21, 2016, to discuss Tsleil-Waututh's view that the Board's process was flawed such that the Governor in Council could not rely on its report and recommendations:

> 81. Canada expressed that it was extremely reluctant to discuss the fundamental flaws that [Tsleil-Waututh] alleged were present in relation to the [Board] process, and even prior to the meeting suggested that we might simply need to "agree to disagree" on all of those issues. In our view Canada had already determined that it was not willing to take any steps to address the issues that [Tsleil-Waututh] identified and submitted constituted deficiencies in the [Board] process, despite having the power to do so under CEAA and NEBA and itself stating that this was a realistic option at its disposal.
>
> (underlining added)

[606] Mr. George was not cross-examined on his affidavit.

[607] Canada's reluctance was firmly expressed a few days later at a meeting held on October 27, 2016. Mr. George affirmed:

> 101. [Tsleil-Waututh] raised its concern that although the [Board] reached similar conclusions as [Tsleil-Waututh] that oil spills in Burrard Inlet would cause significant adverse environmental effects, it disagreed with Drs. Gunton and Broadbent's conclusions as to the likelihood of spills occurring. [Tsleil-Waututh] then asked Canada whether it agreed with those conclusions. Canada was unable to respond because it did not bring its risk experts to the meeting. [Tsleil-Waututh] rearticulated its view that such risks were far too high.
>
> 102. At this point, despite the critical importance of this issue, Canada advised [Tsleil-Waututh] that it was unwilling to revisit the [Board's] conclusions and would instead wholly rely on the [Board's] report on this issue. We stated that we did not accept Canada's position, that further engagement on this subject was required, and that we would be willing to bring our experts to a subsequent meeting to consider any new material or new technology that Canada might identify.
>
> (underlining added)

[608] This evidence is consistent with the meeting notes prepared by Canada which reflect that Canada's representatives "indicated that government would rely on the [Board's] report". The notes then record that Tsleil-Waututh's representatives inquired "if the [Government of Canada] was going to rely on the [Board's] report, there was an openness to discuss matters related to gaps in the [Board's] report and what had been ignored." In response, "Canada acknowledged [Tsleil-Waututh's] views on the [Board] process, and indicated that it could neither agree or disagree: both [Tsleil-Waututh] and [Canada] had been intervenors and neither could know how the [Board] panel weighed information provided to it."

[609] Coldwater provided similar evidence relating to its efforts to consult with Canada about the Project's impacts on its aquifer at meetings held on May 4, 2016 and October 7, 2016.

[610] On May 4, 2016, representatives of Coldwater expressed their view that the West Alternative was a much better pipeline route that addressed issues the Board had not addressed

adequately. As set out above, Canada's representatives responded that for "specifics such as detailed routing, it is the [Board] which decides those" and added that "[t]he responsibility that the Crown consultation team has is to make sure these issues are reflected in the Crown consultation report, so they can be considered by decision makers."

[611] Canada again expressed the view that the Board's findings were not to be revisited in the Crown consultation process at the meeting of October 7, 2016. In response to a question about the West Alternative, Canada's representatives advised that in the Phase III consultation process it was not for Canada to consider the West Alternative as an alternate measure to mitigate or accommodate Coldwater's concerns. The meeting notes state:

> The Crown replied that the [Board] concluded that the current route is acceptable; however the Panel imposed a condition requiring the Proponent to further study the interaction between the proposed pipeline and the aquifer. Tim Gardiner acknowledged that the aquifer hasn't been fully explored, but explained that the [Board] process has analyzed the Project and that the Crown will not be taking an independent analysis beyond that. This is because the [Board] is a quasi-judicial tribunal with significant technical expertise, the Crown (federally and provincially) will not undertake an independent analysis of potential corridor routes. That said, the Crown will take Coldwater's concerns back to decision makers.
>
> (underlining added)

[612] Canada went on to express its confidence in Board Condition 39 and the detailed route hearing process.

[613] Later, in response to Coldwater's concern that the Board never considered the West Alternative, the meeting notes show that Canada's representatives:

> … acknowledged Coldwater's concerns, and explained that when the West Alternative was no longer in the [Board's] consideration, the Crown was not able

> to question that. [Mr. Whiteside] acknowledged that from Coldwater's perspective this leaves a huge gap. Mr. Whiteside went on to explain that the Proponent's removal of the West Alternative "is not the Crown's responsibility. We are confined to the [Board] report."
>
> (underlining added)

[614] Finally, in the course of an overview of decision-making held at the end of the October 7, 2016 meeting, Canada advised it was not considering alternative routes "because the [Board] concluded that the applied for pipeline corridor is satisfactory." Canada added that "[t]he Crown will ensure that Coldwater's concerns about the route are provided to the Cabinet, [and] it will then be up to Cabinet to decide if those concerns warrant reconsideration of the current route."

[615] As this Court had already explained in *Gitxaala,* at paragraph 274, Canada's position that it was confined to the Board's findings is wrong. As in *Gitxaala*, Phase III presented an opportunity, among other things, to discuss and address errors, omissions and the adequacy of the recommendations in the Board's report on issues that vitally concerned the Indigenous applicants. The consequence of Canada's erroneous position was to seriously limit Canada's ability to consult meaningfully on issues such as the Project's impact on each applicant and possible accommodation measures.

[616] Other meeting notes do not record that Canada expressed its reluctance to depart from the Board's findings in the same terms to other Indigenous applicants. However, there is nothing inconsistent with this position in the notes of the consultation with the other applicants.

[617] For example, in a letter sent to Squamish by the Major Projects Management Office on July 14, 2015, it was explained that the intent of Phase III was:

> … not to repeat or duplicate the [Board] review process, but to identify, consider and potentially address any outstanding concerns that have been raised by Aboriginal groups (i.e. concerns that, in the opinion of the Aboriginal group, have not been addressed through the [Board] review process).

[618] Later, Squamish met with the Crown consultation team on September 11, 2015, to discuss the consultation process. At this meeting Squamish raised concerns about, among other things, the adequacy of Canada's consultation process. In a follow-up letter counsel for Squamish provided more detail about the "Squamish Process"—a proposed process to enable consideration of the Project's impact upon Squamish's interests. The process included having community concerns inform the scope of the assessment with the goal of having these concerns substantively addressed by conditions placed on the Project proponent.

[619] Canada responded by letter dated November 26, 2015, in which it reiterated its position that:

> … there are good reasons for the Crown to rely on the [Board's] review of the Project to inform the consultation process. This approach ensures rigour in the assessment of the potential adverse effects of the Project on a broad range of issues including the environment, health and socio-economic conditions, as well as Aboriginal interests.

[620] The letter went on to advise that:

> Information from a formal community level or third-party review process can be integrated into and considered through the [Board] review process if submitted as evidence. For the Trans Mountain Expansion Project, the appropriate time to have done so would have been prior to the evidence filing deadline in May 2015.

[621] Canada went on to express its confidence that the list of issues, scope of assessment and scope of factors examined by the Board would inform a meaningful dialogue between it and Squamish.

[622] In other words, Canada was constrained by the Board's review of the Project. Canada required that evidence of any assessment or review process be first put before the Board, and any dialogue had to be informed by the Board's findings.

[623] A similar example is found in the Crown's consultation with Upper Nicola. At the consultation meeting held on September 22, 2016, Upper Nicola expressed its concern with the Board's economic analysis. The Director General of the Major Projects Management Office responded that "as a rule, the [Governor in Council] is deferential to the [Board's] assessment, but they are at liberty to consider other information sources when making their decision and may reach a different conclusion than the [Board]." The Senior Advisor from Indigenous and Northern Affairs Canada added that "the preponderance of detail in the [Board] report weighs heavy on Ministers' minds."

[624] No dialogue ensued about the legitimacy of Upper Nicola's concern about the Board's economic analysis, although Canada acknowledged "a strong view 'out there' that runs contrary to the [Board's] determination."

[625] Matters were left that if Upper Nicola could provide more information about what it said was an incorrect characterization of the economic rationale and Indigenous interests, this information would be put before the Ministers.

[626] Put another way, Canada was relying on the Board's findings. If Upper Nicola could produce information contradicting the Board that would be put before the Governor in Council; it would not be the subject of dialogue between Upper Nicola and Canada's representatives. Canada did not grapple with Upper Nicola's concerns, did not discuss with Upper Nicola whether the Board should be asked to reconsider its conclusion about the economics of the Project and did not explain why Upper Nicola's concern was found to lack sufficient merit to require Canada to address it meaningfully.

[627] As explained above at paragraph 491, Canada can rely on the Board's process to fulfil, in whole or in part, the Crown's duty to consult. However, reliance on the Board's process does not allow Canada to rely unwaveringly upon the Board's findings and recommended conditions. When real concerns were raised about the hearing process or the Board's findings and recommended conditions, Canada was required to dialogue meaningfully about those concerns.

[628] The Board is not immune from error and many of its recommendations were just that—proffered but not binding options for Canada to consider open-mindedly, assisted by its dialogue with the Indigenous applicants. Phase III of the consultation process afforded Canada the opportunity, and the responsibility, to dialogue about the asserted flaws in the Board's process and recommendations. This it failed to do.

(iv) Canada's erroneous view that the Governor in Council could not impose additional conditions on the proponent

[629] Canada began and ended Phase III of the consultation process operating on the basis that it could not impose additional conditions on the proponent. This was wrong and limited the scope of necessary consultation.

[630] Thus, on May 25, 2015, towards the end of Phase II, the Major Projects Management Office wrote to Indigenous groups to provide additional information on the scope and timing of Phase III consultation. If Indigenous groups identified outstanding concerns after the Board issued its report, the letter described the options available to Canada as follows:

> The Governor in Council has the option of asking the [National Energy Board] to reconsider its recommendation and conditions. Federal and provincial governments could undertake additional consultations prior to issuing additional permits and/or authorizations. Finally, federal and provincial governments can also use existing or new policy and program measures to address outstanding concerns.

[631] Canada expressed the position that these were the available options throughout the consultation process (see, for example, the meeting notes of the consultation meeting held on March 31, 2016, with Coldwater).

[632] Missing was the option of the Governor in Council imposing additional conditions on Trans Mountain.

[633] At a meeting held on April 13, 2016, after Canada's representatives expressed the view that the Crown could not add additional conditions, the Stó:lō's then counsel expressed the

contrary view. She asked that Canada's representatives verify with their Ministers whether Canada could attach additional conditions. By letter dated November 28, 2016 (the day before the Project was approved), Canada, joined by the British Columbia Environmental Assessment Office, advised that "the Governor in Council cannot impose its own conditions directly on the proponent as part of its decision" on the certificate of public convenience and necessity.

[634] This was incorrect. In *Gitxaala*, at paragraphs 163 to 168, this Court explained that when considering whether Canada has fulfilled its duty to consult, the Governor in Council necessarily has the power to impose conditions on any certificate of public convenience and necessity it directs the National Energy Board to issue.

[635] In the oral argument of these applications Canada acknowledged this power to exist, albeit characterizing it to be a power unknown to exist prior to this Court's judgment in *Gitxaala*.

[636] Accepting that the power had not been explained by this Court prior to its judgment in *Gitxaala*, that judgment issued on June 23, 2016, five months before Canada wrote to the Stó:lō advising that the Governor in Council lacked such a power and five months before the Governor in Council approved the Project. The record does not contain any explanation as to why Canada did not correct its position after the *Gitxaala* decision.

[637] The consequence of Canada's erroneous position that the Governor in Council lacked the ability to impose additional conditions on Trans Mountain seriously and inexplicably limited Canada's ability to consult meaningfully on accommodation measures.

(v) Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants

[638] As explained above at paragraph 488, the depth of the required consultation increases with the seriousness of the potentially adverse effect upon the claimed title or right. Canada's assessment of the Project's effect on each Indigenous applicant was therefore a critical aspect of the consultation process.

[639] Canada ultimately assessed the Project not to have a high level of impact on the exercise of the Indigenous applicants' "Aboriginal Interests" (a term defined in the Crown Consultation Report to include "asserted or established Aboriginal rights, including title and treaty rights."). The Project was assessed to have a minor impact on the exercise of the Aboriginal Interests of Squamish and SSN, a minor-to-moderate impact on the Aboriginal Interests of Coldwater and Stó:lō and a moderate impact on the Aboriginal Interests of Tsleil-Waututh and Upper Nicola.

[640] This important assessment was not communicated to the Indigenous applicants until the first week of November 2016, when the second draft of the Crown Consultation Report was provided (the first draft contained placeholder paragraphs in lieu of an assessment of the Project's impact). Coldwater, Upper Nicola and SSN received the second draft of the Crown Consultation Report on November 1, 2016, Squamish and Stó:lō on November 3, 2016 and Tsleil-Waututh on November 4, 2016. Each was given two weeks to respond to the draft Crown Consultation Report.

[641] By this point in time Squamish, Coldwater, Stó:lō and SSN had concluded their consultation meetings with Canada and no further meetings were held.

[642] Tsleil-Waututh did have further meetings with Canada, but these meetings were for the specific purposes of discussing greenhouse gases, the economic need for the Project and the Oceans Protection Plan.

[643] Upper Nicola did have a consultation meeting with Canada on November 16, 2016, at which time it asked for an extension of time to respond to the second draft of the Crown Consultation Report. In response, Upper Nicola received a two-day extension until November 18, 2016, to provide its comments to Canada. Canada's representatives explained that "Cabinet typically requires material one month ahead of a decision deadline to enable time to receive and review the report, translate etc. and that we've already reduced this down to enable a second round of comments."

[644] Importantly, Canada's Crown consultation lead acknowledged that other groups had asked for more time and the request had been "communicated to senior management and the Minister loud and clear." Canada's consultation lead went on to recognize that the time provided to review the second draft "may be too short for some to contribute detailed comments". There is no evidence that Canada considered granting the requested extension so that the Indigenous groups could provide detailed, thoughtful comments on the second draft of the Crown Consultation Report, particularly on Canada's assessment of the Project's impact. Nor does the record shed any light on why Canada did not consider granting the requested extension. The

statutory deadline for Cabinet's decision was December 19, 2016, and the Indigenous applicants had been informed of this.

[645] Ultimately, the Governor in Council approved the Project on November 29, 2016.

[646] The consequence of Canada's late communication of its assessment of the Project's impact was mitigated to a degree by the fact that from the outset it had acknowledged, and continues to acknowledge, that it was obliged to consult with the Indigenous applicants at the deeper end of the consultation spectrum. Thus, the assessment of the required depth of consultation was not affected by Canada's late advice that the Project, in its view, did not have a high level of impact on the claimed rights and title of the Indigenous applicants.

[647] This said, without doubt Canada's view of the Project's impact influenced its assessment of both the reasonableness of its consultation efforts and the extent that the Board's recommended conditions mitigated the Project's potential adverse effects and accommodated the Indigenous applicants' claimed rights and title. For this reason, the late delivery of Canada's assessment of the Project's impact until after all but one consultation meeting had been held contributed to the unreasonableness of the consultation process.

[648] I now turn to review instances that illustrate Canada's failure to dialogue meaningfully with the Indigenous applicants.

(vi) Canada's failure to dialogue meaningfully

a. The experience of Tsleil-Waututh

[649] Tsleil-Waututh had conducted its own assessment of the Project's impact on Burrard Inlet and on Tsleil-Waututh's title, rights and interests and traditional knowledge. This assessment, based on the findings of six independent experts and the traditional knowledge of Tsleil-Waututh members, concluded, among other things that:

- The likelihood of oil spills in Burrard Inlet would increase if the Project is implemented, and because spilled oil cannot be cleaned up completely, the consequences in such circumstances would be dire for sensitive sites, habitat and species, and in turn for the Tsleil-Waututh's subsistence economy, cultural activities and contemporary economy.
- Any delay in spilled oil cleanup response would decrease significantly the total volume of oil which could be cleaned up, and in turn increase the negative effects and consequences of a spill.
- The direct effects of marine shipping are likely to add to the effects and consequences of spilled oil, which in turn will further amplify the negative effects of the Project on Tsleil-Waututh's title, rights and interests.
- Tsleil-Waututh could not accept the increased risks, effects and consequences of even another small incident like the 2007 spill at the Westridge Marine Terminal or the 2015 MV Marathassa oil spill, let alone a worst-case spill.

[650] In the view of Tsleil-Waututh, the Board erred by excluding Project-related shipping from the Project's definition. Tsleil-Waututh was also of the view that the Board's conditions did not address their concerns about marine shipping. For example, Tsleil-Waututh noted that very few of the Board's conditions set out desired outcomes. Rather, they prescribed a means to secure an unspecified outcome.

[651] At the consultation meeting of October 27, 2016, Canada's representatives repeatedly acknowledged Tsleil-Waututh's view that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012* and that the Board's failure to do so resulted in the further failure to impose conditions on marine shipping.

[652] However, when the discussion turned to how to address Tsleil-Waututh's concerns, federal representatives noted that "proposals to strengthen marine shipping management, including nation to nation relationships, would take time to develop and strengthen." They went on to express optimism:

> … that progress toward a higher standard of care could occur over the next few years with First Nations, at a nation to nation level, particularly on spill response and emergency preparedness capacities. As baseline capacities increased, risks would be reduced.

[653] This generic and vague response that concerns could be addressed in the future, outside the scope of the Project and its approval, was Canada's only response. Canada did not suggest any concrete measures, such as additional conditions, to accommodate Tsleil-Waututh's concerns about marine shipping.

[654] Nor did Canada propose any accommodation measures at the meeting of October 28, 2016. At this meeting, Tsleil-Waututh sought further discussion about the Project's definition because, in its view, this issue had to be resolved if the Project was to be sent back to the Board for reconsideration. Canada's representatives responded that this was a matter for consideration

by the Governor in Council and "it was understood that the scope of the [Board's] review would be litigated."

[655] Nor did Canada respond meaningfully to Tsleil-Waututh's concerns in the Crown Consultation Report or in the Tsleil-Waututh appendix.

[656] The appendix, after detailing Tsleil-Waututh's concerns responded as follows:

> Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Tsleil-Waututh that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.
>
> (underlining added)

[657] Section 4.2.6 of the Crown Consultation Report referred to the proposed Indigenous Advisory and Monitoring Committee and to recognition of the historical impacts of the existing Trans Mountain pipeline. The nascent nature of the Indigenous Advisory and Monitoring Committee is shown by the listing of possible roles the committee "could" play.

[658] Section 5.2 of the Crown Consultation Report dealt with Canada's assessment of the adequacy of consultation. It contains no response to Tsleil-Waututh's specific concerns that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012*, and that the Board's failure to do this resulted in the further failure to impose conditions on marine shipping. Section 5.2 did

provide Canada's limited response to concerns about the appropriateness of the Board's review process:

> With respect to perceived inadequacies in the [Board] review process, the Crown notes the Government's commitment to modernize the [Board] and to restore public trust in federal environmental assessment processes. The Crown further notes that consultations on these processes have been launched and will include the engagement of Indigenous groups. Overall, however, Government, through its Interim Strategy, indicated that no project proponent would be sent back to the beginning, which mean [*sic*] that project [*sic*] currently undergoing regulatory review would continue to do so within the current framework.

[659] Canada has not pointed to any correspondence in which it meaningfully addressed Tsleil-Waututh's concern that the Board's conditions were not sufficiently robust and that Project-related shipping should not have been excluded from the Project's definition.

[660] Tsleil-Waututh raised valid concerns that touched directly on its asserted title and rights. While Canada strove to understand those concerns accurately, it failed to respond to them in a meaningful way and did not appear to give any consideration to reasonable mitigation or accommodation measures, or to returning the issue of Project-related shipping to the Board for reconsideration.

[661] While Canada moved to implement the Indigenous Advisory and Monitoring Committee and the Oceans Protection Plan, these laudable initiatives were ill-defined due to the fact that each was in its early planning stage. As such, these initiatives could not accommodate or mitigate any concerns at the time the Project was approved, and this record does not allow consideration of whether, as those initiatives evolved, they became something that could meaningfully address real concerns.

b. The experience of Squamish

[662] At the one consultation meeting held in Phase III with Squamish on October 18, 2016, Squamish took the position throughout the meeting that it had insufficient information about the Project's impact on Squamish to make a decision on the Project or to discuss mitigation measures. Reference was made to a lack of information about the fate and behaviour of diluted bitumen if spilled in a marine environment. Squamish also expressed the view that the Governor in Council was equally unable to make a decision on the Project because of research and information gaps about diluted bitumen.

[663] Canada responded:

> The Crown recognized that there are uncertainties and information gaps which factor into the project decision. Most decisions are not made with perfect certainty. For instance, fate and behaviour of diluted bitumen in the marine environment has been identified as an information gap. The Crown is happy to discuss the level of uncertainty but is unsure how the [Governor in Council] will weigh these issues, such as whether they will decide that uncertainties are acceptable for the project to move forward. It should be noted that the [Governor in Council] can send the [Board] recommendation and any terms and conditions back to the [Board] for reconsideration.
>
> (underlining added)

[664] The meeting notes do not reflect that any discussion ensued about the fate and behaviour of diluted bitumen in water. This is not surprising because the Crown consultation team had effectively told Squamish that any discussion would not factor into the Governor in Council's deliberation and ultimate decision.

[665] In a letter dated the day before the Project was approved, Canada and the British Columbia Environmental Assessment Office wrote jointly to Squamish responding to issues raised by Squamish. With respect to diluted bitumen the letter stated:

> Squamish Nation has identified concerns relating to potential spills as well as the fate and behaviour of diluted bitumen. The [Board's] Onshore Pipeline Regulations (OPR) requires a company to develop and implement management and protection programs in order to anticipate, prevent, mitigate and respond to conditions that may adversely affect the safety and security of the general public, the environment, property and, company's personnel and pipelines. A company must follow the legal requirements identified in the *National Energy Board Act* and its associated regulations, other relevant standards, and any conditions contained within the applicable Project certificates or orders.

[666] This generic response is not a meaningful response to Squamish's concern that too little was known about how diluted bitumen would behave if spilled and that this uncertainty made it premature to approve the Project.

[667] The letter went on to review Board conditions, planned government initiatives (such as the Area Response Planning Initiative, Transport Canada's commitment to engage with British Columbia First Nations on issues related to marine safety and the Oceans Protection Program). The letter also referenced research that the Government of Canada was conducting on the behaviour and potential impacts of a diluted bitumen spill in a marine environment. While laudable initiatives, they too did not respond meaningfully to Squamish's concern that more needed to be known before the Project was approved.

[668] There is nothing in Canada's response to show that Squamish's concern about diluted bitumen was given real consideration or weight, and nothing to show any consideration was given to any meaningful and tangible accommodation or mitigation measures.

c. The experience of Coldwater

[669] Coldwater's concerns about the Project's impact on its aquifer were described above at paragraphs 609-610 in the context of Canada's unwillingness to depart from the Board's findings and recommended conditions.

[670] As explained at paragraph 610, when, during the consultation process, Coldwater suggested an alternate route for the pipeline that in its view posed less risk to its drinking water, Canada advised that it is the Board that decides pipeline routing, and the role of the Crown consultation team was to make sure the issue of an alternate route was reflected in the Crown Consultation Report so that it could be considered by the decision-makers.

[671] Later during the May 4, 2016 meeting, in response to a question from Coldwater about a detailed route hearing, Brian Nesbitt, a contractor made available to answer questions about the Board, responded:

> Brian explained that the Governor in Council would approve the approved, detailed route, but that if someone doesn't agree with that route they can intervene, say a detailed route hearing is required, and propose an alternative route. He stated that the burden of proof is essentially flipped and the landowner has the onus to show that the best route is somewhere other than the approved route.
>
> Brian provided an overview of the Detailed Route Approval Process (DRAP). Alternative routes, even outside the approved ROW corridor, can be proposed. In those cases it falls to the intervening party to make the case for why that route is the best one. In Brian's experience, these arguments have been made in past hearings and sometimes they are successful. He provided the example of a pipeline going through a wooded area where inner city kids would go. If an alternative route is identified in the detailed route hearing, the proponent has to apply for a variance. This might require Governor in Council decisions, depending on how the CPCN is worded. Brian emphasized that the burden of establishing a better route lies with the landowner.

(underlining added)

[672] A senior advisor for Indigenous and Northern Affairs Canada then agreed that Coldwater would require a very significant variance, a departure of about 10 kilometres from the approved pipeline right-of-way.

[673] Counsel for Coldwater, Melinda Skeels, then replied:

> Melinda stated that it does not sound reasonable to expect Coldwater to mount the kind of evidence needed to make the case for that alternative. In her view, this issue needs to be addressed before a certificate is issued. It cannot wait until after.
>
> Melinda stated that it did not seem like a detailed route hearing is a realistic option that would assist in addressing Coldwater's routing concerns.
>
> > *Coldwater's recollection is that:* Joseph, Tim and Ross were in general agreement, particularly given the significance of the variance and the fact that the onus would be shifted to Coldwater.
> >
> > *The Crown's position is that:* The Crown officials would neither have agreed with or disagreed with the above statement.

[674] The senior advisor for Indigenous and Northern Affairs Canada responded:

> … reflecting this concern in the Crown Consultation Report is one way to have it before decision makers prior to a decision on the certificate. He said that the routing issue goes to the heart of the CPCN and that the Crown may need to send the Project back to the [Board] to address this.

[675] As explained at paragraph 587 above, Coldwater's request for an analysis of the pipeline route was revisited at the October 7, 2016, consultation meeting. Canada acknowledged that the aquifer had not been fully explored, but expressed confidence in the Board's Condition 39.

[676] In response:

> Coldwater expressed its concern that, given the momentum behind the project following a [Governor in Council] approval, it will take a major adverse finding in the Condition 39 report for the West Alternative to become viable. They argued that their aquifer concerns would not be sufficiently mitigated by moving the pipeline within the 150m approved route corridor as part of a detailed route hearing, because the West Alternative was well outside that recommended corridor. Coldwater asked if an approved route corridor had ever been changed because of a report released following a GIC approval.
>
> The [Board] asserted that detailed route hearings in the past had led to routes being changed for various reasons; however he (Brian Nesbitt) was personally unaware of a route being moved outside an approved corridor. However, it is possible if the situation warrants.
>
> …
>
> The Crown replied that Condition 39 was put in place because the Board felt that evidence did not provide enough certainty about the impact of the Project on Coldwater's aquifer. That knowledge gap will have to be addressed, to the [Board's] satisfaction, prior to construction commencing. The Crown appreciates that the Condition does not provide certainty about the possibility of changing the pipeline corridor; however the presence of the Condition indicates that the [Board] is not satisfied with the information currently available.
>
> (underlining added)

[677] In the Crown Consultation Report Canada acknowledged that a pipeline spill associated with the Project could result in minor to serious impacts to Coldwater's Aboriginal Interests:

> The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. The Crown acknowledges that Coldwater relies primarily on an aquifer crossed by the Project for their drinking water, as well as subsistence foods and natural resources, and are at greater risk for adverse effects from an oil spill. To address the concerns raised by Coldwater during the post-[Board] Crown consultation period, [Environmental Assessment Office] proposes a condition that would require, in addition to [Board] Condition 39, characterization of the aquifer recharge and discharge sources and aquifer confinement, and include an assessment of the vulnerability of the aquifer.

(underlining added, footnote omitted)

[678] Throughout the consultation process, Canada worked to understand Coldwater's concerns, and the British Columbia Environmental Assessment Office imposed a condition requiring a second hydrogeological report for approval by it. However, missing from Canada's consultation was any attempt to explore how Coldwater's concerns could be addressed. Also missing was any demonstrably serious consideration of accommodation—a failure likely flowing from Canada's erroneous position that it was unable to impose additional conditions on the proponent.

[679] Canada acknowledged that the Project would be located within an area of Coldwater's traditional territory where Coldwater was assessed to have a strong *prima facie* claim to Aboriginal title. In circumstances where Coldwater would bear the burden of establishing a better route for the pipeline, and where the advice given to Coldwater by the Board's technical expert was that he was personally unaware of a route being moved out of the approved pipeline corridor, Canada placed its reliance on Condition 39, and so advised Coldwater. However, as Canada acknowledged, this condition carried no certainty about the pipeline route. Nor did the condition provide any certainty as to how the Board would assess the risk to the aquifer.

[680] At the end of the consultation process, and at the time the Project was approved, Canada failed to meaningfully engage with Coldwater, and to discuss and explore options to deal with the real concern about the sole source of drinking water for its Reserve.

d. The experience of Stó:lō

[681] As part of the Stó:lō's effort to engage with the Crown on the Project, Stó:lō prepared a detailed technical submission referred to as the "Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project", also referred to as "ICA". A copy of the ICA was filed with the Board.

[682] The ICA was based on surveys, interviews, meetings and workshops held with over 200 community members from approximately 11 Stó:lō bands. The ICA concluded that the Project posed a significant risk to the unique Indigenous way of life of the Stó:lō, threatening the cultural integrity and survival of core relationships at the heart of the Stó:lō worldview, identity, health and well-being. The ICA also contained 89 recommendations which, if implemented by Trans Mountain or the Crown, were believed by Stó:lō to mitigate the Project's adverse effects on Stó:lō.

[683] To illustrate the nature of the recommendations, section 17.2 of the ICA deals with recommendations to mitigate the Project's impact on fisheries. Section 17.2.1 deals with Management and Planning in the context of fisheries mitigation. The recommended Management and Planning mitigation measures are:

> 17.2.1 Management and Planning
>
> 5. Stó:lō Fishing representatives will participate in the development and review of Fisheries Management Plans and water course crossing EPPs before construction and mitigation plans are finalized.
>
> 6. Stó:lō representatives will provide input on proposed locations for Hydrostatic test water withdrawal and release.

> 7. [The proponent] will consult with Stó:lō representatives to develop the Emergency Response Plans in the study area.
>
> 8. Stó:lō representatives will consult with community members to determine appropriate restoration plans for water crossings including bank armouring, seed mixes or replanting requirements.
>
> 9. Stó:lō fishing representatives must be notified if isolation methods will not work and [the proponent] is considering another crossing method.
>
> 10. Stó:lō representatives must be notified as soon as a spill or leak, of any size, is detected.
>
> 11. During water quality monitoring program, anything that fails to meet or exceed established guidelines will be reported to a Stó:lō Fisheries Representative within 12 hours.

[684] These measures are specific, brief and generally measured and reasonable. If implemented they would provide more detail to the Board's generic conditions on consultation and require timely notification to the Stó:lō of events that may adversely impact their interests.

[685] During the Board's Information Request process, the Stó:lō pressed Trans Mountain to respond to their 89 recommendations but Trans Mountain did not provide a substantive response. Instead, Trans Mountain provided a general commitment to work with Stó:lō to develop a mutually-acceptable plan for implementation.

[686] The Board did not adopt any of the specific 89 recommendations made by the Stó:lō in its terms and conditions.

[687] At a meeting held with the Crown consultation team on April 13, 2016, before the release of the Board's report, the Stó:lō provided an overview of the development of the ICA and

expressed many concerns, including their dissatisfaction with their engagement with Trans Mountain.

[688] The Stó:lō representative stated that, among other things, Trans Mountain was directed by the Board to include Indigenous knowledge in Project planning, but did not. By way of example, the Stó:lō explained that the Fraser River is a tidal (at least up to Harrison River), meandering river, with a wandering gravel bed that is hydrologically connected to many wetlands and waterways crossed by the Project. A map of historical waterways was provided in the ICA, along with a table listing local and traditional knowledge of waterways crossed by the Project. None of this information was considered in Trans Mountain's technical reports. In Stó:lō's view, Trans Mountain's assumptions and maps about the Fraser River were wrong and did not include their traditional knowledge. A year after the ICA was provided to Trans Mountain the Stó:lō met with Trans Mountain's fisheries manager who had never seen the ICA or any of the technical information contained in it.

[689] Additionally, Stó:lō provided details about deficiencies identified in Trans Mountain's evidence filed with the Board about Stó:lō title, rights, interests and Project impacts. For example, Trans Mountain's evidence was to the effect that the Stó:lō had no traditional plant harvesting areas within the Project area. However, the ICA identified and mapped several plant gathering sites within the proposed pipeline corridor. Another example of a deficiency was Trans Mountain's evidence that there were no habitation sites in the Project area; however, the ICA mapped three habitation sites within the proposed pipeline corridor and two habitation sites located within 50 metres of the pipeline corridor.

[690] At a later consultation meeting held September 23, 2016, the Stó:lō reiterated that a key concern was their view that the Board's process had failed to hold the proponent accountable for integrating Stó:lō's traditional use information into the assessment of the Project. The draft Crown Consultation Report overlooked evidence filed by Stó:lō about their traditional land use. Instead, the report repeated oversights in Trans Mountain's evidence presented to the Board. For example, Stó:lō noted the Crown was wrong to state that "[n]o plant gathering sites were identified within the proposed pipeline corridor". The Stó:lō had explained this at the April 13, 2016 meeting.

[691] The Stó:lō Collective was not confident that Trans Mountain would follow through on commitments to include local Indigenous people or traditional knowledge in the development of the Project unless the Board's terms and conditions required Trans Mountain to regularly engage Stó:lō communities in a meaningful way.

[692] Canada's representatives confirmed that the Stó:lō Collective was looking for stronger conditions, more community-specific commitments and more accountability placed on Trans Mountain so that conditions proposed by Stó:lō became regulatory requirements.

[693] The Crown consultation team met with Stó:lō once after the release of the Board's report, on September 23, 2016.

[694] During this meeting the "Collective noted with great concern that the [Board] report came out May 19th, that the [Governor in Council's] decision is due Dec. 19th, and that the

Crown was just meeting now (Sept. 23) to consult on the [Board] report with so many potential gaps left to discuss and seek to resolve with tight timelines to do so".

[695] At this meeting the Crown consultation team presented slides summarizing the Board's conclusions. The Stó:lō noted their disagreement with the following findings of the Board:

> - "Ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be ***temporarily impacted***" by construction and routine maintenance activities, and that some opportunities for certain activities such as harvesting or accessing sites or areas of [Traditional Land and Resource Use] will be ***temporary interrupted***.";
>
> - "Project's contribution to potential broader cultural impacts related to access and use of natural resources is ***not significant***."; and,
>
> - "Impacts would be ***short term, limited to brief periods*** during construction and routine maintenance, ***largely confined to the Project footprint*** for the pipeline… Effects would be ***reversible in the short to long term, and low in magnitude***."
>
> (emphasis in original)

[696] The Stó:lō pointed to the potential permanent impact of the Project on sites of critical cultural importance to Stó:lō and the Project's impacts related to access and use of natural resources.

[697] With respect to sites of critical cultural importance, the Stó:lō explained that none of the information contained in their ICA influenced the design of the Project or was included in the Project alignment sheets. The failure to include information about cultural sites on the Project alignment sheets meant that various geographic features known to Stó:lō and the proponent were not being factored into Project effects, or avoidance or mitigation efforts. In response to questions, Stó:lō confirmed that even though Trans Mountain was well aware of Stó:lō sites of

importance, as detailed in the ICA, Trans Mountain had not recognized them on the right-of-way corridor maps. Stó:lō believed this afforded the sites no protection if the Project was approved.

[698] With respect to Lightning Rock, a culturally significant spiritual and burial site, the Stó:lō noted that Trans Mountain planned to put a staging area in proximity to the site which, in the view of the Stó:lō, would obliterate the site. The Board had imposed Condition 77 relating to Lightning Rock. This condition required Trans Mountain to file a report outlining the conclusions of a site assessment for Lightning Rock, including reporting on consultation with the Stó:lō Collective. However, Stó:lō Cultural Heritage experts had not been able to meet with Trans Mountain to participate in Lightning Rock management plans since September 2015. This was a source of great frustration.

[699] The Stó:lō suggested that the Board's conditions should specifically list the Indigenous groups Trans Mountain was required to deal with instead of the generic "potentially affected Aboriginal groups" referenced in the Board's current conditions.

[700] The Stó:lō also requested that they be involved in selecting the Aboriginal monitors working within their territory as contemplated by the Board's conditions. For example, Condition 98 required Trans Mountain to file a plan describing participation by "Aboriginal groups" in monitoring construction of the Project. Stó:lō wanted to ensure these monitors were sufficiently knowledgeable about issues of importance to the Stó:lō.

[701] The September 23, 2016, meeting notes do not indicate any response or meaningful dialogue on the part of the Crown consultation team in response to any of Stó:lō's concerns and suggestions.

[702] Interestingly, at the November 16, 2016, consultation meeting with Upper Nicola, the last of the consultation meetings and the only consultation meeting held after Canada provided the second draft of the Crown Consultation Report setting out Canada's assessment of the Project's impacts, the Crown consultation lead explained:

> … "potentially affected Aboriginal groups" has been noted by many Aboriginal groups as too vague in the recommended conditions, and this phrase is repeated throughout the 157 conditions. Makes reference to how the Crown's consultation and accommodation report does address specific Aboriginal groups. Discussed another point on the [Board] condition for "Aboriginal monitors"—where communities would not [*sic*] want locally knowledgeable Aboriginal people to fulfil this role and not someone from farther afield.

[703] Notwithstanding apparently widespread concern about the Board's generic use of the phrase "potentially affected Aboriginal groups" and the need for locally-selected Indigenous monitors, and despite Canada's ability to add new conditions that would impose the desired specificity, Canada failed to meaningfully consider such accommodation.

[704] Canada and the British Columbia Environmental Assessment Office purported to respond to two of Stó:lō's concerns in their letter of November 28, 2016, to the Stó:lō: the concerns about Traditional Ecological Knowledge and sites of cultural importance.

[705] The Crown "acknowledges the Stó:lō Collective's view that the [Board] and the proponent overlooked traditional knowledge within the development of the [Board] conditions

and Project design." The Crown discusses these issues in Sections III and IV of the Stó:lō Collective appendix (pages 13, 29 and 30 respectively).

[706] I deal with the Stó:lō appendix beginning at paragraph 712 below. As explained below, the Stó:lō appendix does not deal meaningfully with the concerns about Traditional Ecological Knowledge and sites of cultural importance.

[707] The Crown made two more points independent of the Stó:lō Collective appendix. First, it expressed its understanding that the Stó:lō could trigger a detailed route hearing. Second, it encouraged the Stó:lō Collective to continue discussions with the proponent.

[708] In connection with the detailed route hearing, the Crown advised that "[w]ithin the scope of such a hearing exists the potential for the right-of-way to move locations." There are three points to make about this response. First, as explained above at paragraphs 380 to 384, at a detailed route hearing the right of way may only move within the approved pipeline corridor, otherwise an application must be made to vary the pipeline corridor; second, the onus at a detailed route hearing is on the person requesting the alteration; and, third, Canada failed to consider its ability to impose additional conditions, likely because it was operating under the erroneous view it could not. The ability to trigger a detailed route hearing provided no certainty about how potential adverse effects to areas of significant importance to the Stó:lō would be dealt with. This was not a meaningful response on Canada's part.

[709] As to the Crown's suggestion that the Stó:lō Collective continue its discussions with the proponent, no explanation is given as to why this was believed to be an appropriate response to the concerns of the Stó:lō in light of the information they had provided as to the proponent's unwillingness to deal directly with them on a timely basis, or in some cases, at all.

[710] The November 28, 2016, letter also referenced the four accommodation measures the Stó:lō requested in their two-page submission to the Governor in Council. The first asked for a condition to "outline and identify specifics regarding Trans Mountain's collaboration with and resourcing of the Stó:lō Collective to update construction alignment sheets and EPPs to reflect information provided in the Integrated Cultural Assessment" (March 2014). The Stó:lō were told "The recommendations included in the Stó:lō Collective's two-page submission of November 17, 2016 will be provided directly to federal and provincial decision makers."

[711] Leaving aside the point that the letter was sent the day before the Project was approved, none of this is responsive, meaningful, two-way dialogue that the Supreme Court requires as part of the fulfillment of the duty to consult.

[712] Nor is any meaningful response provided in the Stó:lō appendix to the Crown Consultation Report. This is illustrated by the following two examples. First, while the appendix recites that the Stó:lō Collective recommended 89 actions that would assist Trans Mountain to avoid or mitigate adverse effects on their Aboriginal Interests there is no discussion or indication that Canada seriously considered implementing any of the 89 recommended actions, and no explanation as to why Canada did not consider implementing any Stó:lō specific

recommendation as an accommodation or mitigation measure. Second, while the appendix acknowledges that the Stó:lō provided examples of Traditional Ecological Knowledge which they felt the proponent and the Board ignored in the Project design, environmental assessment and mitigation planning, no analysis or response to the concern is given.

[713] In the portion of the appendix that deals with Canada's assessment of the Project's impacts on the Stó:lō, the Crown relies on the conclusions of the Board to find that the impacts of the Project would be up to minor-to-moderate. Thus, for instance, the appendix repeats the Board's conclusion that if the Project is approved, the Board conditions would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping and gathering. In an attempt to deal with the specific concerns raised by the Stó:lō about the adequacy of the Board's report and its conditions, the appendix recites that:

> … the proponent would implement several mitigation measures to reduce potential effects to species important for the Stó:lō Collective's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignment Sheets and environmental tables within the immediate vicinity of the [right-of-way] will be clearly marked before the start of clearing.

[714] While the second draft of the Crown Consultation Report was revised to reference the plant gathering sites identified by Stó:lō in the ICA and in the April and October consultation meetings, Canada continued to rely upon the Board's findings without explaining, for example, how the Board's finding that "Trans Mountain adequately considered all the information provided on the record by Aboriginal groups regarding their traditional uses and activities." (report, page 278) was reliable in the face of the information contained in the ICA.

[715] Nor does Canada explain the source of its confidence in the proponent's commitments in light of the concerns expressed by the Stó:lō that Trans Mountain had failed to follow through on its existing commitments and that without further conditions Stó:lō feared the proponent would not follow through with its commitments to the Board.

[716] With respect to the Stó:lō's concerns about a Project staging area at Lightning Rock, the appendix noted that Lightning Rock was protected by Board Condition 77 which required the proponent to file with the Board an archaeological and cultural heritage field investigation undertaken to assess the potential impacts of Project construction and operations on the Lightning Rock site. The appendix goes on to note that:

> However, given that this is a sacred site with burial mounds, Stó:lō Collective have noted that any Project routing through this area is inappropriate given the need to preserve the cultural integrity of the site and the surrounding area. For the Stó:lō Collective, the site surrounding Lightning Rock should be a "no go" area for the Project.

[717] However, Stó:lō's position that Lightning Rock should be a "no go" area is left unresolved and uncommented upon by Canada.

[718] Another Stó:lō concern detailed by Canada in the appendix, but unaddressed, is the concern of the Stó:lō Collective that the locations of various other culturally important sites do not appear on Trans Mountain's detailed alignment sheets. Examples of such sites include bathing sites within the 150 metre pipeline right-of-way alignment at Bridal Veil Falls, and an ancient pit house located within the pipeline right-of-way. None of these sites are the subject of any Board condition.

[719] The appendix recites Canada's conclusion on these concerns of the Stó:lō as follows:

> With regards to specific risk concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for the Stó:lō Collective's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during [right-of-way] finalization, narrowing the [right-of-way] in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

[720] This is not meaningful, two-way dialogue in response to Stó:lō's real and valid concerns about matters of vital importance to the Stó:lō.

[721] Canada adopts a similar approach to its assessment of the Project's impact on freshwater fishing and marine fishing and harvesting at pages 24 to 27 of the Stó:lō appendix.

[722] The section begins by acknowledging the Stó:lō's deeply established connection to fishing and marine harvesting "which are core to Stó:lō cultural activities and tradition, subsistence and economic purposes."

[723] After summarizing each concern raised by the Stó:lō, Canada responds by adopting the Board's conclusions that the Project's impact will be low-to-moderate and that Board conditions will either directly or indirectly avoid or reduce potential environmental effects on fishing activities.

[724] In the course of this review Canada acknowledges the Board's finding that "Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality." Appendix 12 to the Board report defines a moderate impact to be one that, among other things, noticeably affects the resource involved.

[725] Canada also acknowledges that during the operational life of the Project fishing and harvesting activities directly affected by the construction and operation of the Westridge Marine Terminal would not occur within the expanded water lease boundaries.

[726] Further, impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur on a daily basis. Project-related marine vessels also would cause temporary disruption to the Stó:lō Collective's marine fishing and harvesting activities. These disruptions are said "likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue their movements shortly after the tanker passes." This too would occur on a daily basis if the Westridge Marine Terminal were to serve 34 Aframax tankers per month.

[727] Missing however from Canada's consultation analysis is any mention of the Stó:lō's constitutionally protected right to fish, and how that constitutionally protected right was taken into account by Canada. Also missing is any explanation as to how the consultation process affected the Crown's ultimate assessment of the impact of the Project on the Stó:lō. Meaningful

consultation required something more than simply repeating the Board's findings and conditions without grappling with the specific concerns raised by the Stó:lō about those same findings.

e. The experience of Upper Nicola

[728] Throughout the consultation process, Upper Nicola raised the issue of the Project's impact on Upper Nicola's asserted title and rights. The issue was raised at the consultation meetings of March 31, 2016, and May 3, 2016, but no meaningful dialogue took place. Canada's representatives advised at the March meeting that until the Board released its report Canada did not know how the Project could impact the environment and Upper Nicola's interests and so could not "yet extrapolate to how those changes could impact [Upper Nicola's] Aboriginal rights and title interests."

[729] The issue was raised again, after the release of the Board's report, at the consultation meeting of September 22, 2016. Upper Nicola expressed its disagreement with Canada's assertion in the first draft of the Crown Consultation Report that potential impacts on its title claim for the pipeline right-of-way included temporary impacts related to construction, and longer-term impacts associated with Project operation. In Upper Nicola's view, construction did not have a temporary impact on its claim to title. Upper Nicola also stated that Canada had examined the Project's impact on title without considering impacts on governance and management, and concerns related to title, such as land and water issues. The meeting notes do not record any response to these concerns.

[730] Nor did Canada respond meaningfully to Upper Nicola's position that the Project would render 16,000 hectares of land unusable or inaccessible for traditional activities. Upper Nicola viewed this to constitute a significant impact that required accommodation of their rights to stewardship, use and governance of the land and water. Canada's response was to acknowledge a letter sent to the Prime Minister in which numerous Indigenous groups had proposed a mitigation measure to ensure they would have a more active role in monitoring and stewardship of the Project. Canada stated that it saw merit in the proposal and that a response to the letter would be forthcoming.

[731] On November 18, 2016, Upper Nicola wrote to the Crown consultation lead to highlight its key, ongoing concerns with the Project and the consultation process. With respect to title, Upper Nicola wrote:

> There were areas which the Crown has determined that we have a strong prima facie claim to Aboriginal title and rights. The Crown must therefore acknowledge the significant impacts and infringements of the Project to Upper Nicola/Syilx Title and Rights, including the incidents of Aboriginal title which include: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land and adequately accommodate these impacts, concerns and infringements. This has not yet been done.
>
> (underlining added)

[732] Canada and the British Columbia Environmental Assessment Office wrote to Upper Nicola on November 28, 2016, the day before the Project was approved, to respond to the issues raised by Upper Nicola. The only reference to Upper Nicola's asserted title is this brief reference:

> *Impacts and Mitigation:* In response to comments received, the Crown has reviewed its analysis and discussion in the Consultation and Accommodation Report on the direct and indirect impacts of the Project on Syilx (Okanagan) Nation's rights and other interests. In addition, Upper Nicola identified that the study titled "Upper Nicola Band Traditional Use and Occupancy Study for the Kingsvale Transmission Line in Support of the Trans Mountain Expansion Project" (Kingsvale TUOS) had not been specifically referenced in the Syilx (Okanagan) Nation appendix. Upper Nicola resent the Kingsvale TUOS to the Crown on Friday, November 18 and in response to this information, the Crown reviewed the Kingsvale TUOS, summarized the study's findings in Syilx (Okanagan) Nation's appendix, and considered how this information changes the expected impacts of the Project on Syilx (Okanagan) Nation's Aboriginal rights and title. <u>As a result, conclusions were revised upward for Project impacts on Syilx (Okanagan) Nation's freshwater fishing activities, other traditional and cultural activities, as well as potential impacts on Aboriginal title</u>.
>
> (underlining added)

[733] No response was made to the request to acknowledge the Project's impacts and infringement of Upper Nicola's asserted title and rights.

[734] In the Upper Nicola appendix, Canada acknowledged that the Project would be located within an area of Syilx Nation's asserted traditional territory where Syilx Nation was assessed to have a strong *prima facie* claim to Aboriginal title and rights. Canada then asserted the Project to have "minor-to-moderate impact on Syilx Nation's asserted Aboriginal title to the proposed Project area." Canada did not address Upper Nicola's governance or title rights in any detail. Canada did refer to section 4.3.5 of the Crown Consultation Report but this section simply reiterates the Board's findings and conditions and the requirement that the proponent continue consultation "with potentially affected Aboriginal groups".

[735] Missing is any explanation as to why moderate impacts to title required no accommodation beyond the environmental mitigation measures recommended by the Board—mitigation measures that were generic and not specific to Upper Nicola.

[736] Throughout Phase III, Upper Nicola had proposed numerous potential mitigation measures and had requested accommodation related to stewardship, use and governance of the water. No response was given as to why Canada rejected this request. This was not meaningful, two-way dialogue or reasonable consultation.

f. The experience of SSN

[737] Canada met with SSN twice during Phase III. At the first meeting, on August 3, 2016, SSN expressed the desire to have consultation go beyond the environmental assessment process which they felt was insufficient to tackle the issues that affected their territory. SSN sought to move forward on a nation to nation basis and wished to formalize a nation to nation consultation protocol using the Project as a starting point for further consultation.

[738] In response, Canada and representatives of British Columbia asked that the SSN be prepared to review a draft memorandum of understanding for consultation about the Project (affidavit of Jeanette Jules, paragraph 70).

[739] The meeting notes reflect that at the first meeting on August 3, 2016, SSN also raised as accommodation or mitigation measures that: the Project conditions be more specific with respect to safety and emergency preparedness response, warning notifications to communities and

opportunities for training; and, that there be provision for both a spillage fee and a revenue tax imposed on the proponent for the benefit of SSN. The meeting notes do not reflect any dialogue or response from Canada to these proposals.

[740] On September 9, 2016, the Crown consultation lead sent a two-page draft memorandum of understanding to the SSN (two pages not including the signature page).

[741] At the second and last meeting on October 6, 2016, the SSN advised that they desired the proponent to submit to a review of the Project by the SSN, but that the proponent was unwilling to undergo another review. The SSN also repeated their desire for the federal and provincial Crowns to allow SSN to impose a resource development tax on proponents whose projects are located in the SSN's traditional territory. In response, the Crown raised the difficulty in implementing the tax and having the Project undergo assessment by the SSN before the mandated decision deadline of December 19, 2016.

[742] At this meeting Canada sought comments on the draft memorandum of understanding. Jeanette Jules, a counsellor with the Kamloops Indian Band swore in an affidavit filed in support of SSN's application for judicial review that:

> At [the October 6, 2016] meeting, the majority of the time was spent on discussing the content of the [memorandum of understanding], that is, what would engagement with the Crowns on the Project look like. We did not spend any time discussing the routing of the pipeline Project at Pipsell or SSN's concerns about the taking up of new land in the Lac du Bois Grasslands Protected area, although I did voice concerns about those issues again at that meeting. At the end of the meeting, the Crowns committed to revising the [memorandum of understanding] and to setting up another meeting to discuss it with us.
>
> (underlining added)

[743] The meeting notes state that toward the end of the meeting SSN expressed the desire to have a terrestrial spill response centre stationed in their reserve. SSN contemplated that funding for the centre should be raised through a per-barrel spillage fee charged on product flowing through the pipeline.

[744] Thereafter, no memorandum of understanding was finalized and no further meetings took place between Canada and the SSN. Ms. Jules swears that:

> I fully expected that between our last meeting with Canada and the Province of BC and the [Governor in Council] decision to approve the Project, we would come to an agreement on the terms of a [memorandum of understanding] and have had meaningful engagement with the Crowns about pipeline routing and SSN's other concerns raised in its final argument.

[745] Ms. Jules was not cross-examined on her affidavit.

[746] In the November 28, 2016, letter sent to the SSN by Canada and the British Columbia Environmental Assessment Office they wrote:

> We also would like to take this opportunity to provide you with additional information or responses to concerns that Stk'emlúps te Secwèpemc Nation has raised with the Crown.
>
> At the October 6, 2016 meeting with SSN, in addition to reiterating SSN's plan on undertaking its own assessment of the project, SSN outlined a proposal for an SSN resource development tax that they charge directly to proponents whose projects are in their traditional territory, and that SSN wants the federal and provincial Crown's to make the jurisdictional room necessary for the tax to be implemented. These proposals have been added to the SSN specific appendix for consideration by decision makers.

[747] This is not a meaningful response to the proposals made by the SSN. The only response made to the resource development tax during the consultation meetings was the difficulty this

would pose to meeting Canada's decision deadline (notwithstanding that SSN had sought consultation on a broader basis than the Project—the Project was contemplated by SSN to be a starting point).

[748] The SSN appendix to the Crown Consultation Report faithfully records SSN's concerns about the review process, noting, in part, that:

> SSN stated that the [Board] hearing process is an inappropriate forum for assessing impacts to their Aboriginal rights. SSN also expressed concern about the [Board] process' legislated timelines and the way these timelines were unilaterally imposed on them. SSN considers this timeline extremely restrictive and does not believe it affords SSN sufficient time to review the application and participate meaningfully in the review process. SSN has stated that their ability to participate in the process is further hampered by a lack of capacity funding from either the [Board] or the Crown. SSN has expressed a view that related regulatory (i.e. permitting) processes are not well-coordinated, which they believe results in an incomplete sharing of potential effects to SSN Interests. They refer to the perceived disconnected process between the proposed Project and proposed Ajax Mine application review. SSN are not satisfied with the current crown engagement model and the lack of addressing SSN's needs for a nation-to-nation dialogue about their concerns and interests, and have proposed that the Crown develop a [memorandum of understanding] to address these issues and provide a framework for the dialogue moving forward.
>
> …
>
> SSN have requested Nation-to-Nation engagement related to the broader issue of land management and decision making within their territory. SSN requested a consultation protocol agreement be developed, starting with a [memorandum of understanding] for Nation-to-Nation consultation, which would take the form of a trilateral agreement between SSN, BC and Canada. SSN recommended a framework of sustainable Crown funding to participate in the [memorandum of understanding] process, leading to a sustainable funding model to support ongoing land use management within SSN's territory.
>
> At the October 6, 2016 meeting, SSN outlined a proposal for an SSN resource development tax that they charge directly to proponents whose projects are in their traditional territory. SSN wants the federal and provincial Crown's [*sic*] to make the jurisdictional room necessary for the tax to be implemented.
>
> (underlining added)

[749] Missing from the appendix is any advice to the Governor in Council that Canada committed to providing a draft memorandum of understanding to SSN and any advice about the status of the memorandum of understanding. Also missing is any indication of what, if any, impact this had on Canada's view of the consultation process.

[750] In the SSN appendix Canada acknowledged that "the Project would be located within an area of Tk'emlúps te Secwe'pemc and Skeetchestn's traditional territory assessed as having a strong *prima facie* claim to Aboriginal title". Canada had also assessed its duty to consult SSN as being at the deeper end of the consultation spectrum.

[751] Notwithstanding, Canada did not provide any meaningful response to SSN's proposed mitigation measures, and conducted no meaningful, two-way dialogue about SSN's concerns documented on pages 3 to 7 of the SSN appendix.

[752] This was not reasonable consultation as required by the jurisprudence of the Supreme Court of Canada.

(vii) Conclusion on Canada's execution of the consultation process

[753] As explained above at paragraphs 513 to 549, the consultation framework selected by Canada was reasonable and sufficient. If Canada properly executed it, Canada would have discharged its duty to consult.

[754] However, based on the totality of the evidence I conclude that Canada failed in Phase III to engage, dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodation of these concerns.

[755] Certainly Canada's consultation team worked in good faith and assiduously to understand and document the concerns of the Indigenous applicants and to report those concerns to the Governor in Council in the Crown Consultation Report. That part of the Phase III consultation was reasonable.

[756] However, as the above review shows, missing was a genuine and sustained effort to pursue meaningful, two-way dialogue. Very few responses were provided by Canada's representatives in the consultation meetings. When a response was provided it was brief, and did not further two-way dialogue. Too often the response was that the consultation team would put the concerns before the decision-makers for consideration.

[757] Where responses were provided in writing, either in letters or in the Crown Consultation Report or its appendices, the responses were generic. There was no indication that serious consideration was given to whether any of the Board's findings were unreasonable or wrong. Nor was there any indication that serious consideration was given to amending or supplementing the Board's recommended conditions.

[758] Canada acknowledged it owed a duty of deep consultation to each Indigenous applicant. More was required of Canada.

[759] The inadequacies of the consultation process flowed from the limited execution of the mandate of the Crown consultation team. Missing was someone representing Canada who could engage interactively. Someone with the confidence of Cabinet who could discuss, at least in principle, required accommodation measures, possible flaws in the Board's process, findings and recommendations and how those flaws could be addressed.

[760] The inadequacies of the consultation process also flowed from Canada's unwillingness to meaningfully discuss and consider possible flaws in the Board's findings and recommendations and its erroneous view that it could not supplement or impose additional conditions on Trans Mountain.

[761] These three systemic limitations were then exacerbated by Canada's late disclosure of its assessment that the Project did not have a high level of impact on the exercise of the applicants' "Aboriginal Interests" and its related failure to provide more time to respond so that all Indigenous groups could contribute detailed comments on the second draft of the Crown Consultation Report.

[762] Canada is not to be held to a standard of perfection in fulfilling its duty to consult. However, the flaws discussed above thwarted meaningful, two-way dialogue. The result was an unreasonable consultation process that fell well short of the required mark.

[763] The Project is large and presented genuine challenges to Canada's effort to fulfil its duty to consult. The evaluation of Canada's fulfillment of its duty must take this into account.

However, in largest part the concerns of the Indigenous applicants were quite specific and focussed and thus quite easy to discuss, grapple with and respond to. Had Canada's representatives met with each of the Indigenous applicants immediately following the release of the Board's report, and had Canada's representatives executed a mandate to engage and dialogue meaningfully, Canada could well have fulfilled the duty to consult by the mandated December 19, 2016 deadline.

E. Remedy

[764] In these reasons I have concluded that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision whether to approve the Project. The Board unjustifiably excluded Project-related shipping from the Project's definition.

[765] This exclusion of Project-related shipping from the Project's definition permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related shipping. Having concluded that section 79 did not apply, the Board was then able to conclude that, notwithstanding its conclusion that the operation of Project-related vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project was not likely to cause significant adverse environmental effects.

[766] This finding—that the Project was not likely to cause significant adverse environmental effects—was central to its report. The unjustified failure to assess the effects of Project-related shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed

conclusion about the environmental effects of the Project was critical to the decision of the Governor in Council. With such a flawed report before it, the Governor in Council could not legally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

[767] I have also concluded that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants.

[768] It follows that Order in Council P.C. 2016-1069 should be quashed, rendering the certificate of public convenience and necessity approving the construction and operation of the Project a nullity. The issue of Project approval should be remitted to the Governor in Council for prompt redetermination.

[769] In that redetermination the Governor in Council must refer the Board's recommendations and its terms and conditions back to the Board, or its successor, for reconsideration. Pursuant to section 53 of the *National Energy Board Act*, the Governor in Council may direct the Board to conduct that reconsideration taking into account any factor specified by the Governor in Council. As well, the Governor in Council may specify a time limit within which the Board shall complete its reconsideration.

[770] Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the *Species at Risk Act* to Project-related shipping, the Board's environmental assessment of the Project in the light of the

Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter the Governor in Council should consider appropriate.

[771] Further, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval.

[772] As mentioned above, the concerns of the Indigenous applicants, communicated to Canada, are specific and focussed. This means that the dialogue Canada must engage in can also be specific and focussed. This may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful. The end result may be a short delay, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples.

F. Proposed Disposition

[773] For these reasons I would dismiss the applications for judicial review of the Board's report in Court Dockets A-232-16, A-225-16, A-224-16, A-217-16, A-223-16 and A-218-16.

[774] I would allow the applications for judicial review of the Order in Council P.C. 2016-1069 in Court Dockets A-78-17, A-75-17, A-77-17, A-76-17, A-86-17, A-74-17, A-68-17 and A-84-17, quash the Order in Council and remit the matter to the Governor in Council for prompt redetermination.

[775] The issue of costs is reserved. If the parties are unable to agree on costs they may make submissions in writing, such submissions not to exceed five pages.

[776] Counsel are thanked for the assistance they have provided to the Court.

"Eleanor R. Dawson"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Judith Woods J.A."

APPENDIX

National Energy Board Act, R.S.C. 1985, c. N-7

52 (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out	52 (1) S'il estime qu'une demande de certificat visant un pipeline est complète, l'Office établit et présente au ministre un rapport, qu'il doit rendre public, où figurent :
(*a*) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and	*a*) sa recommandation motivée à savoir si le certificat devrait être délivré ou non relativement à tout ou partie du pipeline, compte tenu du caractère d'utilité publique, tant pour le présent que pour le futur, du pipeline;
(*b*) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.	*b*) quelle que soit sa recommandation, toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de le délivrer, notamment des conditions quant à la prise d'effet de tout ou partie du certificat.
(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:	(2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit :
(*a*) the availability of oil, gas or any other commodity to the pipeline;	*a*) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;
(*b*) the existence of markets, actual or potential;	*b*) l'existence de marchés, réels ou potentiels;
(*c*) the economic feasibility of the	*c*) la faisabilité économique du

pipeline;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(*e*) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

(3) If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

(4) The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.

(5) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.

(6) The Board shall make public the

pipeline;

d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;

e) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.

(3) Si la demande vise un projet désigné au sens de l'article 2 de la *Loi canadienne sur l'évaluation environnementale (2012)*, le rapport contient aussi l'évaluation environnementale de ce projet établi par l'Office sous le régime de cette loi.

(4) Le rapport est présenté dans le délai fixé par le président. Ce délai ne peut excéder quinze mois suivant la date où le demandeur a, de l'avis de l'Office, complété la demande. Le délai est rendu public par l'Office.

(5) Si l'Office exige du demandeur, relativement au pipeline, la communication de renseignements ou la réalisation d'études et déclare publiquement, avec l'approbation du président, que le présent paragraphe s'applique, la période prise par le demandeur pour remplir l'exigence n'est pas comprise dans le calcul du délai.

(6) L'Office rend publiques, sans

dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.

délai, la date où commence la période visée au paragraphe (5) et celle où elle se termine.

(7) The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time.

(7) Le ministre peut, par arrêté, proroger le délai pour un maximum de trois mois. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, accorder une ou plusieurs prorogations supplémentaires.

(8) To ensure that the report is prepared and submitted in a timely manner, the Minister may, by order, issue a directive to the Chairperson that requires the Chairperson to

(8) Afin que le rapport soit établi et présenté en temps opportun, le ministre peut, par arrêté, donner au président instruction :

(*a*) specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;

a) de fixer, en vertu du paragraphe (4), un délai identique à celui indiqué dans l'arrêté;

(*b*) issue a directive under subsection 6(2.1), or take any measure under subsection 6(2.2), that is set out in the order; or

b) de donner, en vertu du paragraphe 6(2.1), les instructions qui figurent dans l'arrêté, ou de prendre, en vertu du paragraphe 6(2.2), les mesures qui figurent dans l'arrêté;

(*c*) issue a directive under subsection 6(2.1) that addresses a matter set out in the order.

c) de donner, en vertu du paragraphe 6(2.1), des instructions portant sur une question précisée dans l'arrêté.

(9) Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.

(9) Les décrets et arrêtés pris en vertu du paragraphe (7) lient l'Office et les arrêtés pris en vertu du paragraphe (8) lient le président.

(10) A copy of each order made under subsection (8) must be published in the *Canada Gazette* within 15 days after it is made.

(10) Une copie de l'arrêté pris en vertu du paragraphe (8) est publiée dans la *Gazette du Canada* dans les quinze jours de sa prise.

(11) Subject to sections 53 and 54, the Board's report is final and conclusive.

(11) Sous réserve des articles 53 et 54, le rapport de l'Office est définitif et sans appel.

53 (1) After the Board has submitted its report under section 52, the

53 (1) Une fois que l'Office a présenté son rapport en vertu de l'article 52, le

Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.

(2) The order may direct the Board to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the Board shall complete its reconsideration.

…

54 (1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order,

(*a*) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or

(*b*) direct the Board to dismiss the application for a certificate.

(2) The order must set out the reasons for making the order.

(3) The order must be made within three months after the Board's report under section 52 is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, by order, extend that time limit by any additional period or periods of time. If the Governor in Council makes an order under subsection 53(1) or (9), the period that is taken by the Board to complete its reconsideration and to report to the Minister is not to be included in the calculation of the time limit.

(4) Every order made under subsection

gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen.

(2) Le décret peut préciser tout facteur dont l'Office doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer.

…

54 (1) Une fois que l'Office a présenté son rapport en application des articles 52 ou 53, le gouverneur en conseil peut, par décret :

a) donner à l'Office instruction de délivrer un certificat à l'égard du pipeline ou d'une partie de celui-ci et de l'assortir des conditions figurant dans le rapport;

b) donner à l'Office instruction de rejeter la demande de certificat.

(2) Le gouverneur en conseil énonce, dans le décret, les motifs de celui-ci.

(3) Le décret est pris dans les trois mois suivant la remise, au titre de l'article 52, du rapport au ministre. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, proroger ce délai une ou plusieurs fois. Dans le cas où le gouverneur en conseil prend un décret en vertu des paragraphes 53(1) ou (9), la période que prend l'Office pour effectuer le réexamen et faire rapport n'est pas comprise dans le calcul du délai imposé pour prendre le décret.

(4) Les décrets pris en vertu des

(1) or (3) is final and conclusive and is binding on the Board.	paragraphes (1) ou (3) sont définitifs et sans appel et lient l'Office.
(5) The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.	(5) L'Office est tenu de se conformer au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.
(6) A copy of the order made under subsection (1) must be published in the Canada Gazette within 15 days after it is made.	(6) Une copie du décret pris en vertu du paragraphe (1) est publiée dans la Gazette du Canada dans les quinze jours de sa prise.

***Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s.52**

2(1) designated project means one or more physical activities that	2(1) projet désigné Une ou plusieurs activités concrètes :
(*a*) are carried out in Canada or on federal lands;	*a*) exercées au Canada ou sur un territoire domanial;
(*b*) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and	*b*) désignées soit par règlement pris en vertu de l'alinéa 84a), soit par arrêté pris par le ministre en vertu du paragraphe 14(2);
(*c*) are linked to the same federal authority as specified in those regulations or that order.	*c*) liées à la même autorité fédérale selon ce qui est précisé dans ce règlement ou cet arrêté.
It includes any physical activity that is incidental to those physical activities.	Sont comprises les activités concrètes qui leur sont accessoires.
…	…
5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are	5 (1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants :
(*a*) a change that may be caused to the following components of the environment that are within the	*a*) les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la

legislative authority of Parliament:	compétence législative du Parlement :
(i) fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*,	(i) les poissons et leur habitat, au sens du paragraphe 2(1) de la *Loi sur les pêches*,
(ii) aquatic species as defined in subsection 2(1) of the *Species at Risk Act*,	(ii) les espèces aquatiques au sens du paragraphe 2(1) de la *Loi sur les espèces en péril*,
(iii) migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and	(iii) les oiseaux migrateurs au sens du paragraphe 2(1) de la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*,
(iv) any other component of the environment that is set out in Schedule 2;	(iv) toute autre composante de l'environnement mentionnée à l'annexe 2;
(*b*) a change that may be caused to the environment that would occur	*b*) les changements qui risquent d'être causés à l'environnement, selon le cas :
(i) on federal lands,	(i) sur le territoire domanial,
(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or	(ii) dans une province autre que celle dans laquelle la mesure est prise, l'activité est exercée ou le projet désigné ou le projet est réalisé,
(iii) outside Canada; and	(iii) à l'étranger;
(*c*) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on	*c*) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :
(i) health and socio-economic conditions,	(i) en matière sanitaire et socio-économique,
(ii) physical and cultural heritage,	(ii) sur le patrimoine naturel et le patrimoine culturel,
(iii) the current use of lands and resources for traditional purposes, or	(iii) sur l'usage courant de terres et de ressources à des fins traditionnelles,

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

(iv) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

…

…

19 (1) The environmental assessment of a designated project must take into account the following factors:

19 (1) L'évaluation environnementale d'un projet désigné prend en compte les éléments suivants :

(*a*) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à celle d'autres activités concrètes, passées ou futures, est susceptible de causer à l'environnement;

(*b*) the significance of the effects referred to in paragraph (a);

b) l'importance des effets visés à l'alinéa a);

(*c*) comments from the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, any interested party — that are received in accordance with this Act;

c) les observations du public — ou, s'agissant d'un projet dont la réalisation requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, des parties intéressées — reçues conformément à la présente loi;

(*d*) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux négatifs importants du projet;

(*e*) the requirements of the follow-up program in respect of the designated project;

e) les exigences du programme de suivi du projet;

(*f*) the purpose of the designated project;

f) les raisons d'être du projet;

(*g*) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means;

g) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

(*h*) any change to the designated project that may be caused by the environment;

h) les changements susceptibles d'être apportés au projet du fait de l'environnement;

(*i*) the results of any relevant study conducted by a committee established under section 73 or 74; and

i) les résultats de toute étude pertinente effectuée par un comité constitué au titre des articles 73 ou 74;

(*j*) any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.

j) tout autre élément utile à l'évaluation environnementale dont l'autorité responsable ou, s'il renvoie l'évaluation environnementale pour examen par une commission, le ministre peut exiger la prise en compte.

…

…

29 (1) If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that the report concerning the environmental assessment of the designated project sets out

29 (1) Si la réalisation d'un projet désigné requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, l'autorité responsable à l'égard du projet veille à ce que figure dans le rapport d'évaluation environnementale relatif au projet :

(*a*) its recommendation with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, taking into account the implementation of any mitigation measures that it set out in the report; and

a) sa recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)a) relativement au projet, compte tenu de l'application des mesures d'atténuation qu'elle précise dans le rapport;

(*b*) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

b) sa recommandation quant au programme de suivi devant être mis en oeuvre relativement au projet.

…

31 (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*

(*a*) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project

(i) is not likely to cause significant adverse environmental effects,

(ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or

(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and

(*b*) direct the responsible authority to issue a decision statement to the proponent of the designated project that

(i) informs the proponent of the decision made under paragraph (a) with respect to the designated project and,

(ii) if the decision is referred to in subparagraph (a)(i) or (ii), sets out conditions — which are the implementation of the mitigation

…

31 (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale ou son rapport de réexamen en application des articles 29 ou 30, le gouverneur en conseil peut, par décret pris en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie* :

a) décider, compte tenu de l'application des mesures d'atténuation précisées dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen, que la réalisation du projet, selon le cas :

(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,

(ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans les circonstances,

(iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

b) donner à l'autorité responsable instruction de faire une déclaration qu'elle remet au promoteur du projet dans laquelle :

(i) elle donne avis de la décision prise par le gouverneur en conseil en vertu de l'alinéa a) relativement au projet,

(ii) si cette décision est celle visée aux sous-alinéas a)(i) ou (ii), elle énonce les conditions que le promoteur est tenu de respecter relativement au

measures and the follow-up program set out in the report with respect to the environmental assessment or the reconsideration report, if there is one — that must be complied with by the proponent in relation to the designated project.	projet, à savoir la mise en oeuvre des mesures d'atténuation et du programme de suivi précisés dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen.

***Species at Risk Act*, S.C. 2002, c. 29**

77 (1) Despite any other Act of Parliament, any person or body, other than a competent minister, authorized under any Act of Parliament, other than this Act, to issue or approve a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species may enter into, issue, approve or make the authorization only if the person or body has consulted with the competent minister, has considered the impact on the species' critical habitat and is of the opinion that	77 (1) Malgré toute autre loi fédérale, toute personne ou tout organisme, autre qu'un ministre compétent, habilité par une loi fédérale, à l'exception de la présente loi, à délivrer un permis ou une autre autorisation, ou à y donner son agrément, visant la mise à exécution d'une activité susceptible d'entraîner la destruction d'un élément de l'habitat essentiel d'une espèce sauvage inscrite ne peut le faire que s'il a consulté le ministre compétent, s'il a envisagé les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce et s'il estime, à la fois :
(*a*) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and	*a*) que toutes les solutions de rechange susceptibles de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce ont été envisagées, et la meilleure solution retenue;
(*b*) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.	*b*) que toutes les mesures possibles seront prises afin de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce.
(1.1) Subsection (1) does not apply to the National Energy Board when it issues a certificate under an order made under subsection 54(1) of the	(1.1) Le paragraphe (1) ne s'applique pas à l'Office national de l'énergie lorsqu'il délivre un certificat conformément à un décret pris en vertu du paragraphe 54(1) de la *Loi*

National Energy Board Act.

(2) For greater certainty, section 58 applies even though a licence, a permit or any other authorization has been issued in accordance with subsection (1).

…

79 (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

(2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

(3) The following definitions apply in this section.

person includes an association, an organization, a federal authority as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*, and any body that is set out in Schedule 3 to that Act.

sur l'Office national de l'énergie.

(2) Il est entendu que l'article 58 s'applique même si l'autorisation a été délivrée ou l'agrément a été donné en conformité avec le paragraphe (1).

…

79 (1) Toute personne qui est tenue, sous le régime d'une loi fédérale, de veiller à ce qu'il soit procédé à l'évaluation des effets environnementaux d'un projet et toute autorité qui prend une décision au titre des alinéas 67a) ou b) de la *Loi canadienne sur l'évaluation environnementale (2012)* relativement à un projet notifient sans tarder le projet à tout ministre compétent s'il est susceptible de toucher une espèce sauvage inscrite ou son habitat essentiel.

(2) La personne détermine les effets nocifs du projet sur l'espèce et son habitat essentiel et, si le projet est réalisé, veille à ce que des mesures compatibles avec tout programme de rétablissement et tout plan d'action applicable soient prises en vue de les éviter ou de les amoindrir et les surveiller.

(3) Les définitions qui suivent s'appliquent au présent article.

personne S'entend notamment d'une association de personnes, d'une organisation, d'une autorité fédérale au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* et de tout organisme mentionné à l'annexe 3 de

	cette loi.
project means	projet
(*a*) a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012* or a project as defined in section 66 of that Act;	*a*) Projet désigné au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* ou projet au sens de l'article 66 de cette loi;
(*b*) a project as defined in subsection 2(1) of the *Yukon Environmental and Socio-economic Assessment Act*; or	*b*) projet de développement au sens du paragraphe 2(1) de la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*;
(*c*) a development as defined in subsection 111(1) of the *Mackenzie Valley Resource Management Act*.	*c*) projet de développement au sens du paragraphe 111(1) de la *Loi sur la gestion des ressources de la vallée du Mackenzie*.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-78-17 (LEAD FILE); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17
STYLE OF CAUSE:	TSLEIL-WAUTUTH NATION et al. v. ATTORNEY GENERAL OF CANADA et al.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 2-5, 10, 12-13, 2017
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. WOODS J.A.
DATED:	AUGUST 30, 2018

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	ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SQUAMISH NATION, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN IN HIS CAPACITY AS CHIEF OF THE COLDWATER BAND ON BEHALF OF ALL MEMBERS OF THE COLDWATER BAND
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	SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE
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Ministry of Justice Victoria, British Columbia	FOR THE INTERVENER, ATTORNEY GENERAL OF BRITISH COLUMBIA

Appendix C

Federal Court of Appeal  Cour d'appel fédérale

Date: 20200409

Docket: A-102-20

Ottawa, Ontario, April 9, 2020

Present: PELLETIER J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER

WHEREAS the Court has before it a motion for an *ex parte* interim injunction and an interlocutory injunction arising from certain statements made by or on behalf of the Canadian Transportation Agency (the Agency); and

WHEREAS the urgency alleged by the applicant, Air Passenger Rights, (APR) consists in the fact that the Agency did not take action when requested to by APR on March 30, 2020 and the dissemination of allegedly misleading information by members of the travel industry under the guise of the Agency's statement; and

WHEREAS the failure of the Agency to respond to APR's deadline is not evidence of urgency; and

WHEREAS while the matters raised in the Notice of Application are important, they are not of such urgency as to require this Court to interfere in the work of a senior Canadian agency without hearing from it.

NOW THEREFORE IT IS HEREBY ORDERED THAT:

1. The portion of the motion seeking an *ex parte* interim injunction is dismissed;

2. The portion of the motion seeking an interlocutory injunction is dismissed as it was filed without proof of service but the applicant has leave to file it again upon proof of service;

3. There will be no order as to costs.

"J.D. Denis Pelletier"

J.A.

Federal Court of Appeal | Cour d'appel fédérale

TO : Appeal Registry

FROM : Pelletier J.A.

DATE : April 9, 2020

RE : *Air Passengers Rights v. Canadian Transportation Agency* A-102-20

DIRECTION

The Notice of Application may be filed. The question of whether there is subject matter for judicial review can be decided after hearing from both parties.

The notice of motion seeking an *ex parte* interim injunction and an interlocutory injunction is to be accepted for filing.

"DP"